

REPORT OF  
THE WAITANGI TRIBUNAL  
ON  
THE WAIHEKE ISLAND CLAIM  
(WAI 10)

WAITANGI TRIBUNAL  
DEPARTMENT OF JUSTICE  
WELLINGTON  
NEW ZEALAND

June 1987

*Original cover design by Cliff Whiting,  
invoking the signing of the Treaty of Waitangi  
and the consequent development of Maori–Pakeha history interwoven in  
Aotearoa, in a pattern not yet completely known, still unfolding.*

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**THE WAITANGI TRIBUNAL**

IN THE MATTER of the Treaty  
of Waitangi Act 1975

AND

IN THE MATTER of a claim by  
Hariata Gordon for Ngati Paoa  
commonly called THE  
WAIHEKE CLAIM

**REPORT TO THE MINISTER OF MAORI  
AFFAIRS**

This report, save the recommendations on pages 100 and 101 is not for public release before promulgation of a decision of the Court of Appeal in *New Zealand Maori Council v Attorney-General*, CA54/87.



CHAIRMAN

## CONTENTS

1.	The Waiheke Claim	1
2.	Ngati Paoa	3
3.	The Sale of Waiheke	11
4.	The Development of Development Schemes	15
5.	The Waiheke Development Scheme	21
6.	Disposal of the Waiheke Scheme	24
7.	Reaction	28
8.	Overview and Recommendations	30
	Appendix I The Written Claim as Filed by Hariata Gordon on 8 March 1985	49
	Appendix II Relief Sought in Counsel's closing Address	51
	Appendix III Record of Hearing	52

The Hon K T Wetere  
Minister of Maori Affairs  
Parliament Buildings  
WELLINGTON

We report to you on what we have come to call

## 1. THE WAIHEKE CLAIM

The claim has two elements. The first describes the immediate cause of complaint—that the Board of Maori Affairs (the Board) disposed of lands comprising the Waiheke Development Scheme (the Waiheke Scheme) to the Waiheke Station Evans Partnership (the Evans Partnership) when it ought, the claimants say, have passed the land to the Ngati Paoa tribe.

The second element describes the gravamen of the complaint, that Crown policies fail to support the tribal groups that were parties to the Treaty of Waitangi, and in particular, those tribes like Ngati Paoa now so lacking for land or other endowments that they are threatened with extinction.

We begin with brief descriptions of the Waiheke Scheme and the current circumstances of Ngati Paoa before assessing both aspects of the claim in more detail.

The Waiheke Scheme comprises some 2,050 acres at Onetangi to the north-east of Waiheke Island in the Hauraki Gulf with access by road to the wharf at Man-O-War Bay. Though the land has been developed by the Board of Maori Affairs, it is not Maori land. The Board bought it with ‘taxpayer’ money from private owners, and it is Crown land.

In much earlier years the land was owned by Ngati Paoa, for Waiheke Island was once the northern sentinel of that tribe guarding the seaways to their mainland villages on the west coast of the Hauraki Gulf. But Ngati Paoa have not owned the land since 1858 when some 11,000 acres that included what is now the Waiheke Scheme was sold to the Crown. The Crown granted the land in many small allotments to various settlements. Eventually several of those allotments came into the ownership of one K M Scott. The Board of Maori Affairs was not involved at all until 1965 when it undertook the development of Mrs Scott’s acquisitions.

The Board spent heavily on development. Later it bought the land from Mrs Scott. It became apparent however that the Board’s farming operations could not sustain the cost and in 1983, the Board agreed to alienate the land by lease with purchase rights to the Evans Partnership.

The current troubles then surfaced. Members of Ngati Paoa considered the Board ought to have preferred an arrangement with them for traditionally Waiheke was their land. The Board, it was considered, had a commitment to Maori people and was bound to have regard to Maori circumstances and customs not least of which required recognition of tribal boundaries and tribal needs.

On 30 January 1984 a group of Ngati Paoa occupied the land to protest the proposed alienation. They were not removed until arrested on the Board’s charges of trespass.

In the meantime this claim had been filed and when the trespass charges were disposed of, the claim was heard. The claimants sought a recommendation that the lease be declared “null and void” and that the Board negotiate with the tribe to establish a Ngati Paoa trust upon the land.

The full text of the claim was set out in a document filed by Hariata Gordon on 8 March 1985. Though it came in the form of a submission it outlined the immediate concerns clearly enough. Apart from some abbreviation to the introduction the claim is as printed in Appendix I. In her closing submissions, Counsel for the claimants amended the remedies sought and asked for relief in four areas. These are described in Appendix II. A summary of the proceedings is contained in Appendix III.

Upon hearing the immediate cause of complaint, that the scheme should have passed to a Ngati Paoa Tribal Trust, it was soon apparent the claim addressed much wider issues—for the real plight of Ngati Paoa is that it has been rendered almost landless. It is a tribe that lost with its land, its own identity, and yet, it was this once powerful tribe that held in former days a large slice of what is now Auckland and a substantial part of the Hauraki Gulf and Plains. The tribe suffered more than most the bad effects of European contact and then for no other reason than that it occupied some most desirable real estate and held to a strategic land corridor that led the way to other good pickings both north and south. In the result nearly all of its territory, being most at risk, was alienated early, last century in fact. Lacking a land base for its endowment, Ngati Paoa was denied the opportunity afforded other tribes to capitalise on the good effects of European settlement as an agricultural economy brought New Zealand to prosperity.

Such is the lot of landless tribes. By the middle of this century one might well have asked, did Ngati Paoa exist or didn't they? Whether they were unnoticed when the Board disposed of the Waiheke Scheme is a question to be dealt with later, but certainly Ngati Paoa thought they were overlooked, and being by-passed, slighted. It was necessary in their view to remind the bureaucracy that though the land was no longer theirs, the land was still there to behold and Ngati Paoa was still here too.

Thus the Waiheke occupation was more than an attempt to recapture a part of the world that once belonged to them. It was a proclamation of survival, and a call to the scattered remnants of a once powerful tribe to come together, to seek an ancestral base from which they might recapture the pride of their forbears and bring hope to a younger generation that might otherwise be lost to the cities.

So it was that this claim illuminated broad issues sparked off by the arrangements for Waiheke Station and exposed a range of questions that Ngati Paoa introduced to us.

It is timely now that we should introduce Ngati Paoa, the people and their land, to trace their progress to 1840, when they sought a pact in the Treaty of Waitangi, and to outline their decline, focusing thereafter on that part of their ancestral land that led to this inquiry—the land on Waiheke Island.

## 2. NGATI PAOA

The story of Ngati Paoa begins with the Tainui people of Waikato, probably in the 1600s when Paoa, younger brother of Manuta, left his home at Taupiri on the Waikato River to marry Tukutuku, great granddaughter of Maratuahu, eponymous ancestor of the Hauraki tribes. In the course of time the children of Paoa and his followers dominated the western shores of the Hauraki Gulf where they lived close to the related tribes of the Maratuahu compact, Ngati Maru, Tamatera, Ngati Whanaunga and those earlier tribes absorbed by them, Ngati Huarere and Ngati Hei. Soon Ngati Paoa exerted an influence northwards until, by the 1700s, they held to a corridor from the Waitemata Harbour south along the western shores of the Gulf to the Hauraki Plains. A section of the tribe called Ngati Hura occupied Waiheke Island.

In about 1740 Ngati Paoa lost ground. Their northern extension was checked by the movement south of Ngati Whatua. Battles were fought on Tamaki isthmus and Ngati Paoa was obliged to shift over, to the eastern side of Tamaki and to the islands of the Hauraki Gulf. Then peace with Ngati Whatua was compacted by marriage settlements and gifts. That was the way of days gone by when warfare was constrained by its own technology and the relative equality of rival tribes.

The northern Ngapuhi followed close on the heels of the Ngati Whatua in the later 1700s to challenge the Waitemata holdings of both tribes. We need not traverse the complicated history of attack and counter-attack save to say that Ngati Paoa held firm. Their famous fighting canoes, Kahumauroa and Te Kotuiti, and the strategic buttress of Putiki-o-Kahu Pa on Waiheke Island, maintained their coastal prowess. But for Ngapuhi they also maintained a legacy of unsettled scores.

Ngati Paoa had also an enviable economy to sustain them. Captain Cook in 1769, and later in the 1790s several whalers, sealers and traders, visited the area leaving pigs and potatoes and bequeathing to us a picture of Ngati Paoa at that time. For the following portrait we are indebted to 'The Ancestors of Ngati Paoa' written by Bronwyn Kayes when a student in the Anthropology Department of the University of Auckland.

"Cook's description of the Firth of Thames attracted a great number of ships to the area. The period 1790-95 was dominated by sealing and whaling ships who did most of their repairs at Waiheke Island, the domain of Ngati Paoa. The years 1795-1801 were a time of timber ships to the Hauraki Gulf. To provide for the ships the Maori people of the Firth of Thames grew potatoes and, by the beginning of the 1800s, had very large quantities growing . . .

"In April 1801 the Royal Admiral came to the Hauraki to collect spars. In the log of that vessel it states:

'The only European vegetables grown by the natives was the potato, extensive fields of which were grown and all very free.'

"This use of Maori land made an enterprising adaptation to the needs of the ships entering the Firth of Thames, and for their own benefit the potato being a more hardy plant than the kumara, thus the Hauraki Maoris supplied potatoes for the ships in exchange for iron and goods of use to them (Barton, 1978:15).

"However, 1801 marked an abrupt end for a period to the timber ships coming to the Hauraki. The *Plumier* became badly damaged on a sand bank and the *Royal Admiral*, being near to the area,



spent three months anchored near Miranda toiling to bring out logs from Turua only to find that the logs were useless. White pine is not kauri!

“In 1806 the brig *Venus*, captured by convicts came to the Hauraki Gulf. Te Haupa (a Ngati Paoa chief) went on board the brig and was captured by convicts. Te Haupa escaped by jumping overboard.

“These ships did bring with them one thing the Maori population could well do without—disease. Three great epidemics spread through the Thames area . . . . In 1795 a vast epidemic occurred so terrible that, as Isdale says, ‘The living could scarcely bury the dead’. The burial pits of that time are full of a pathetic number of the small skulls of children. 1801 was a year of the epidemic known as rewharewha influenza which greatly depleted the population.

“Nevertheless, by the time of Marsden’s arrival in the brig *Active* in November 1814 the Ngati Paoa were again a force to reckon with. The brig came down from Bream Head to the harbour of the River Thames and to Tapapakanga where the great chief Te Haupa resided. Tapapakanga is a fortified village situated on a hill about a mile from Whakatiwai. Marsden had heard of the chief Te Haupa, ‘as a man much esteemed as well as feared and who possessed very great power’ (Elder, 1932:103).

“A party of warriors including Te Haupa and his son came out in a war canoe to meet them and Te Haupa and his son got on board the brig. Marsden described him as ‘one of the strongest and best made men I almost ever beheld’ (Ibid:104). Cruise who sailed to Hauraki in the 1820s talked to Te Haupa as a great ariki who possessed an immense tract of land and held almost despotic control. He said of him ‘he was a very old man, his beard white as snow and his body much tattooed’ (Cruise, 1824). Perhaps he was like Ruatao, son of Te Ngako and grandson of Marutuahu, who was described by one author as ‘obviously one of those Polynesian giants sometimes seen in the South Sea Islands, as well as in New Zealand . . .’ (Isdale, 1967:15).

“Te Haupa and Marsden exchanged gifts. Because of bad weather, Marsden was forced to harbour at Whakatiwai where the Ngati Paoa headquarters were. They were welcomed with great joy and provided with many hogs and potatoes . . . Few men were present at the village as the men were on a taua. They then proceeded to Te Haupa’s fortified village at Tapapakanga. There they observed many women and children, very fat hogs and fine plantations of potatoes. ‘The pillars leading into the fortification were much carved with various figures such as men’s heads etc (up to 14ft high)’ (Elder, 1932:8).

“Piti a chief of the village wished Marsden’s group to come to the upper end of the village where he resided. Said Marsden, ‘when we arrived we met some of the finest men and women I have yet seen in New Zealand, and well dressed’ (Ibid:8).

“These accounts of Marsden and Nicholas are first-hand accounts of the Ngati Paoa and everything described is indicative of an extremely powerful and wealthy tribe; clothing, cultivation, carving. Te Haupa, an ariki of the Ngati Paoa has great mana and under his mana would the Ngati Paoa reside.”



Their residence however was precarious. On the debit ledger of their economy was a list of old scores Ngapuhi wanted settled, and while the Reverend Marsden was preaching in New Zealand, Hongi Hika was in England planning a trip to Australia to acquire muskets to deal with his old foes.

The Reverend Marsden, with Mr Butler, arrived on a second voyage to New Zealand in about 1820 on the brig *Coromandel*. They visited the chief Te Hiinaki at Mokoia on the Tamaki River. Kayes continues :

“They were joyously and enthusiastically received at Mokoia Pa. Mokoia was a very populous settlement Butler estimating four thousand inhabitants, while Te Hiinaki stated there were seven thousand. Marsden described Mokoia; ‘Their houses are superior to most I’ve met with. Their stores were full of potatoes containing some thousands of baskets and they had some very fine hogs. The soil is uncommonly rich and easily cultivated. They grow sweet and common potatoes, turnips and cabbage the principal. No grain foods.’

“Butler who climbed what was probably Mt Maungarei (Mt Wellington) saw twenty villages in the valley below and ‘with a single glance beheld the greatest portion of cultivated land I had ever met within one place in New Zealand’ (Butler, 1927:99–105, 174). Butler and Marsden write of the anxiousness of the people to acquire a missionary or a white man . . . From these accounts Mokoia was a vast settlement with enormous cultivations.

“Marsden had not been gone two days when Cruise arrived at Mokoia on the *Prince Regent*. He describes the village and the extensiveness of the surrounding villages and cultivations. Cruise says of the people ‘It was generally observed that for the harmony of their voices, the gracefulness of their movements as well as in personal appearance they had far the advantage of any other tribe we had met with . . . in appearance these people were far superior to any of the New Zealanders we had hitherto seen—they were fairer, taller and more athletic, their canoes were larger and more richly carved and ornamented and their houses, larger and more ornamented with carving than we had generally observed.”

But this wealthy tribe was on the brink of more war and a new type of warfare. The old balance of power was about to shift dramatically with the advent of the gun. Hongi Hika returned from overseas. In 1821 some 2,000 well armed Ngapuhi warriors set off from the Bay of Islands. In the holocaust that followed, the Ngati Paoa on Tamaki were routed and dreadful massacres took place. It appears that soon after the invaders challenged Waiheke—the island that for 60 years had thwarted their pretensions. The defenders at Waiheke were no match for the musket and soon fled down the Firth of Thames. They had not the expected opportunity to regroup and counter-attack. The beach near Kaiaua remains sacred to this day for there some of the finest of the Ngati Paoa fighting force were overtaken in pursuit, and slain.

The Ngati Paoa survivors of these battles fled south to receive refuge with the Waikato tribes, principally at Horotiu near to what is now Hamilton, but the corridor to Hauraki plains and thence to Waikato had been cleared and Ngapuhi wasted no time in moving on, thrusting south into Waikato through the exposed Hauraki flank. Once more we need not recount the long and tangled stories of raid and counter-raid that continued well into the 1820s. It is sufficient to say the invaders sought revenge and glory rather than land. It is said that Ngati Paoa occupied the

main 'trading and raiding route' of the time, but their lands were not occupied. Thus being vacant Ngati Paoa were able to return.

With the aid of a peace pact between Ngapuhi and Te Rauroha of Ngati Paoa, some of Ngati Paoa returned to their villages skirting the gulf. They did so cautiously at first holding to the southern villages around Kaiaua not too distant from Waikato and often returning only to cultivate land or to fish. But several settled permanently and Captain D'Urville, on his second visit to New Zealand in 1827, records a great village in the area with many inhabitants and a great quantity of drying fish. The return to Waiheke came later when the Ngapuhi chief, Patuone, married the Ngati Paoa chieftainess Riria in a peace arrangement, and settled on Waiheke at Putiki Pa.

But additionally in the 1830s Ngati Paoa sought a pact with the kinder instruments of European contact, the missionaries, who offered a new life, and who promised them a Treaty with the white chiefs that would bring "peace and good order" and "the necessary laws and institutions".

Trade also came to occupy the interests of Ngati Paoa. A trading station was established at Miranda in 1832 dealing in flax and spars. A mission station opened at Thames in 1833 with a second, soon after, at Puriri. The missionaries described the people as numerous despite fearful devastations, industrious and willing to receive instruction. Ngati Paoa was soon involved in the production of maize, onions, kumara, cabbage, wood and flax and tended herds of pigs, goats, fowls and geese.

The Treaty of peace that the missionaries promised was the Treaty of Waitangi, signed by five representatives of Ngati Paoa at Waitemata on 4 March 1840, a further three at Coromandel and another one at Mercury Bay until finally, on 9 July 1840, seven of the Ngati Paoa chiefs travelled from Kaiaua to Waitemata to execute a further copy there. That Treaty of peace was nonetheless, for Ngati Paoa, born in the wake of the musket. Even at the time of signing in 1840 a further Ngapuhi raid was thought to be imminent and Auckland settlers were soon preparing for it. Ngati Paoa saw advantage in an alliance with the white tribe to share the land with them. So it was that Ngati Paoa entered with hope the next significant stage of their history.

The missionaries heralded a new life indeed. Behind them came the Government Land Purchasing Officers to acquire nearly all the Ngati Paoa lands around Auckland in the very early 1840s.

The claim was filed before our jurisdiction was extended. It was beyond our authority to review those early transactions in any detail except, as here, to provide a background to the Ngati Paoa people. As part of that background however we refer to the research of some modern historians doubting that at this early time the Maori understood that a deed of sale meant they were giving up their right to the land forever, and postulating that they often seem to have believed they were granting only rights of occupancy (see for example A Ward *A Show of Justice* p29 and A Parsonson in *The Oxford History of New Zealand* p148). We would add that customary settlement arrangements had no affinity at all with sales as the settlers know them. Occupational arrangements such as Waikato made with Ngati Paoa during the Ngapuhi wars, or customary land gifts both involved in sharing in land, not a conveyance of ownership or vacant possession. They each required too a commitment from the recipient to honour the mana or authority of the benefactor.

From the Crown's viewpoint it may have been thought that Ngati Paoa would still retain sufficient land for their own needs despite the extensive purchases. Early maps accompanying the Deeds of Sale on Waiheke indicate that intention. The western extremity called Te Hurihi containing 2,100 acres is depicted as a 'Native Reserve for Ngati Paoa'. But the reserve was never created, just as similar proposed reserves were not respected for other tribes. New Zealand history is marked by the continuing attempts of the Maori to retain tribal identity and autonomy and that may be largely due to the failure to ensure tribal reserves.

The European settlement of Auckland meanwhile was growing rapidly—there were some 18,000 there by 1854—and Ngati Paoa benefitted. Kayes (supra) considers

"The Government *Gazette* of the Province of New Ulster has recorded the tribes who brought produce to Auckland, how much and what and these records are amazing. Ngati Paoa is one of the major food suppliers to the Auckland province. They have obviously regrouped into a strong and powerful tribe once more as the quantity and variety of their production is mammoth. Often these government documents are inaccurate and these foodstuffs all came via canoe but nevertheless the quantities are impressive. One inaccuracy that is possible in this document is the crediting of Ngati Paoa with produce of another tribe. A map of the 1860s marking tribal areas has allotted all the Coromandel as Ngati Paoa territory which is incorrect. If the canoes bringing foodstuffs were asked the area they came from not the tribe they belonged to inaccuracies would be inevitable. But without a doubt proportionately the Ngati Paoa are far outstripping the other tribes in both production and range of produce."

Extensive land sales however, and some uncertainties about the new settlers appeared to cause concern and misunderstanding.

In 1851 Te Hoera of Ngati Paoa living on Waiheke, and Ngawiki or Ngati Tamatera, were arrested and then released, apparently without any explanation. Some of Ngati Paoa proposed retaliation in a raid on Auckland, a raid that did not eventuate when the would be attackers, on reaching the mainland, were warned off by a warship in Waitemata Harbour. The tribe saw the proposed raid as an act of foolishness and tendered to Governor Grey a Ngati Paoa heirloom, a mere called Hinenui-o-te-paoa, as representing their desire for continued peace.

There followed, in the later 1850s, the sale by Ngati Paoa of the islands in the Hauraki Gulf including some three quarters of Waiheke Island. Once more, further research would be needed to settle the background to those sales. We are not called upon to provide that in this case but we do have some accounts indicating that the mere of peace was not received in the spirit in which it was given and that the sales may have resulted from reprisals for the abortive raid, a pressure upon Government Land Purchase Commissioners to buy more land, and a feud between Ngati Paoa and Ngati Maru.

Hori Matua Evans, who will figure again later in this report, gave his family's understanding of events according to the oral accounts passed down. His great great grandmother, he explained, Hariata Whakatangi of Ngati Maru and Ngati Paoa, was born on Waiheke in the early 1800s. She married an American seafarer, William Martin, who traded in flax gathered from the distant Te Araroa region near East Cape. Mr Martin returned to the United States, taking with him his two half caste sons but leaving

behind Hariata Whakatangi and a daughter also called Hariata. Hariata (No 2) was born on Waiheke as well, in 1824. She married Hori Akuhata of Te Araroa, and although buried at Te Araroa, when she died at age 104 in 1928, she lived most of her married life in the Coromandel area. Hariata Akuhata passed on to her children her understanding of events. She, her parents and grandparents had lived at Waiheke and were there when the Treaty of Waitangi was signed in 1840. Then, in Mr Evan's words ". . . the Maoris living on the outlying islands were routed by the constabulary for it was felt that the seat of Government should be positioned in developing Auckland" (which it was, by *Gazette* Notice 26 November 1842) "and it was feared then that the Maoris living on the outlying islands could pose a threat to that objective. Her whanau (family) were moved from the island and settled in the Thames–Coromandel area and there they had to restart and rebuild a heritage for themselves. She further related that when her mother Hariata Whakatangi died, Hori Akuhata, her husband, returned her body to Waiheke and she was buried there at Putiki—Te Putiki o Kahu."

It seems more likely the relocation Mr Evans described, if correct, would have postdated the 1851 raid. Added to that the 1850s saw considerable settler pressure on Government Land Purchasing Commissioners to acquire more Maori land (see M P K Sorrenson in Appendix B to the 1986 *Report of the Royal Commission on the Electoral System*). A measure of responsible government had been given to the young colony but Britain retained control of Maori matters. The settlers, resentful of the slowness of the Government to purchase Maori land, campaigned for the abolition of pre-emption. Eventually, in 1859 the General Assembly passed a Native Territorial Rights Bill which would abolish the Crown's pre-emption and allow settlers to buy direct from individual Maori. While the Bill was disallowed by the British Government, as an infringement of the Treaty of Waitangi, the pressure remained on the Government land purchase officers to acquire all they could. It was during this period of pressure that the islands of the gulf including the greater part of the Waiheke lands were acquired, in 1857 and 1858.

That pressure, combined with the possible relocation of the islanders to the mainland may explain why the deeds of sale for the islands are executed by remarkable few alienors and why we have no record (as yet) of the large tribal meetings that were normally associated with customary land transactions. It may be of greater significance however that the alienors were of Ngati Paoa when, as contemporary evidence discloses, Ngati Maru had also a claim to the land.

We have accepted that Waiheke is the ancestral home of Ngati Paoa because that is what the Maori Land Court came later to determine and because subsequently, and at our hearings, no demurrer was made to that claim. It is not that we consider that Ngati Maru had no right but rather that we were not called upon to determine the point. The position of Ngati Maru may deserve further study however. It is clear that Ngati Paoa and Ngati Maru are most closely related tribes, enjoying a common ancestor in Marutuahu, and that for a time they lived together on Waiheke. Fighting broke out between them when Rongomarikura of Ngati Paoa was drowned at Tikapa (Firth of Thames) and Ngati Paoa blamed Ngati Maru. The former maintained that before 1840 the latter were expelled to join their kin on the Coromandel peninsula. That may be so but the latter had a different opinion and clearly the position at 1840 was not certain.



It was a commonplace at that time that some Maori hapu sold land to prove their own mana (authority) and negate the claims of others, particularly if there was a dispute, and common too that Crown purchasing officers elected to deal only with sellers, ignoring the claims of others. The practice has been commented upon by several historians and we need refer only to A Parsonson in *The Oxford History of New Zealand* pp148–152, M P K Sorrenson “The Politics of Land” in *The Maori and New Zealand Politics* p23 and the broad summary of G Asher and D Naulls (for the New Zealand Planning Council) in *Maori Land* pp15–19. Indeed, it was this very practice that sparked off the land wars in 1860 following the Waitara purchase.

Be that as it may Ngati Maru continued to insist that they had not relinquished a share in the land. They said so in the Maori Land Court some years later, in 1865, but to no avail. The Court found Ngati Paoa to be solely entitled (see Hauraki Minute Book vol 1, Maori Land Court). It seems to have been quite common too, in those days, that the Maori Land Court found in favour of those who had already sold the surrounding land. Still, if insistence is any evidence of right, it is worth noticing that Ngati Maru maintained their insistence, until in 1867 the Crown paid Ngati Maru six hundred pounds in return for an acknowledgment that Ngati Paoa alone had been entitled to Waiheke (Turtons Deeds 287 and 248).

Ngati Maru has since held to that acknowledgment—and so we have no need to question it. We note however that an uncertainty of intention may well have surrounded the mainland sales. In addition the historical events and internecine disputes described, cloud the clear wording of the Deeds of cession and question whether the Waiheke sales were freely and willingly entered into, and then with the assent of all the right people.

It is clear however that by the end of the 1850s the Crown buyers faced difficulties in acquiring more land, especially in the Auckland and Waikato areas. There was a realisation that land sales meant vacant possession to threaten that which has consistently loomed large in the post European history of Maoridom—tribal identity and autonomy. For Ngati Paoa a restoration of tribal authority was essential to prevent sales by a few individuals that would leave the tribe homeless. In that respect the Treaty appeared to offer no protection at all from dispossession.

Ngati Paoa resolved to hold to their remaining lands, now mainly reduced to the south-western aspects of the Firth of Thames, and to support in that respect the Waikato anti-land-sales policy. That policy was taken by Governor Grey as a challenge to the authority of the Crown and in July 1863, Imperial forces invaded Waikato. To many, the true intention of the new partners now seemed manifest.

Many of Ngati Paoa then joined with Waikato in the war. They faced, in any event, a traditional obligation to support the Waikato tribes that had earlier succoured them. Some of the Ngati Paoa remained ‘loyal’ to the Crown, Patara Pouroto representing Ngati Paoa at the major conference of loyalist chiefs summonsed by Governor Gore-Browne at Kohimarama, Auckland in 1860. Others however joined with Waikato in battle. For their pains they lost the war and some land, confiscated under the New Zealand Settlements Act 1863. (The claimants maintained 50,000 acres was confiscated from Ngati Paoa. We had the benefit of a paper on Ngati Paoa confiscated lands, prepared by Dr Michael Belgrave of the Tribunal’s staff, describing the lands confiscated at East Wairoa and Miranda. While the Ngati Paoa acreage is difficult to quantify, and while it appears their land

lost would not amount to 50,000 acres, yet in modern terms the losses appear substantial.)

The residue of the tribe, defeated once more and without the land resources previously held, looked to a bleak future. For them as for most tribes, land loss meant a loss of food resources leading to poor nutrition, ill health, lowered resistance to disease and a drop in fertility. Ngati Paoa, like other tribes, went into what was thought to be an irreversible decline. At the turn of the century it was believed the 48,000 Maori in New Zealand would disappear. Ngati Paoa's experience to 1900 would confirm this. With its land base a mere fraction of its former self, its people reduced by conquest and deprivation of resources, Ngati Paoa leadership declined along with its people.

Then, following the wars Ngati Paoa were to find that even the remnants of their lands they were about to lose too—not through the machinations of another war, but rather through the mechanics of another new instrument—the Maori Land Court.

Here we return our attentions to Waiheke. The tribe still owned about one quarter of the island and some had returned to live there. A report of 1870 estimated this to be some 40 persons at that time while a count in 1881 gives the number on Waiheke as 52 (see AJHR 1870 A-1 and AJHR 1881 G-3). Those who returned in the 1860s may have been greater. They returned to find a new regime, the regime of the Maori Land Court.

### 3. THE SALE OF WAIHEKE

Waiheke has been home to many tribes over many periods but for some long time before Waitangi, it was the home of Ngati Paoa. That, as we have seen, was one of the earliest decisions of the Maori Land Court established in 1865 to determine who owned what in Maori land. Ngati Maru had lived there too, for a long time, but by 1840, according to the Court, and whether because they went or were sent, Ngati Maru had returned to their homes on mainland Coromandel. As we have also noted, that finding was propitious for the Crown, for the Crown had already bought most of the island before the Court had decided ownership, and it had bought exclusively from Ngati Paoa. In particular the Crown had bought Omaru and Opopo blocks in 1857 for £200 and £300 respectively (Turtons Deeds 237 and 242), some 10,900 acres in the north east (including the Waiheke Station now in dispute) in 1858 for £800 (Turtons Deed 244) and an adjoining area some weeks later for £10 (Turtons Deed 245). Those areas were bought for the Crown by Mr D McLean (later Sir Donald), he having earlier acquired almost the whole of the Ngati Paoa holdings around Auckland in massive land purchases. (His service to the Crown and colony has been documented in several histories.) There were other sales too, direct to settlers, and their subsequent land claims were ratified by Crown grants.

When the Maori Land Court investigated the titles to the remaining Maori lands in 1865, shortly after the Waikato wars, all that remained on Waiheke was some 2,100 acres in the west (Te Huruhi block), some 800 acres near Mawhitipana Bay (Hoporata, Opopoto and Mawhitipana blocks) and some 2,800 acres in the south (Kauakarau, Maunganui, Rangihoua, Awaawaroa, Whakanewha and Okoka blocks).

Those lands, and some 16,000 acres around Kaiaua on the Firth of Thames, were about all that remained of Ngati Paoa holdings. Even that land may have served to underwrite the continued existence of what was left of Ngati Paoa but a combination of factors ensured that that was not to be so. Those factors arose each from the legislative framework in which the new Maori Land Court of 1865 was bound to work.

Despite every tribal protestation from throughout New Zealand, the Court was not empowered to award land to tribes as distinct entities. The tribes had sought that arrangement in order that tribal authority might be continued and developed according to its own style. Instead the Maori Land Court was bound by the law of the Government to carve the tribal estates so as to award lands only to defined individuals in defined shares, thus breaking up “the beastly communism” that was said in the House of Representatives to afflict all native tribes. Of course the partitioning of lands and the individualisation of titles also assisted sales, bypassing the traditional tribal controls that had become the bulwark to continued land acquisition and which largely accounts for the land wars.

In addition the Court at that time could not award land to more than ten persons. Not unexpectedly, since the Court had then to choose, it chose mainly from those in actual occupation, ignoring, of necessity, the traditional politic that the individual licence to occupy was subject to the oversight of the wider hapu or tribal group, or that occupants were often those left behind when tribes gathered in times of need to embark upon tribal projects, as they had done only a short while before, in the war. To simplify the choice further, the rule was also that the share of a “rebel” native, that is to say one who had fought against the Crown, was to be



forfeited to the Crown. Maori claimants were astute in not including such persons when nominating owners and for the same reason did not always argue strongly against the entitlement of actual occupiers.

Nor were the Maori people successful in their attempts to have the general Courts declare that the few who were to take, took as representatives for the tribe. The Supreme Court was to hold that it could not go behind the Crown Grants that followed the Court decisions, and those named on titles must be deemed to be absolute owners (see *Ani Kanara v Mair* [1886] NZLR 216).

The lands at Waiheke were amongst the first to be investigated by the Maori Land Court (or the Native Land Court as it was then called) for the Court began its inquiries in those areas closest to the major settlements. In 1865, and in due accordance with the law, the ten remaining blocks on Waiheke were awarded to the few to the disinheritation of many. Not surprisingly nine of those ten blocks were sold before the turn of the century. Those nine blocks, averaging 400 acres each, had been awarded to an average of only two persons. The remaining larger block, Te Huruhi of 2,100 acres, though shown on earlier plans as intended for a Ngati Paoa Reserve was vested in five persons, but later, when the law changed, 65 were put in. In 1897 it was apportioned between the 65 by dividing the land into thirteen parts. After some further partitioning most of the divisions were sold but small parts survived to this century.

More of Ngati Paoa then left the island. Some of the land owning families remained until about 1915 when several of them moved too to join their kinsfolk at Waikato and Kaiaua. By 1940 there were about five families left. One witness, who named the five families, said all the men worked in Auckland, travelling by ferry because of a lack of work on the island. Princess Te Puea, of the kindred Waikato tribe, paid them annual visits to ensure the continued association of the tribe with their land. When she died in 1952, nearly all of them shifted to the mainland. Several witnesses before us recalled those times.

Today the only remaining Maori land on Waiheke is

Te Huruhi urupa, 1 acre 0 roods 32 perches being a burial ground

Te Huruhi 13A, 2 roods, solely owned but also a burial ground, and

Te Huruhi 12B, 9 acres 3 roods, 5 perches, owned by 3 persons.

Apart from those small holdings only a lineage of headland pa sites on a convoluted coast bears testimony to the former Ngati Paoa presence.

On the mainland the tribal estates had been primarily reduced to lands near Kaiaua, some 6,430 acres being Wharekawa No 1 and 10,180 acres being Wharekawa No 2. The first block was vested in ten persons representative of four Ngati Paoa hapu but after numerous complaints, and a change in the law, the list was extended to 92 persons following further inquiry. The land was then divided amongst them and only a small part remains today. There were complaints too about the second block, vested in nine persons, but there was never a subsequent inquiry to extend the list and that too was sold.

There has been in New Zealand from time to time some criticism of the American policy that saw the creation of Indian reservations to be held in perpetuity for the tribes. Many may hold misgivings about such a policy but it is one that Ngati Paoa would gladly have received. They have in fact no tribal land—no lands were ever reserved for them in perpetuity,

though some intention to do that is apparent in the markings on the early land sale map for Waiheke, of 1867.

Ironically in 1981, over a century after tribal ownership was denied and large areas vested in a token few, the Maori Land Court effectively awarded to the tribe as a whole two small remnant islands that escaped the attention of Government buyers in the 1850s. Gannet and Shag Rocks, called Horuhoru and Tarakihi by Ngati Paoa, were respectively one and five hectares offshore from Waiheke that the Wildlife Service of the Department of Lands and Survey wished to protect as Wildlife Reserves. The Court was asked to determine ownership so the owners could be consulted. It determined, with clear precedent to rely on, that Ngati Paoa was entitled and still in accordance with precedence, elected to vest the title to both in one person only. But in a radical departure from the past, and in reliance on a provision that the Court may award title to a deceased, the Court selected as owner, Paoa—eponymous ancestor of the tribe! (That did not make dealings impracticable for the Court then vested the title in trustees to represent Paoa's issue, and presumably, pending administration of his—and subsequent—estates.)

The irony is that the traditional objective was to be achieved only in respect of the crumbs that went unseen in Ngati Paoa's larder. The irony was not lost upon Ngati Paoa. Later, when the Board of Maori Affairs canvassed tribal trusts in the South Auckland–Waikato areas to administer the Waiheke Station, Ngati Paoa protested that they had been overlooked, and pointed to the Tarakihi-Horuhoru trust as evidencing their endowment, though founded upon two barely habitable rocks.

Accordingly while it is quite clear that the Waiheke Scheme was part of a large sale, in area if not in price, in 1858, it is not unreasonable in our view that Ngati Paoa should look to every opportunity to recover a part of it that they might as one witness put it “pass on to our children something more than the pain that was all that was passed on to us” (Miria Andrews, a young mother arrested at Waiheke in 1985). For the moment only the humble hamlet of Kaiaua on the Firth of Thames is home to the seeds of Ngati Paoa now scattered throughout Auckland and Waikato.

The second irony, from a Ngati Paoa point of view, is that the Board's assistance to those with land has no benefit for those whose needs may be greater through having no land at all. It highlights a complaint in this case that the historic function of the Board to develop Maori land for the betterment of Maoris, is not a sufficient criteria for the equitable development of the Maori tribes. For the Board had been in existence for a long time and its role in financing the Maori land owners through Development Schemes, Incorporations or Trusts was firmly established and well known. The owners of Development Schemes, the shareholders of Incorporations and the beneficiaries of Trusts might be few in number (where based on family membership) or many (when based upon broad tribal connections). It was natural to assume, in this case, as Ngati Paoa later did, that settlement, following development, would be by suitably qualified Ngati Paoa members.

Ngati Paoa were to find that the Board's range of options to assist is limited. While the Board has provided immense financial support to Maori land owners over the years, it cannot assist those without a land base or other assets that might provide an equity contribution.

It is from this background that we come to consider how the Board of Maori Affairs became involved in Waiheke, and why it disposed of the land it acquired without consultation with Ngati Paoa. It is helpful to

consider first however, the history of the Board itself, and the policies that determine the management and disposal of its development schemes.

#### 4. THE DEVELOPMENT OF DEVELOPMENT SCHEMES

Government assisted schemes for the development of Maori land owe much to the early influence of Sir Apirana Ngata, though Ngata's policies for the management of those schemes were not always implemented.

Ngata was undoubtedly one of Maoridom's greatest leaders of modern times. He was a lawyer and politician who never lost close contact with his people. He was to be found working with them on land development schemes or in marae rebuilding projects as much as he was to be found in the House. Still, though he knew the Maori mind well and understood Maori hopes he was not always successful in having Maori aspirations catered to. He began, for example, the development of Maori land by and for Maori communities, with Maori groups working together. Soon however, Maori land development came to be undertaken through a Department of State, usually with non-Maori managers, and the land was to be mainly settled by Maori individuals, not Maori groups.

Like other Maori leaders of his time Ngata also favoured tribal ownership of land. He realised however that the laws of individual ownership had become too entrenched to displace, given the politics of his time, and concentrated on the grouping of individual owners and titles in Maori incorporations, adapting modern concepts of corporate identity to emulate traditional control modes. Others however thought to know better and Maori incorporations did not dominate Maori land ownership except in Ngata's own tribal area of the East Coast.

When Ngata first came to prominence at the end of the 19th century, the Crown had policies for the extensive acquisition of Maori land for European settlement. Ngata, like Sir James Carroll before him, was deeply concerned at the rate of Maori land alienation. Individual ownership offered the least protection against sales and from the 1890s Ngata actively promoted the aggregation of individual owners and the consolidation of their titles, reversing the Maori Land Court process, to form incorporations. But the acquisitions continued, with little or no thought to the future of the tribes, and the fact that the land was "idle" was the excuse. In rejoinder Ngata proposed the wholesale development of Maori lands even if it required the elimination of those forests and swamps that sustained traditional lifestyles. It seemed that Maori must farm the land in the European way, or lose it altogether. He undertook, in the process, to convert the Maori race from the traditional horticulture to which it was accustomed, and the subsistence horticulture to which it had been reduced, to pastoral farming and large scale ranging. It was a formidable task but the agrarian and mental revolution required was eventually to be won. Despite later criticism of Ngata's financial controls, Ngata earned such an honoured position in the histories told at Maori gatherings, that now his status can only grow as the generations extend.

Though loans were available for the settlement of Europeans, there was no comparative funding for Maori land development for some long time, despite Ngata's urgings. With or without loan money Ngata began a long process of organising Maori villagers into working groups to start the clearing and development of their lands. No substantial funding came until the depression years of the 1920s and in that depression "Maori land development schemes" took root. The necessary legislation came in section 23 of the Native Land Claims Amendment and Native Land Claims Adjustment Act 1929. Ngata, as the then Minister of Native

Affairs, wasted no time in using the money budgeted to him, and, it was to transpire, a little more besides.

Under the 1929 Act, the development was under Ngata's direct control as Minister. Ngata combined the advantages of both ready cash and a large Maori labour supply. The pace of development was remarkable, and since the rate of expenditure was matched to immediate returns, the schemes drew favourable comment that the Maori performed better in meeting loan repayments than many European settlers.

Criticism grew of Ngata's budgetary controls and his over-expenditure of Government money. A formal enquiry resulted in Ngata's resignation as Minister and a proposal, in 1935, to re-write Maori Land Development laws.

The new law came in Part I of the Native Land Amendment Act 1936. In the first instance it transferred control of the schemes to what is now called the Board of Maori Affairs, serviced by what is now called the Department of Maori Affairs. The Board had formerly existed primarily to oversee the alienation of Maori land for the settlement of Maori and Europeans on freehold or leasehold farms.

Ngata opposed the transfer of control to a bureaucracy, predicting that tribal initiatives would soon be displaced by government parentalism. He was right. Owner involvement was never to be the same. European managers were introduced, farm workers were engaged by the State, the mainly voluntary gangs of villagers disappeared, and for the next forty years at least the settlement of individual farmers on smaller titles predominated.

Ngata criticised the drastic nature of some of the control powers which provided, he said, for "a sort of beneficent despotism". Land could be brought under development, with or without owner's consent, and upon development, all control was vested in the Board. Once ready for settlement it was the Board, not the owners that decided who might be settled, when and on what terms. The Board maintained a strict parental control of its settlers and had exclusive authority to determine the ultimate alienation. Those provisions enure, even in our times, save that some consent is now needed for development to begin. Effectively, though thousands of acres of Maori land that might otherwise have languished were developed through these State controlled schemes, to the ultimate advantage of the Maori people, and the State development schemes may account for most of the major Maori land developments in the country, the rangatiratanga or right of tribal control that the Treaty talked of, was lost, and tribal policies gave way to the preferred policies of succeeding governments. Today much more is done than in previous years to consult with owner elected groups in the development process and to meet annually with the owners as a whole, but a picture of the bureaucratic parentalism that Ngata had warned of became entrenched and the recent image rebuilding we fear, will need to be continued much longer before the picture will fade from view.

Ngata particularly criticised the thrust of the Act to promote individual Maori settlement with loans to Maori settlers to buy out Maori owners. Ngata preferred that the developed lands be taken over intact by Maori incorporations representative of the owners as a whole. Individual settlement was not, in his view, the Maori way and led to sales. "I would point out to the Minister" he said in debate in 1936, "as I did to the former Prime Minister, that he is giving the Maori something he can cash in—either a lease or a freehold title. It may be loaded with a mortgage, but it is



cashable; and we are now in a period when there is a land hunger in New Zealand. So we have more temptation today, in a time of prosperity, confronting the Maori than was the case during the depression, when the scheme was started”.

The Maori preference for tribal development was once more submerged and the settlement of individual farmers became the predominant policy of the Board. just how many of those individual farmers sold, is not known to us, but we suspect, most did.

The development methodology also aroused fears that land held for development would not return to owners until generations had elapsed. This often proved to be the case. The Board works in stages, the initial “capital development” stage envisaging substantial expenditure to achieve a maximum stock carrying capacity for the whole block in as short a time as time allows. A “consolidation phase” follows to build up stock production and then, a “debt reduction stage” when farming profits are used to reduce the compounded debt to a point where settlement is feasible. Unsustainable over-expenditure from the public account can find relief in provisions enabling interest remission or debt write offs but nonetheless, the development methodology implies that the block when developed will be capable of repaying the debt, and it seems, that farm prices will be maintained, or will improve at the end of the capital development stage. That was not always the case. An alternative of smaller development to establish base units able to service smaller debts but with a profit margin to underwrite further expansion may have provided a greater check against uncertainties but would not have enabled the rapid development of the bulk of Maori land.

Rapid development was needed, in Ngata’s view as well, to retain Maori land for its owners, but in the views of others, as stated in the House at the time of the 1936 Bill, a major hope was also to improve Maori land in the interests of the national economy at one level, and the next-door neighbour at the other. Some speakers drew attention to the spread of weeds from Maori land, the failure of the Maori to enclose wandering stock, and the effect of unpaid rates on local authorities where Maori land predominated.

Certainly the intention to benefit Maoris was the intention stated in the Act. It is still stated that way in today’s laws. The main purpose of the development provisions in Part XXIV of the current Maori Affairs Act 1953 is stated in section 327 as being “. . . to promote the occupation of Maori freehold land by Maoris and the use of such land by Maoris for farming purposes.” What is unusual, from a Maori perspective, and quite apart from the vexed question of whether individual farmers or some corporate Maori group should be preferred, is the manner in which Maoris are consistently seen in law as simply Maoris and not as Maoris see themselves, as members of particular whanau, hapu and iwi. The current section 342 requires that in the identification of suitable settlers, preference be given to Maoris, but which Maoris? No distinction is drawn between Maoris who are owners, or Maoris of the same kin group or tribe, or Maoris from other areas. There is no requirement that an applicant for settlement have the precedent support of the local tribal group or that the local group should be involved. No doubt the identification of preferred settlers from within a tribe is not easy for the bureaucrat, but even without the aid of prescriptive regulations, Maori tribes have no difficulty in knowing their own members, and in ranking them in priority according to their

own criteria. Though (again) there is more consultation today, the requirement for consultation is not there and the precedent for no consultation being established, is still on occasion followed.

The settlement of individual farmers was usually by way of lease, the settler being assisted to buy the improvements and rent being distributed to owners based on the unimproved value of the land. Settlers were also assisted to buy out owners. Sometimes the Board bought up the shares of owners on sale to the settler. Often the Board had bought substantial shareholdings even before settlement and was able to settle farmers on freehold titles, for when owners had been dissociated from the actual use and occupation of their lands for some decades, and saw little prospect of returning to them, there was an inclination to sell. Often the owners had moved some years before, to town, wondering if their lands would ever return to them.

It was not until the 1970s that there was a shift in policy. A new Minister of Maori Affairs, a Maori, considered the laws affecting Maori land should recognise the kin group structure of Maori titles and Maori districts. A notable change was made in the law on the disposition of individual shares in Maori land, limiting sales to those of the land owning group or their families (see section 213). In a Government White Paper of 1973 it was also proposed, in the tradition of Ngata, to abolish the Board of Maori Affairs and resume direct Ministerial control, the Minister acting with the advice of Maori Land Advisory Committees established in districts each with predominantly Maori personnel. As it turned out the board was not abolished but Maori Land Advisory Committees were created.

At the time of the Government White Paper the Board of Maori Affairs was responsible for 102 stations accounting for over 380,000 acres. The paper advised "the emphasis is now being placed on the return of these stations as soon as practicable . . . ." It was about then that the Board's policy shifted from the settlement of individual farmers on units within the scheme, to the return of lands intact, as stations, to incorporations and trusts representative of the owners as a whole. It was 38 years after the control of development had been vested in the Board.

There was an added advantage to the owners. Inflation had grown in an unaccustomed way and rentals under the unit leases, usually for 42 years with 14 year rent reviews, no longer gave owners adequate returns. Corporate farming with a distribution of profits seemed preferable. Accordingly it was arranged that the incorporations and trusts take over the balance owing on development debts by way of mortgages back. That represented some progress for the owners but while this method of 'hand back' had the virtue of simplicity, it did not permit the incorporations or trusts to examine the cost effectiveness of the development work, and in particular, to contest the assumption that the whole development debt in the Department's book was represented by added value to the land.

A difficulty is that the approach of Government in the mid 1970s, to recognise the tribal nature of Maori society, and in reality, to put a bit of "Maori" into the Maori Affairs Act, was not carried through to that part of the Act that dealt with Maori land development. It was provided, by an amendment to the sections constituting the Department of Maori Affairs, that in the exercise of its functions the Department is always to consider "the preservation, encouragement and transmission of . . . Maori customs and traditions . . . and other aspects of Maori culture essential to the identity of the Maori race". Tribal identity would appear to be part of that culture, along with tribal mana, a word that denotes both status and



authority. Those same instructions were not put into that part of the Act that governs the operations of the Board, where the Board governs and the Department merely serves. Perhaps that was considered unnecessary in the light of section 6 of the Act which provides that in the exercise of its functions and powers "the Board shall give effect to the policy of the Government as communicated to it from time to time by the Minister (of Maori Affairs)".

Perhaps it was thought too that all that was needed was some expansion to the Board. We have seen that in 1974 Maori Land Advisory Committees were established with Maori representation to provide more local and Maori input. Later the Board itself was expanded. It was at the time comprised of the Minister and Secretary for Maori Affairs, the Director-General of Lands, the Valuer-General, a Member of Parliament for a Maori electorate and four other representatives of the Maori people. In 1982 the 'four' was increased to nine to include in particular, the Presidents of the New Zealand Maori Council and Maori Women's Welfare League, the Chairman of the Maori Education Foundation and six others appointed by the Minister. In 1985 the Maori Trustee, who is also Deputy Secretary for Maori Affairs, was added. This expansion however, is probably primarily due to the extended duties recently cast upon the Board in the provision of housing, hostels, pensioner flats, facilities for culture groups, the promotion of business and the control of the lending and investment operations of the Maori Trustee.

In advising the Board the Minister of Maori Affairs was not without the benefit of opinion from Maori people. From the moment Maori people were invited to participate in policy formulation the Minister was to be swamped with recommendations, and the deluge has yet to end. On the land side they are remarkably consistent, demonstrating only too clearly that the group development and tribal recognition that Ngata spoke of, is still preferred. From the first Tu Tangata Conference hosted by the Minister in Parliament Buildings in October 1980, to the second in 1981 and thence to the Maori Economic Summit of 1984, tribal development, tribal recognition, tribal land ownership and the use of Maori land to assist tribally based training projects for young people has been a consistent theme of the resolutions, and so too resolutions calling for assistance to increase tribal land holdings through the acquisition of lands to be owned of course, by tribes, The settlement of individual farmers has barely ranked mention. The long-held call for tribal identity and autonomy still persists.

Similar proposals were to continue after those conferences through the reports of the Maori Economic Development Commission. They found expression too in the recommendations of the New Zealand Maori Council. The Council, invited by the Minister to draft guidelines for a new Maori Affairs Act, presented its report *Kaupapa* in February 1983. Land ownership, it noted, was traditionally tribal and "the law should reflect our communal and tribal heritage by enabling Maori land to support groups and tribal projects". "The potential for funding tribal development programmes is heavily dependent on the capacity of the tribal resource" it noted, "We ask the Government to recognise the substantial loss of Maori land over the past 120 years and to support and encourage Maori authorities to buy land wherever possible to restore their land base".

Maoridom was said to be on the move but that did not mean Governments had been moved too. At least in one case these emergent policies took root. The total Maori shareholding in the Mamakumarū Development

Scheme had been purchased by the Crown on an undertaking to settle Ngati Haua people. Individual settlement was not pursued, and the land, which legally had come to belong to the Crown, was settled on a trust established by the Maori Land Court to represent the Ngati Haua tribe. It was, at last, a true tribal trust, without individual ownership.

Still, a half century of parental control in the development of Maori land has established its own traditions which will take their own time to die. In more recent years the continued requests of Maoridom for tribal recognition have been more graciously received but the tribal principle is not perfected in law or official policy and is not given the attention it needs in practice. In that respect the Waiheke case was no exception, but the special circumstances attendant on the Waiheke Scheme must now be reviewed.

## 5. THE DEVELOPMENT OF THE WAIHEKE SCHEME

The Waiheke Scheme is unusual in that it was not founded on Maori land. As we have seen the former Maori land was part of the much larger sale to the Crown in 1858 and Ngati Paoa has not owned the land since.

It is also unusual that from the beginning of the development scheme there was no substantial tribal presence on Waiheke. The remnants of Ngati Paoa had occupied the western aspects of the island at Te Huruhi—and nearly all had left by the 1950s. Only archaeological sites remain to evidence the relatively dense native population of past years.

On the lands of the Waiheke Scheme itself, unlike other parts of Waiheke, there are no obvious pa sites—for it is an inland area—but numerous pit sites and terraces tell of extensive gardening in the past, and large swamps indicate that the occupants had access as well to substantial bird resources. A promontory near Man-O-War Bay called Te Huruhi, suggests some link between the locality of the scheme and the main residential area at the western end of the island that bears the same name. There was also a burial ground on the scheme, that people of Ngati Paoa were aware of, but when the bones of Ngati Paoa forebears were exhumed on the mainland in 1942, on extensions to the Devonport Naval Base, they were reinterred at Te Huruhi urupa on the western peninsula. That at least indicates that Ngati Paoa still saw the island as their ancestral home.

For those involved in Maori affairs however, the territory of Ngati Paoa ought to have been known, for it is well recorded in the oral history of the Maori people and is documented as a finding in the records of the Maori Land Court. The establishment of the marae at Waiheke in 1982 gave further reminder to those interested of the former Ngati Paoa presence.

Early ownership probably meant little to the Europeans who obtained Crown grants for various allotments in the area of the scheme in the 1850s. By the 1890s the bulk of allotments had passed to the ownership of Eliza Rutherford Thomson. Her lands then passed through five other owners before being purchased by Charles Hutchinson Scott and his wife Kathleen Hiraani Scott in 1937. It was subsequently transferred to Kathleen Hiraani Scott solely.

Kathleen Hiraani Scott (née Blake) was the descendant of a Maori from Parihaka in Taranaki with connections as well to Ngati Kahungungu. Her husband Charles Hutchinson Scott, known also as Charles Te Mangu Scott, was also the descendant of a Maori with connections to Te Arawa of Rotorua. Neither however had direct connections with Ngati Paoa of Waiheke. In Maori terms they were as much strangers to the land in 1937 as the European purchasers who preceded them. And of course, the fact that the land was purchased in 1937 by Maoris did not mean that the land thereby ceased to be General land and became Maori land. The purchase was in all respects an ordinary commercial transaction in which the buyers just happened to be Maori.

The land was acquired, it seems, to establish a family farming venture, but it appears also that its full potential could not be realised without major capital injections. From about 1940 Mrs Scott sought the assistance of the Department of Maori Affairs to develop the property but without success, due mainly to the doubtful economy of developing an island property and the fact that the area that could readily be grassed was too small in relation to the whole block. The land suffers, in addition, from

summer drought, some winter flooding and gorse infestation, and it later proved to be bad for facial eczema too. The cost of administration from a mainland office and a typography that restricted the use to sheep farming were also problems, there being fewer Maoris with the capital to settle on a sheep and cattle unit.

In 1960 the land was offered for sale to the Crown but the Department of Lands and Survey declined to purchase it.

Mrs Scott was persistent. After further representations in 1963 and 1964 and some degree of political pressure on the Board, an agreement was reached. Although Mrs Scott hoped the Department would develop the land as a station on the trustee basis for her family the only source of funds then available through the Department for land development was pursuant to Part XXIV of the Maori Affairs Act 1953 relating to development schemes under the control of the Board. The Board agreed to develop the land only with a view to its eventual division to some three farms and the settlement of Maori farmers within a projected time of seven years. An area of 25 acres on the sea-coast, containing two homes, was to be excluded from the scheme for the Scott family, and although members of the Scott family would no doubt qualify as prospective settlers on the proposed units, no undertakings were made as to who might eventually be settled. On figures prepared by it the Board estimated that at the end of the development stage—approximately seven years—the estimated realisation value of the property, including stock and chattels, would be \$187,790 and that the development would have cost \$225,590. The excess debt over the valuation was believed to be recoverable from farming proceeds.

There was nothing untoward, at least in law, in the establishment of the Waiheke Scheme on General (or European) land. Though invariably the Board develops Maori land, it may also develop General land owned by a Maori as was the case here (see sections 330(2) and 326 Maori Affairs Act 1953).

It was unusual too, but not without justification, that the decision was made to undertake the scheme. It was not policy at the time to develop land owned by an individual Maori, especially if it were to confer an individual benefit. It just so happened, after repeated requests for assistance from Mrs Scott, that money was available for development, that no Maori land in multiple ownership was then being offered for development, and the prevailing buoyant prices for wool and other farm products made island farming more viable than it had seemed before. It is to be noted however that while the Board had jurisdiction to develop the land on behalf of the Scott family, it preferred to maintain its policy of applying its monies for the ultimate benefit of a greater number. Its intention was to develop the land for the settlement of Maori farmers, without commitment to the Scott family in particular, and it hoped that some three Maori families might be settled.

In April 1965 the land was formally gazetted as subject to the provisions of Part XXIV of the Maori Affairs Act 1953 and the Maori Affairs Waiheke Island Development Scheme took root.

The misgivings of the Board that development of the area was marginal was soon translated into fact. There is one view that the Board went in too big to spend too much too soon so as to create an unsustainable debt. There is another that the amount spent was commensurate with the objective of developing the land for outside unit settlement at an early stage, and that losses were due to unexpected falling prices and drought conditions. We need not examine the cause but only the result. Between 1965

and 1972 the Board expended on development and incurred losses totaling nearly \$287,000. By 1972 the development debt was almost twice the book value of the land, improvements, stock and plant, and annual losses were occurring.

There seemed little prospect that unit settlement would be effected in Mrs Scott's lifetime and it appeared to be in her interests to sell out. That seemed also to be in the interest of the Board if it were to benefit from the capital gains of rising land values. It seemed also that the scheme might be made more economic with the acquisition of further land than available. Accordingly in 1972 Mrs Scott was to sell the greater part of her freehold interest to the Crown for the purposes of Part XXIV of the Maori Affairs Act, and by further agreements in 1975 a further 440 acres were acquired from adjoining farmers.

There is nothing untoward, at least in law, that the Board bought the land. It is specifically empowered to acquire land for development (section 370(1) Maori Affairs Act 1953). Unless the land is acquired on behalf of specific Maoris, which was not the case here but which commonly arises when further land is needed to develop an existing Maori owned scheme (see section 370A), then the land so acquired is acquired on behalf of the Crown and becomes Crown land (see section 370(1)(3) and section 384). The Waiheke Scheme was independent of any other and from the date of acquisition therefore, the land in the Waiheke Scheme was Crown land.

There was excluded from the sale by Mrs Scott, 105 acres, (not 25 acres as earlier envisaged) taking in the whole of the beach frontage. Accordingly no part of the scheme adjoins the coast and no parts of it have potential for coastal recreation reserves or coastal residential subdivision. Those parts of the land in native bush, predominantly Kauri forest, were to be left as proposed Crown Reserves.

The purchase probably did little more than slow down the rate at which the debt was increasing. After 17 years of farming, on the Board's method of calculating, and after allowing for office and managerial expenses, the farm had produced a farming profit in only four of those years. The debt was continuously rising. In only two years had that debt been lower than the previous years. To 1983, from purchase in 1972, the debt more than doubled to reach a peak of \$670,000. The greatest advantage appeared to be the work and training given to unemployed under Labour Department unemployment schemes. The economics of continuing farming with a substantial debt looked doubtful and the outlay of further money would only increase the difficulty of finding a settler with sufficient cash to take on the land. The prospects for sale however looked reasonable. The land was reasonably developed and carried 5,000 ewes, 100 other sheep, 200 breeding cows and 100 other cattle.

The Board determined it would be best quit of the scheme. That the Board resolved to dispose of it, and the manner in which it did, sparked off complaints that in turn illuminated the plight of Ngati Paoa. It was natural that the immediate complaints were directed to the immediate cause of complaint—the decision to dispose of the land, and the basis and method whereby that decision was taken. It is necessary therefore to review the disposal of the Waiheke Scheme.



## 6. DISPOSAL OF THE WAIHEKE SCHEME

The Board had no legal obligation to dispose of the scheme to a Maori. The land had been bought and developed and stock had been purchased all from public monies. It was money allocated for Maori development but upon sale the outlay would return to the Maori account for a Maori benefit. The authority to sell Crown land under development is contained in sections 335(2) and 384(2) of the Maori Affairs Act.

At first the scheme was offered to the Department of Lands and Survey as a base for existing or proposed farming operations in the area, or as an addition to the Hauraki Gulf Maritime Park. It was considered of insufficient merit for those purposes to warrant the purchase price.

The Head Office of the Department of Maori Affairs then proposed an open market sale as providing the simplest solution. That would have involved a sale of the land as surplus Crown land by the Department of Lands and Survey. The Board would recover its development debt (then \$670,000) and the price paid for the land with interest compounded (\$140,000), but we were given to understand the net profit (probably some \$400,000) would have passed to Treasury. The loss of that profit to the Maori Development account may not have seemed satisfactory to the Board which had laboured with the property for many years. It may also have been unsatisfactory to Government had the land been sold on the open market. At about this time public controversy was raging over the sale of adjoining Crown land on Waiheke to private interests, in what is sometimes called "the Stony Batter" affair. In any event the Board was to decide that the land should be offered for Maori settlement for it had been developed from money allocated for Maori benefit. Though the original policy at the time the scheme began had been the settlement of individual Maori farmers, that was no more than an initial policy and upon the subsequent purchase of the freehold, there was no obligation to anyone to do that. It was open to the Board to settle a Maori trust or incorporation.

What took the claimants by surprise however was the disclosure, in the course of our hearing, that at this time the Board had considered the possible alienation of the scheme to Ngati Paoa. They were not the forgotten people they thought they were. Ngati Paoa had some cause to feel they were, for in the course of the public debate that preceded our hearings officials were heard to say that no one knew of Ngati Paoa's existence. Indeed in giving evidence to us one Board member stated that he knew not of Ngati Paoa's association with the land at the relevant time, and that, had the Board known, further enquiries would have been made. In fact, as Ngati Paoa came to learn, a specific recommendation to "return" the land to Ngati Paoa was put to the Board in 1982, and equally specifically, that proposal was rejected.

In December 1982, as part of a three yearly review, the District Officer, Hamilton, had opposed further major spending recommending that the scheme be wound up in three years with some limited essential expenditure being sustained by the remission of further interest. He went on to recommend that investigations be made for the block to be taken over by a Ngati Paoa tribal trust, or the Tainui Maori Trust Board on Ngati Paoa's behalf, pointing out that the land had been acquired with a view to Maori utilisation, that the land was in Ngati Paoa territory, that the early sales of the land might be suspect, that a sale to the tribe might be practicable, and that the tribal involvement would further develop PEP programmes. He

thought the three year period should be used for investigating whether there was any justification for handing over the land to Ngati Paoa people.

The District recommendations were opposed by the Head office of the Department. "The Crown purchased the property as General land" it noted and neither the Tainui Maori Trust Board nor the Ngati Paoa people had any specific claim upon it. A transfer to Ngati Paoa, which had nothing, would require a gift of a substantial part of the equity, and that could not be contemplated without Parliamentary approval sought and obtained on some substantial grounds. Whether or not substantial grounds existed was not substantially investigated.

In any event the Head Office of the Department opposed the District report and recommended that the scheme be wound up and sold. The Board concurred, at a meeting of 3 February 1983 but with some dissension, notably that of the Board representative for the Maori electorates (Mr K T Wetere as he then was), who at that and subsequent meetings urged consultation with Ngati Paoa.

At that meeting however, nor did the Board agree that there should be an open market sale without further enquiries. Concern was expressed to maintain the Board's brief of settling Maoris, if that were practicable, and the Department was instructed to investigate and cost the various disposal options.

The District Officer reported that 486 hectares of developed land might profitably be severed for the settlement of a Maori sheep farmer and the balance rough land sold as surplus.

Before reaching that conclusion the District Officer reviewed various possible scenarios including a sale at full value to the Tainui Maori Trust Board to hold the land on Ngati Paoa's behalf. The Trust Board was a substantial concern, which Ngati Paoa was not, and in his view, the Ngati Paoa land was within the wider boundaries of the Tainui area. (He appears not to have considered whether Ngati Paoa was represented on the Board. We were given to understand that Ngati Paoa held to some independence. Ngati Paoa had no representation on the Board, it was said, because it had declined to be involved in an arrangement between Tainui and the Crown over land confiscation problems many years ago and which had led to the Trust Board's establishment.) Administration by the Trust Board would have required paying a manager and staff and on the District Officer's budget figures the Trust Board would need to put in at least \$840,000 cash. In evidence to us the District Officer advised he knew the Trust Board well and it did not have that money. If it did, profitability would still be marginal and it was not a good investment of trust funds. The Deputy Secretary agreed, in evidence before us, stating he did not think the Trust Board could have made a profit unless the property was given to it at a fraction of its current value with the greater part of the debt being written off. That would have required Parliamentary consent.

The Board considered the report at a meeting on 7 April 1983. It directed the Department to canvass Maori people, trusts, incorporations or trust boards to buy or lease the 486 hectares, the residue or both. On the figures supplied at that stage however it was patently obvious that whoever exercised any option would need to make a substantial cash contribution if the project was to be viable.

The Department sent information about the proposals to its various offices and to some twelve Maori authorities or individuals in the South Auckland-Waikato area known to have some strong asset base (including



the Tainui Maori Trust Board). It then proceeded to advertise the property as available for settlement by “suitably qualified Maori farmers” by placing small advertisements in the *Auckland Herald*, *Waikato Times* and *Dominion* newspapers on three occasions. No notice was given to any Ngati Paoa authority.

Ngati Paoa complained to us that they were not given notice and learnt too late of the opportunity to tender. Given the intention to canvass only those with assets that is not surprising. Certainly a Ngati Paoa trust for the leasing of two tiny islands as wildlife refuges had existed since 1981, but there was not known to the Department, and indeed there is still not known, any Ngati Paoa trust, incorporation, trust board or private farmer of the locality with the cash backing that was needed. That in itself spells out the Ngati Paoa case for while the Board was seeking a Maori body with the necessary capital, the nub of the Ngati Paoa complaint is that it has none and ought to have special assistance,

R T Mahuta for the Tainui Maori Trust Board protested that the Trust Board never received full particulars of the alternatives offered and questioned whether tribal bodies, as distinct incorporations or owner trusts, could ever be involved in land projects without some equity write off and without training programmes to enable local Maori groups “to pick up these developments”.

However seven individuals did respond to the advertisements. Each was sent full details of the property. Only two made formal application. We agree with the Board that of them, the proposal of Hori Matua Evans of Gisborne was demonstrably the best, Mr Evans and his family having both cash and technical know-how well above that of the average New Zealand farm settler.

The Evans offer was not for one piece or the other but the lot. After some processing by the Department a recommendation was put to the Board that an Evans family partnership would buy the stock, plant and improvements and some additional livestock by way of some \$300,000 cash and \$480,000 loan from the Board at 7.5% interest. The partnership would lease the land for 33 years with perpetual right of renewal, the rent reviewable each 11 years at 4% of the unimproved value with a right of compensation for improvements on termination of the lease. The lease would grant the partnership an option to purchase for cash or by deferred payment. Other provisions would reserve to the Crown the first right of refusal in the event of the partnership wishing to dispose of its leasehold interests in the first 14 years, and the first right of refusal to buy back the freehold if after acquiring the freehold the partnership wished to sell.

The terms, the rate of interest on the loan, and the rental and review periods are concessional. The authority of the Board to lease development lands on these terms is in section 345 of the Act. The authority to include an option to purchase is in section 335(2) and 384(2).

Some facets of the Evans offer deserve noting. It weighed heavily with the Board that Mr Evans could trace descent to Ngati Paoa and in particular, to an early occupant of Waiheke. It appears that Mr Evans’ great great grandmother, Hariata Whakatangi, was born and reared at Waiheke from the early 1840s. (We were told she was of Ngati Paoa although it was also said she was of the Taipari family, which we understood related mainly to Ngati Maru). She married William Martin, an American seafarer who traded in flax gathered from Te Araroa near East Cape (the marriage is recorded in McKay’s *Historic Poverty Bay*). Her daughter, also born on Waiheke, was to visit Te Araroa frequently and for her work there was

later to be given land at Te Araroa which she called Tokota after the home block on Waiheke Island. The Te Araroa block still bears that name today. The daughter, also called Hariata, married one of the Te Araroa people, Hori Akuhata. Hariata and Hori Akuhata lived at Waiheke but later shifted, with Hariata Whakatangi or Martin, to Thames. On her death Hariata Whakatangi was buried at Waiheke. Hariata Akuhata died in 1928 at age 104 and she was buried at Te Araroa. Some of her children settled there, at Tokota, and thus the Akuhata family of the East Coast grew. Mr Evans is a member of that family.

Advice, through the media, that Mr Evans was also of Ngati Paoa, did not weigh too heavily with Ngati Paoa. It is usual that a Maori can trace ancestry to a range of tribes, near and far. More significant is how a Maori identifies and maintains links to a proclaimed tribe by attending that tribe's gatherings. In his public life Mr Evans was identified not with Ngati Paoa but with the distant Ngati Porou. Matters have clearly changed since our hearings opened, but at the time the Evans' ancestral claim, without the prior affirmation of ancestral links by attending Ngati Paoa hui, merely invited the Ngati Paoa rejoinder that they—no-one else—should identify their own and that Ngati Paoa should have been consulted in any selection process when tribal affinity was seen as important.

It also impressed the Board that the Evans offer was made on behalf of a proposed family partnership involving two "farming" sons and thus envisaged the settlement of more than one Maori upon the land. That, in the Ngati Paoa view, was merely a device to circumvent settled rules. Mr Evans had had Board assistance before, in the acquisition of a vineyard in the East Coast, the sale of which would finance the Waiheke venture. A further Board loan would still be needed to the extent of some \$480,000, a concessionary rate of interest was proposed with concessionary lease terms, and yet it was not Board policy to assist one person twice. The Board maintained that it was not—the earlier loan was to Mr Evans, the proposed loan was to a partnership. In Ngati Paoa's view the Board was playing with semantics. The family partnership was merely a cloak to conceal. If the Board could fashion a cloak or stretch the rules to accommodate Mr Evans, could it not also fashion a cloak or stretch the rules for Ngati Paoa?

No doubt however the main consideration was Mr Evans' wide farming experience and capital. Not only was he to contribute the sale proceeds of his Gisborne vineyard, but he had also managed sheep and cattle farms for years, was a former Director of the Rural Bank, a former member of the Wool Board and a Manager of some substantial Maori incorporations. His eldest son was completing a Bachelors degree in Agriculture. Mr Evans was the applicant most likely to succeed in farming this difficult property.

The Evans proposal was accepted by the Board on 31 August 1983 with settlement to take effect on 1 February 1984. An offer was sent to Mr Evans on 20 September 1983 and accepted on 18 October.

Once the Board's decision was publicly known, public reaction was swift and in less than a month a petition on the matter was before a Select Committee of Parliament.

## 7. REACTION

The first reaction came not from Ngati Paoa but from European residents of Waiheke, for Ngati Paoa was barely resident there. They had had an experience in reacting, having earlier battled over the disposal of adjoining Crown land to private and apparently wealthy individuals, and a Waiheke Land Action Society (Inc) (the 'Action Society') was already in existence. The disposal of the Waiheke Scheme involved the loss of another large block of Crown land to private ownership and to the ownership of one who, if not as wealthy as the other, had other reasons to be as well known. Mr Evans was a public figure through his positions on the Rural Bank and Wool Board but had attracted further publicity only shortly before the Waiheke announcement through conviction for offences against the Secret Commissions Act.

The Action Society held public meetings, lobbied Parliamentarians and protested to the Board and Ombudsman on the disposal of more Crown land, the disposal of that land to Mr Evans in particular, the loss of unemployment schemes on Waiheke Station and the loss to the public of the kauri bush stands and access (although it had been arranged that the bush would remain as Crown Reserves). In September 1983 Mr Gary Blair, a member of the Action Society and a shepherd on the Waiheke Scheme, filed a petition to Parliament. It was referred to the Land and Agriculture Committee.

The petition sought an investigation of the matters leading to the Board's decision and a review of that decision. The latter was achieved even before the petition was heard insofar as the Board reviewed its own decision and resolved, on 6 October 1983, to affirm it. The former involved an inquiry by the Committee. Following a hearing on 26 October 1983 the Committee determined it had no recommendation to make.

Mr Blair explained that at the time of his petition he did not know of Ngati Paoa. He claimed to have inquired of "an official from Hamilton" as to the original inhabitants of the island and was told "the Department had tried to find descendants and had found none". He said he made inquiries of his own to 'find' Ngati Paoa.

The first Ngati Paoa involvement of which we were informed came as a telegram to the Hamilton District Officer (now called 'Director of Maori Affairs, Hamilton') from Mrs Hariata Gordon. The District Officer thought the telegram arrived in "September/October 1983." Mr Evans had accepted the Board's offer on 18 October.

Members of Ngati Paoa meantime were slowly regrouping. They were well scattered. The main applicant, Mrs Hariata Gordon, was living in Wellington at the time. The District Officer advised he did not hear further from Ngati Paoa until "early January 1984" when Mrs Gordon asked that a Ngati Paoa delegation meet with Mr Evans. By accident they did meet the following week, in the Department of Maori Affairs at Hamilton, and in the District Officer's view the delegation "seemed pleased that a member of Ngati Paoa was able to take over the land".

It was not until 15 January 1984 that a general tribal meeting could be convened. At a hui at Paoa Whanaunga Marae, Kaiua, a Ngati Paoa executive was formed to continue discussions with the Minister of Maori Affairs and Mr Evans, and an action committee was formed (Ngati Paoa Waiheke Whenua) to occupy the land if need be. This claim was filed on 18 January 1984 and a group visited the scheme land on 22 January. Then, on learning that settlement of the transfer was fixed for 2 February, when

vacant possession would be given and taken, Ngati Paoa resolved to fill the vacancy themselves.

On 31 January a group of fifteen moved onto the block, camping at the main gate to restrict access. They were soon joined by members of the Action Society and the group swelled to twenty-two. Mr Blair said: "When Ngati Paoa arrived to occupy the land I was very pleased on several counts; firstly, it was rightly their place to fight over. Even though the people who went to Wellington (on the petition) all share a love of the land involved, we were not the tangata whenua of Waiheke. The time had come for us to support them. Secondly they were not what I had imagined a Maori activist would look like. They were ordinary people alienated from their homeland . . . "

The District Officer was instructed to attend at the island and serve warning notices. He did so, on 1 February, returning the next day with members of the police. After discussions some of those in camp then left but eleven remained and were arrested for trespass.

Those eleven were convicted and sentenced on 12 May 1984 but each appealed to the High Court where the convictions were set aside. Amongst other things, it was held, the warning notice could only be given by a person authorised by the Board and in this case, the authority had purportedly been given by circulating the fourteen Board members and obtaining the signatures of six. The High Court considered the authority had not been properly given, even had it been signed by all fourteen members, for a meeting of the Board was necessary. That decision, of 20 September 1984, shows that this was no mere technicality and we refer to the following extract from it:

" . . . it accords with the objective of the provisions in the statute relating to the operation of the Board to hold that decisions can only be taken at meetings. As I have already indicated, there are fourteen members of the Board. Clearly that membership has been prescribed carefully in a way to ensure that the Board should have available to it a wide range of representative opinion, particularly from the Maori community. It accords with that approach that decisions should not be made by the Board without the opportunity of all members of the Board able to attend a properly called meeting to consider any proposed decision and to debate it openly at the meeting. Only thus can the decision truly be said to be that of the members of the Board. To allow decision by circulation would be to deprive members of the Board of the benefit of hearing the views and arguments of others.

"This case illustrates the importance of that approach. The issues to be determined relating to this land at Waiheke were clearly those where Maori cultural attitudes and views were relevant. The procedure prescribed in the Act should have ensured that before the Board made a decision affecting matters of this kind there should at least have been an opportunity for full discussion. This objective can hardly be said to have been achieved where the authority was signed as the result of it being circulated to only six of the members of the Board."

The relevance of those cultural attitudes and views, and the weighting given them by the Board, are considered further in our overview and recommendations that follow.



## 8. OVERVIEW AND RECOMMENDATIONS

On the specific aspects of this claim, as outlined in Chapter 1, we have come to the conclusion, without too much debate, that given the regime of current laws and policies to which the Board of Maori Affairs was bound, that which the Board did was right. Whether the Crown's policies and practices match the principles of the Treaty of Waitangi is another matter that we will consider below, but within the parameters of such settled policies as exist, the Board acted responsibly in our view and save in the area noted by the High Court, with the professionalism appropriate to its status and role. Our criticism is entirely limited to things done or not done along the way and which might be said to infringe a kaupapa Maori (Maori protocol).

Certainly the Board presumed to judge Mr Evans' entitlement based upon his genealogy, when clearly there could be fewer functions so patently within the traditional purview of a tribal body than the right to determine its own membership and the priority of status within it. Given the pressure of time however and the practices that have prevailed, the oversight is not without excuse. The Maori Land Court does much the same thing nearly every day. Good law is not of bad practice made but the subjugation of tribal authority in the determination of occupational rights based on genealogy has been so complete in the judicial and administrative handling of Maori affairs that the practice is now presumed, and is not readily seen for what it truly is—a denigration of tribal esteem.

For our part we might have questioned whether the ancestor on whom Mr Evans relied was more Ngati Maru than Ngati Paoa, but that was for the tribe to do, if it thought that way, and we certainly did not expect its elders to do so in our presence. It is a pity too that the tribe was denied an opportunity to recognise Mr Evans, if his whakapapa so required, and so "call" him home. Instead the tribe found itself confronting one who may have been a member of its own clan and was exposed to having other people point to Mr Evans' ancestry as though the tribe, somehow, did not know its own culture. We understand that outside of our hearings Mr Evans and the tribe went to lengths to repair the breach that was forced upon them.

It could also be fairly said, in our view, that greater consultation with the Tainui Maori Trust Board and Ngati Paoa would not have gone amiss. The failure to consult, apart from time constraints, seems to have arisen from two presumptions, that neither Tainui, nor the Ngati Paoa branch of Tainui, had any interest in the land or entitlement to participate in decision making. That, we think, reflects a misunderstanding of 'ancestral land', and what it means to a Maori. We understood 'ancestral lands' to refer to the lands of one's tribal forebears irrespective of who holds title. An alternative conclusion would suggest that Maoris have no special status or interest once their tribal lands have gone and while in another respect some Maoris think that too, and some Europeans would celebrate the same conclusion, we do not think the Treaty of Waitangi intended that result, but rather that the cultural circumstances of the indigenous occupants would be always material considerations.

We note in this respect that the High Court has recently affirmed that conclusion, holding that 'ancestral land' as appearing in section 3 (1) (g) of the Town and Country Planning Act 1977, may include land no longer owned by Maoris, and even, as in that case, Crown Land (see *Royal Forest*

*and Bird Protection Society Inc v W A Habgood Ltd and others*, Administrative Division, High Court, Wellington 31 March 1987, Holland J). That decision over-rules several contrary interpretations of the Planning Tribunal that prevailed when the Board's decisions were made, but we do not think the prevailing interpretations bound the Board when dealing outside the Town and Country Planning Act.

Accordingly the opinion that any tribal connections with the land were well and truly severed when Ngati Paoa sold, in 1852, does not hold unless by 'connections' is meant a legal interest in the land. The Ngati Paoa case was based upon broader connections than that.

Perhaps the difficulty is that Part XXIV of the Maori Affairs Act does not differentiate between Maoris. Nonetheless we think any Board dealing with Maori people ought to be aware of the tribal differentiations that exist in fact, and which are endemic in Maori culture; and if one Board member did not know the tribal associations of Waiheke, we do not think it should have been beyond his wit to insist on being informed.

But what was there to consult about? The trouble, we feel, was the next presumption, made without the inquiry the District Officer invited, that Tainui and Ngati Paoa in particular could have no special claim upon the land. Still this was no ordinary land despite its Crown land status. Whether by accident or design it had come back to a Maori arena by being placed under Part XXIV for a Maori benefit and all expenditure had come from a Maori benefit account. The land is part of the ancestral domain of Ngati Paoa and this was the only chance that Ngati Paoa had, since development schemes started in 1929, to obtain practical recognition of their 'take' to the land. Other families owning land in other areas had received substantial assistance from the Department's funds, but because of their landlessness the families of Ngati Paoa had had none. To anyone on the sidelines the actions of the Department in purchasing an area of land within the Ngati Paoa ancestral domains and placing it under a development scheme would lead to the conclusion that Ngati Paoa and its members could eventually benefit from it. The Board did not wear a "human face" when the future of the Waiheke Scheme was being considered. Had they been consulted Ngati Paoa, or the Tainui Trust Board on its behalf may well have presented a case to Government for special concessions.

In rejoinder it was submitted that it was Ngati Paoa that should have made the approaches to the Board or Government, and that if Ngati Paoa had a claim it delayed too long in making it. The Board had been involved with Waiheke for eighteen years and during that time Ngati Paoa had never sought the settlement of a tribal trust or some involvement with the land.

The rejoinder is by no means a complete answer to the Board's obligations. The lack of Maori action in this case is explicable. Ngati Paoa owned no substantial interests in land, they had no previous involvement with their own development schemes and no occasion to join the growing clamour of the late 1970s for the vesting of Maori land in incorporations or trusts, for they had nothing to incorporate or put in trust. It was not until 1980 that the approach changed and tribes were invited to assist policy formulation at Government sponsored national hui. (The last such hui had been in 1879.) It was only after the 1980 conference there was talk of Government assisting tribes to buy back former Maori lands and once more Ngati Paoa were late-comers to the scene. They were a scattered and depressed people without representation at the land conferences of

Maoridom. They could learn only later of the “emergent policies” and consider what the implications of a buy-back scheme might have for them. For those who have suffered the oppression of land loss it has not been until very recently that they have been able to sense the prospect of change and know that if they speak they might also be heard.

We would not expect Ngati Paoa to have been in any position to consider the prospect of a claim before the decision of the Board was taken. We think it more reasonable, and more in accord with custom, that the Board should have sent someone to Ngati Paoa even from the time it acquired the land. Through tribal elders it may have resulted in the employment of Ngati Paoa on work and skills training programmes on the land and possible arrangements for the settlement of Ngati Paoa workers.

Despite the shortcomings, serious though we think them to be, we would not wish to be overly critical of the Board, for the nub of the problem as we see it, is that it was not within the province of the Board to depart too radically from settled commercial practice, without clear direction from the Minister on advice of Government policy in terms of section 6 of the Act. The claimants put great stress upon what they called “the emergent policies” of Maoridom to seek a better and proper land base for the tribes in tribal ownership, as is to be gleaned from the reports they referred to, from the Department’s own Tu Tangata Hui, the Maori Economic Summit, the Maori Economic Development Commission and the ‘Kaupapa’ of the New Zealand Maori Council. They need to understand however that such policies are not Crown policies even though verbal support from politicians may sometimes convey another impression, and unless and until they are formally ratified and adopted in some way, and passed into law where that is necessary (see for example *Dannevirke Borough Council v Governor-General* [1981] 1 NZLR 129 on the status of Maori policy statements in an election manifesto).

Accordingly it was not open to the Board to recommend to Government some equity write off to assist Ngati Paoa on the basis of policies that had not been approved or that may have been approved but not conveyed to the Board by the Minister.

Accordingly also, as we see it, Maori claims are still largely dependent upon the identification and proof of some wrong, like some land confiscation. This “tortious approach” as we call it, will be considered later in this report. It is sufficient to say for now that claims in this category were at the time (for our Act has since been amended), addressed only by Parliamentary petition. It is not within the brief of the Board to make those claims for Maori people or even encourage them. The most that the Board might have done, after consultation with the Tainui Maori Trust Board or Ngati Paoa, would have been to delay action to enable those bodies to present a case to Government if they wished. In the light of some need to move promptly, the fact that grounds for a claim in respect of the land in question were not immediately apparent and the nature of the Board’s primary role to develop and settle land, there is justification in the Board’s resolve to move more promptly.

We do not therefore criticise the final decision of the Board, given the constraints described. It was reasonable that when the scheme was not paying as it should, and the Maori development account was being taxed as a result, that the Board moved to dispose of it. It was reasonable that in disposing of it, the Board should have sought to so do as to enable the settlement of Maoris upon it in accordance with the Board’s statutory objectives. It was reasonable furthermore, given the doubtful economics of



settling a tribal authority and the more certain economics of the Evans offer, that it should elect to settle the Evans family unit.

We accept also that the Board had a duty to protect the Maori Development fund. The Board deals with returnable money, that is to say, it lends on projects likely to return the money with interest over a fixed period. It does not make grants or subsidies from the land development fund. We accept that a regimen of rules and regulations warned off the Board from showing the largesse reserved for Governments, and that a gift would have been needed if Ngati Paoa were to be anywhere near in the running in the tender round. That, we think, puts the problem where it really lies. The issue of whether policies should exist for the protection and development of the landless tribes has not been addressed by Government.

The Ngati Paoa concerns are clear enough. They have no major lands. Their tribal territory is largely overtaken by greater Auckland and intensive settlement. Waiheke offers one of the few remaining open space areas of old.

Are Ngati Paoa destined to live only in cities? The people are scattered throughout Auckland and Waikato. The Paoa Whanaunga and Waiti Marae, though important, are all they have to come home to. Unemployment is growing amongst them compelling a search for the old ways, but the land is not there for the purpose.

Ngati Paoa are not without hopes and opinions. As Hariata Gordon put it:

"... the stated principles of the Department of Maori Affairs is that the people must be encouraged to help themselves... so that they may stand tall on the land. Here was a scheme which had already made imaginative use of Department of Labour schemes for employing and training young unemployed while at the same time giving them back their roots in the land. The cost of development has been high but should be weighed against the negative funding of welfare benefits."

She sought "development with a human face" not "overly rationalistic and utilitarian policies that damage social relationships". She postulated the need for an alternative economy in times of unemployment that was collective, cooperative, 'low tech' with minimum investment, using the skills of all and not just the best and with multipurpose benefits in social and cultural as well as commercial terms.

The people saw in the Waiheke Scheme, she said, "a chance to follow the path other tribal groups were on, and a base from which they could draw in their young people again and help them to stand tall, as Ngati Paoa, as Maori and as New Zealanders".

The young people too saw their values and strengths lying with their tribal affiliations and lands. "As long as the land remains central the web remains whole" said Taotahi Pihama.

Gary Blair mentioned that many had been engaged on the temporary employment schemes, clearing and fencing, and maintained "at times there were more than fifty working". But clearly those engaged were not necessarily or predominantly of Ngati Paoa. Te Tii Kaaho Andrews complained:

"We have not been given the opportunity to generate our own programmes, to employ our own skills or to operate any form of cultural or economic activity from within our traditional areas. Nor

have been given the opportunity to acknowledge the social and cultural values of our traditional lands for developing work employment programmes . . . . Our entire future as a people, our opportunity to create our own employment, our chance to establish an economic tribal base for the benefit of controlling our own destiny both economically and spiritually, has been affected.”

We saw considerable energy amongst Ngati Paoa, especially amongst the many youth, but little to constructively expend it on. Still, ‘hope springs eternal in the human breast’ and in May 1985, the claimants had a Ngati Paoa Development Trust Board incorporated under the Charitable Trusts Act 1957—with a trust fund of \$50.

These hopes and concerns express the desire for projects to maintain the status of tribes and the relationship they have to their ancestral lands. The claim goes further however. The case demonstrates, forcefully in our view, the inequities of furnishing development funds, at concessionary rates, to those at the top end of the market, those tribes with land to develop or those Maoris with money to invest. We find that while the land development provisions of the Maori Affairs Act undoubtedly provide considerable benefit to Maori people, they do not assure their equitable development in accordance with their tribal divisions. The Maori development programme is thus constrained, giving vent to the inference that the real objective is the development and allocation of Maori land in the interests of the national economy.

Ought Government to do any more? That question leads to the gravamen of the contention, as summarised at page 1, that Crown policies since 1975 fail to support the tribal groups that were party to the Treaty and in particular, those tribes like Ngati Paoa now so lacking for land or other endowments that they are threatened with extinction. This complaint raises profound questions for any Government seeking, as ours does, the relief of native groups that survived the world-wide consequences of colonisation. The same questions are of paramount importance for this Tribunal which faces a clamour of claims based on the transactions of colonial times. To deal with the issue in this case we will consider, in this order, our jurisdiction on this claim, the principles inherent in the Treaty and the options for Government today.

Our jurisdiction is to consider Crown acts, policies and practices. Though it may have seemed to the contrary the Board was not on trial. We were not concerned to establish whether the Board had acted within the law, but to assess the relevant acts, policies and practices undertaken by the Board on behalf of the Crown and those policies the Crown imposed upon the Board or failed to provide for.

In addition, in this case, our jurisdiction is limited to acts, policies and practices postdating the Treaty of Waitangi Act 1975. This claim was filed before that Act was amended and before we were empowered by that amendment to recommend on things that happened before the principal Act was passed. We emphasise therefore that the issues before us do not depend upon findings on those land sales, confiscations, relocations and land laws that the claimants represented to us in dubious light. Those matters were not researched in detail but broadly reviewed as background to Ngati Paoa’s current landless state. In view of our jurisdictional limitations the question in this case is whether the principles of the Treaty compel the Crown to adopt policies that would relieve Ngati Paoa having regard to its present condition. We are not concerned in this case with

compensation for past wrongs but with the significance of the Treaty in the formulation of modern policies.

There is a strong parental element in the Treaty. In the text Her Majesty is “anxious to protect” the native chiefs and tribes whom she regards “with Her Royal Favour”. The Maori parties saw the Treaty in similar light. Tamati Waka Nene, who may have done more than anyone to influence the Maori debate at Waitangi, is recorded as saying to Governor Hobson:

“O Governor, sit . . . remain for us a father, a judge, a peacemaker. You must not allow us to become slaves. You must preserve our customs, and never permit our lands to be wrested from us . . . Stay then, our friend, our father, our Governor” (K Sinclair, *A History of New Zealand*, p71).

Parentalism may not translate well to modern times, for both parties to the Treaty have since quite grown up, but the sentiments expressed underline the degree of parental responsibility inherent in the guarantee to the tribes, in Article 2 of the English text, of the “full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.”

That simple statement must be read in the context of Colenso’s account of the signing of the Treaty of Waitangi. It is patently clear that the Maori present were most concerned with the threat of landlessness that might reduce them to the condition of slaves. Several questioned the propriety of earlier land transactions. The Governor referred to his Proclamation forbidding further private land sales and promised a review of old ones “that all lands unjustly held would be returned”.

We must consider then the exclusive right of pre-emption that Article the second secured to the Crown. Underlying that part of the text are instructions to Governors on the acquisition of native lands, to acquire only “unsettled lands” or “waste lands” from which it was presumed the Maori would retain those parts necessary for themselves. If the lands were purchased cheaply, as it was thought they would be, the Maori would profit the added value to their remaining land from the development around them (see for example, Lord Normanby, Secretary of State to Captain Hobson, 14 August 1839).

On one contention the pre-emptive right upheld a settled rule for colonisation—that it is necessary to maintain the legal protocol that all freehold titles must emanate from the Crown, and, the political protocol that British citizens may not establish colonies without the Crown’s licence. We consider that was indeed the case though the Maori signatories would not have appreciated the legal and political traditions of British culture and although there was no demurrer on that count when, for a short period, Governor Fitzroy waived the Crown’s pre-emption.

Another contention is that the pre-emptive right was a handy fiscal arrangement by which the Crown could fund the cost of settlement from the resale profits of land. It was that too. The instructions to Governor Hobson disclose that intent. Our investigation of one Auckland land sale shows that nine months after purchase the Crown resold parts of the land to settlers at a per acre price increase of over eight thousand times. That may seem an unconscionable profit but the key to the arrangement was that the tribes would gain from the development around them the increased value of the land retained, provided, that is, they retained it.

It follows that the Crown's exclusive right of pre-emption may also be seen as carrying a corresponding duty to protect the tribes in the acquisition process. Seven years after the Treaty Chapman J gave expression to this opinion in the Supreme Court, in *R v Symonds* (1847) [1840-1932] NZPCC 387, stating that the rule of pre-emption

" . . . necessarily arises out of our peculiar relations with the native race, and out of our obvious duty of protecting them, to as great an extent as possible from the usual consequences of the intercourse to which we have introduced them, or imposed upon them. To let in all purchasers, and to protect and enforce every private purchase, would be virtually to confiscate the lands of the natives in a very short time."

The doctrine he saw as securing to the Maori

" . . . all the enjoyment from the land which they had before our intercourse, and as much more as the opportunity of selling portions, *useless to themselves*, affords" (at page 391 but with emphasis added).

Further confirmation of the duty inherent in the pre-emptive right came in 1859, at a time of a growing demand for more Maori land for settlement. As we have seen, in that year the British Government disallowed the Native Territorial Rights Bill proposed by the New Zealand General Assembly to do away with pre-emption and place Maori land on an open market. It did so on the ground that the Bill was an infringement of the Treaty. It was not until 1862, after the control of Maori Affairs passed to the New Zealand Government, that the Crown's pre-emptive right was finally abolished (and that the Courts came to declare the Treaty "a mere nullity").

We come then to consider the principles of the Treaty as applied to our jurisdiction in this case, and the options available to Government to provide relief if a claim is well founded. As members of this Tribunal we have come to a common conclusion but we record our separate reasons for doing so, at least from this juncture.

## CHIEF JUDGE DURIE

The jurisdictional question as I see it, is whether the omission to investigate the Ngati Paoa circumstance and provide any just relief, before alienating the scheme, was an act of the Crown prejudicial to Ngati Paoa and contrary to the principles of the Treaty. It seems clear enough that that which the Board did, or failed to do, was done for the Crown for the Board's whole authority, or the lack of it, emanates from the Crown whether by legislative prescription or Ministerial direction. It also seems clear, or at least is not in dispute, that Ngati Paoa is prejudicially affected by the failure to review their case and by the Board's ability, or the lack of it, to provide some relief. The main question then, is whether, in terms of the Treaty, the Crown had an obligation to Ngati Paoa to ensure that the Board went, or was able to go further than it did.

For reasons later to be given, I have come to the conclusion that the Treaty obliges the Crown, in circumstances like these, to consider always the future survival of the local tribes. Given our finding that the Board itself was unable to do other than that which it did, it is the failure of the Crown to direct the Board, or furnish it with the necessary authority, that constitutes a breach of the principles of the Treaty in this case. I come to



that conclusion having regard to a policy, fundamental to the execution of the Treaty in my view, that in the colonisation process the tribes would not be left landless, and by extrapolating from that, a continuing duty to consider redress where a current state of landlessness is in itself evidence that the Crown has not maintained that intent.

The Treaty of Waitangi must be seen in the factual matrix of its time. In previous reports we have reviewed the principles of Treaty interpretation (*Te Atiawa Report* para 10.1, *Manukau Report* para 8.2) and have concluded that treaties are to be interpreted having regard to surrounding circumstances and any declared or apparent objects and purposes. We have noted some authority for the proposition that recourse may be had to the subsequent conduct and practice of the parties. We are in any event directed to this broad approach by our empowering Act. The Treaty of Waitangi Act 1975 requires that we have regard to the ‘principles’ of the Treaty—it refers not to its provisions.

In this report we have measured the Crown’s right of pre-emption, as provided for in Article 2, against the policy expressed in the initial instructions from the Colonial Secretary to acquire only waste or surplus lands leaving to the Maori those lands essential to their needs. We must consider too the reported comments of those who participated in the signing of the Treaty at Waitangi, the Maori concerns about the prospect of landlessness, the Governor’s promise that earlier private land sales would be reviewed and lands unjustly held restored, and Waka Nene’s reliance upon the parental authority of the Governor, at a critical stage in the debate, to prevent his people from becoming slaves, a class known to the Maori as landless. Indeed the Maori would have placed more emphasis, and certainly not less, on the spoken words than on those written. They too, in my view, must form part of our understanding of this Treaty between two cultures.

Further light is shed on the Crown’s responsibilities in the exercise of its pre-emptive right in other opinions not too distanced from the time of the Treaty, and in particular the 1847 decision of Chapman J in *R v Symonds* (*supra*) that “To let in all purchasers, and to protect and enforce every private purchase, would be virtually to confiscate the lands of the natives in a very short time” and the opinion of the Imperial Government in rejecting the proposal to abolish pre-emption in 1859. It must be recalled, as Commissioner MacKay stated in his 1891 report to the General Assembly on native claims in the South Island, and with regard to South Island landless natives (G7 and G7A)

“ . . . That Governor Fitzroy was fully alive to the importance of making such reserves, and in both of his proclamations, dated respectively the 26th March 1844 and 10 October 1844, waiving the Crown’s right of pre-emption, it was stipulated that one-tenth of the land, of fair average value as to position and quality, was to be conveyed by the purchaser to Her Majesty for public purposes, especially the future benefit of the Natives; and in a memorandum on the sale of land in New Zealand by the aboriginals, about the same date, the importance of setting apart reserves for the Natives is alluded to as follows: ‘With respect to the interest of their descendants they are indifferent, and require the provision of at least a tenth of all lands sold, besides extensive reserves in addition’ . . . ”

MacKay went further to record the Imperial Government views as to the course that should be pursued in acquiring Maori land including the opinion



" . . . that all dealings with the Maoris for these lands must be conducted on the same principles of sincerity, justice and good faith as must govern transactions with them for the recognition of Her Majesty's sovereignty of New Zealand, and that the Natives must not be permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injuries to themselves, nor must they be required to cede any territory the retention of which by them would be essential or highly conducive to their comfort, safety or subsistence."

That the Imperial Government contemplated the reservation of substantial areas in Maori hands is apparent in the New Zealand Constitution Act 1852, an Act that introduced a measure of self-rule to the young colony, but which provided, in section 71, for the creation of districts in which Maori law would prevail. It seems hardly the fault of Britain that districts were not created nor lands reserved as a protection against landlessness.

To consider then that the object of the pre-emptive rule was to protect the Maori in the alienation process, is in my view, to state the purpose too narrowly. The duty corresponding to the Crown's right of pre-emption is properly to be stated, in my opinion, as a duty to ensure that each tribe maintained a sufficient endowment for its foreseen needs. That indeed was the rationale that justified the Imperial Government's instruction to purchase 'surplus lands' at obviously inferior prices.

The same policy led, in North America, to the creation of Indian Reservations and there is some evidence, prior to the passage of Maori matters to the control of the Colonial Government, that the same policy was intended here. Appellations on early maps, such as that Proposing 2,100 acres on Waiheke as a Ngati Paoa Reserve, were by no means unusual. Maori titles were individualised however, after the Imperial Government relinquished its oversight of Maori affairs. Then Tribal Reservations were no longer considered, but the concept of retaining reserves as endowments continued to find expression in other ways. The Native Land Act 1873 for example, provided for the survey of lands within tribal districts, the assessment of tribal numbers, the delineation for sale of lands "excessive" to the people's needs and the reservation of the balance. The preamble stated the purpose

" . . . of assuring to the natives without any doubt whatever a sufficiency of their land for their support and maintenance, *as also for the purpose of establishing endowments for their permanent general benefit from out of such land*" (with emphasis added).

It is enough to say that in 1900 all restrictions on the alienation of Maori land, whether they were intended to maintain endowments or reserves or not, were removed. There was substituted instead, a duty, entrusted to the Maori Land Court, to watch over land sales and ensure fair dealings. We are now familiar with the parental or protective role that is continued in the Maori Land Court even today but the survival of that role ought not to obscure the wider policies originally intended, and which were maintained throughout the century of the Treaty's execution. Indeed it is the original policy that gives weight to the catch cry of the Maori Land March in 1975 that "not one more acre of Maori land should pass from Maori ownership".

I interpolate here that I have the benefit of Mr Poole's contrary opinion, now recorded below, on whether the pre-emptive right carries a corresponding duty to prevent excessive sales. He properly points out that no such duty is stipulated in the Treaty and that Article the second gives only

one condition to the exercise of pre-emption—a willingness to sell. I understand him to say that that being so and as the Treaty is not without clarity in that respect it is not within the province of a Tribunal or Court to import words not there by reference to surrounding circumstances.

I digress to mention that the ‘willingness to sell’ is more forcefully stated in the English than the Maori text that was principally signed. In the English the first clause of the second article guarantees the possession of lands “so long as it is (the owners) wish and desire to retain the same in their possession”. The words quoted are omitted in the corresponding section of the Maori text where there is simply a guarantee of possession. The English text then limits the Crown’s pre-emption to “such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed” while the Maori refers only to the Crown’s purchase of those lands where the proprietors agree on the price proposed by the Queen’s purchase agents (“... o era wahi wenua e pai ai te tangata nona to wenua ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko o meatia nei e te Kuini hei kai hoko mona”). The difference is probably reconcilable in that an agreement on price presupposes a willingness to sell, but I mention this matter as the differences between the two texts, at least in my view, weaken an inference that might otherwise be drawn from the English version of Article 2 that the Crown’s guarantee of lands is limited only by the owners’ “wish and desire to retain the same in their possession” and that the Crown’s pre-emptive right was not therefore constrained by any greater duty than to be satisfied that there was a willingness to sell and at an agreed price.

That does not dispose of the main issue—a duty to maintain reserves is nowhere specified. With respect I hold to the view that Article the second is not to be construed as to read down the broad principles and expectations enunciated in the preamble. There the Sovereign, regarding the tribes with “Her Royal Favour” is “anxious to protect their just Rights and Property”. The language employed casts a wide responsibility on the Crown, indicating a fiduciary trust. The preamble is affirmed at the Treaty’s end, where in Article the third the Sovereign “extends to the Natives of New Zealand Her Royal protection”. The recorded statements of the signatories to the Treaty, as earlier quoted, emphasise the weight given by the parties to the Crown’s parental or protective role. In approaching the specific terms of the Treaty then, the honour of the Crown is always involved and no appearance of delimiting the Crown’s undertaking should be sanctioned. I do not consider therefore that the Crown’s pre-emptive right, conferred in Article the second, is to be construed as meaning that the Crown is not in honour bound to afford some greater protection than that of enquiring on the willingness to sell.

In determining the respects in which the Crown may have afforded some greater protection it is relevant, in my view, to consider the surrounding circumstances, the policies seen as practical at the time and other statements of purpose and intent. If that requires some departure from established canons of statutory construction, the departure seems appropriate in interpreting a bilingual Treaty between two vastly different cultures. I am reinforced in that view by the approach of the Canadian Court of Appeal in *R v Taylor and Williams* (1981) 34 or (2d) 360 (CA). There, in a Treaty not lacking for clarity, certain Indians ceded lands to the Crown “without reservation or limitation”. Despite the clear words of the Treaty the Court had no difficulty in referring to the surrounding circumstances, tribal needs, and recorded statements made during negotiations, holding, following a review of those things, that there could have been no intention

to part with hunting rights on the ceded lands, and that the “oral terms recorded in the minutes” form part of the Treaty too.

Referring now to the land policies described, at the time of the Treaty, it ought to have been a reasonable expectation of the Treaty that Ngati Paoa would retain sufficient land for its own needs. Our jurisdiction in this claim does not enable us to examine the detail of how Ngati Paoa lost its land, but we can consider the result. Ngati Paoa is virtually landless and it is the current state of landlessness that is the basic cause of complaint.

Two questions then arise. Can the Treaty speak to us today on a Ngati Paoa condition that did not prevail when the Treaty was signed, and if so, what does it say? The preamble to our governing Act directs, in my view, that the Treaty is to be always speaking—it must be made relevant to our times. The Tribunal is established, it is said, “to make recommendations on claims relating to the practical application of the principles of the Treaty”. The significance of ‘principles’ as distinct ‘provisions’ was referred to earlier as contemplating a broad approach to Treaty interpretation, but ‘practical’ denotes in this context, that a degree of adaptation of principles to meet changed circumstances is envisaged as well. “Practical” in Fowler’s *Modern English Usage* “means adapted to actual conditions” and ‘practical’ in the preamble and short title, would appear to relate to ‘claims’ not ‘recommendations’. The claim may therefore be seen as contending, and properly so in my view, that a policy to prevent Ngati Paoa’s landlessness, in 1840, when Ngati Paoa had all and the settlers none, becomes in 1987, an obligation to restore when the original policy has lapsed and the position in land ownership is reversed. It seems then a reasonable expectation today, and in keeping with the spirit of the Treaty, that the Crown should not resile from any opportunity it may have to provide at least a part of those endowments that it ought to have guaranteed, and to ensure, that proper policies to that end are maintained.

There is little Crown land left in the Ngati Paoa territory, not already committed to an existing public need, with which to make amends. The Waiheke Scheme however was excess to the Crown’s requirements it having been said that it could readily be sold as surplus Crown land. Thus there was an opportunity to reaffirm in a modern way the Treaty with Ngati Paoa, the Treaty on which Ngati Paoa had relied in a time of great stress to ensure its own survival. I hold to the view that the omission to seek a land base for Ngati Paoa, when the opportunity presented itself, and although a substantial gift of equity would have been involved, was contrary to the principles of the Treaty having regard to Ngati Paoa’s landless state. I am therefore of the opinion that the claim is well founded.

That conclusion compels others relevant to the second leg to our task, to recommend, where a claim is well founded, on the action to be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future. Quite apart from the opinion that the Waiheke Scheme should have passed to Ngati Paoa, is the corollary that the provision of cheap development money through the Board of Maori Affairs, benefits only the tribes with land to develop, while those most needy, with no land, are without aid at all. It ought to be recalled that the Treaty was not just with Maoris. It was a Treaty with tribes and was taken about the country to be separately considered by them. Government ought therefore to be concerned not only with the development of Maori land but with an equitable development that has regard to the differences in tribal land holdings. That view suggests the need for two accounts in the

Board of Maori Affairs, a loan account to aid those tribes with land, and a grant account to help others recover it.

Such a policy raises the most profound issue to have come from the Waiheke claim. Need the resettlement of the landless tribes depend upon proof of some past wrong or is it more equitable to apportion assistance having regard to need? Does the reparation approach in any event create more problems than it solves?

One may view with concern an apparent expectation that recompense for past wrongs might follow this Tribunal's scrutiny of old transactions with damages assessed, I presume, according to settled rules for the quantification of loss and the compounding of interest as though the inevitable incidents of the historical process are to equate definable torts. One cannot prejudge the many claims already pending before us but it would be overly pedantic not to consider that many may be well founded, and that compensation assessed according to settled rules, especially if American precedent were followed, may produce results that cannot be fulfilled in this country. It adds further to difficulties that many tribes seek land to be given in exchange for land lost, not cash, and uncommitted Crown lands, at the present time, seem likely to diminish.

An exposure of past wrongs may be necessary and will no doubt bring new understandings and help heal old wounds, but an eye for an eye approach to reparation or an overly tortious trend, may head us on an impossible path, turning a Treaty of peace into a *casus belli*. One may well ask therefore, on the instant case, whether it is necessary or wise to compel the exercise of Ngati Paoa's inchoate right, given in a recent amendment to our Act, to bring another case based upon the particular land transactions of the past.

The prospect that reparation may come to depend upon various degrees of wrong must also cause concern. Some tribes it seems may expect to recover handsomely through events that may rank as atrocities. Others, perhaps 'loyal' to the Crown in the wars, may expect little if anything at all. Yet, in the same historic process, tribes in both categories have somehow lost a reasonable land base. It is difficult to see that a tortious approach serves best to provide equity amongst them, or that it can ever deal adequately with those consequences of social dislocation that call for an assessment of the particular needs of each.

There is an alternative approach. To compensate a tort is only one way of dealing with a current problem. Another is to move beyond guilt and ask what can be done now and in the future to rebuild the tribes and furnish those needing it with the land endowments necessary for their own tribal programmes. That approach seems more in keeping with the spirit of the Treaty and with those founding tenets that did not see the loss of tribal identity as a necessary consequence of European settlement. It releases the Treaty to a modern world, where it begs to be reaffirmed, and unshackles it from the ghosts of an uncertain past.

The governments of both the United States of America and Australia have instituted tribal development and 'buy-back' policies to much the same end. Their examples merit study. Though current policy in New Zealand has been directed to the channelling of social and other services through tribal bodies, the deployment of available lands to assist the tribes to an economic base freed from State dependence would appear to meet best a cultural need, and may yet represent a cost saving in the longer term.



I would commend to Government therefore not only that it now looks to the settlement of a Ngati Paoa Trust on the Waiheke Scheme, but that it also promotes policies to secure to the tribes, over a period of time, a reasonable land base in tribal ownership. In this way, the Treaty may yet be given new life and the honour of the Crown restored, not upon the assessment of past wrong, but upon the Crown's own concern to promote the survival of the tribes in the years ahead.

## E D NATHAN

When the decision was made to solicit responses from established Trust Boards, it was natural to expect that the tangata whenua<sup>1</sup> would have been included. Mention of this matter by Sir Graham Latimer and by Mr Wetere as he then was, indicates that this code of ethics is commonly recognised by Maori people.

All Board members would be conversant with tribal policy. Moreover they would acknowledge and respect any censorious re-action from any tribe that chose to challenge them on that issue.

Ngati Paoa have been deeply hurt. They have good reason to claim that they have been prejudicially treated at least if their claim is viewed in terms relative to Maori spiritual attitudes. By that kaupapa Maori<sup>2</sup>, they were entitled to be heard and to expect that the Board members would have authority to hear their propositions, and consider the plans and means by which they proposed to achieve them.

Such an interview would have happened in an atmosphere conducive to harmonious exchange, and would probably have avoided the extremes taken by Ngati Paoa to contest what they contend is an unjust decision.

The Ngati Paoa history is saturated with bloodshed to the extent that by 1830 they were close to annihilation. The survivors were accepted into other areas, formed affiliations with neighbouring tribes and through inter-marriage developed whanaungatanga linkages. The effect of the past tragedies however is still apparent in the demeanour and attitudes of their elders.

The young, on the other hand, portray leadership qualities that harbour well for their future stature. The phenomena of their resolve, ambition and enthusiasm to revive their ihi<sup>3</sup> and wana<sup>4</sup> indicate positiveness. They were imbued with hope and anticipation that the opportunity had arrived to re-occupy their turangawaewae<sup>5</sup>, to restore their tangatatanga stature<sup>6</sup> and move back to the Ao-marama.<sup>7</sup> Their hopes and aspirations are inspiring. Their case should have been investigated with a view to assisting them with substantial resources so that their energies could have been applied practically and beneficially.

As the recognised tangata whenua and in accordance with kaupapa Maori, Ngati Paoa had an undisputed right to be informed, as the Trust Boards were, of the intention to dispose of the land concerned, and to

<sup>1</sup> tangata whenua—tribe associated with the land

<sup>2</sup> kaupapa Maori—Maori protocol

<sup>3</sup> ihi—life force

<sup>4</sup> wana—feeling of wellbeing

<sup>5</sup> turangawaewae—traditional standing place

<sup>6</sup> their tangatatanga stature—their human dignity

<sup>7</sup> Ao-marama—the world of light



submit their tender, or failing that, to be invited, as tangata whenua, to participate in the deliberation and selection of the prospective tenant. A manager with experience and expertise would have been needed by Ngati Paoa and their consideration of the tenant elect could have achieved a whanaungatanga situation<sup>8</sup>, an all embracing unification. A tribe sharing agreement could have evolved with Mr Evans to the satisfaction of all concerned.

A compromise arrangement between Mr Evans and Ngati Paoa would help to resolve a whanau<sup>9</sup> situation and bring them together as a whanau. If it is too late then the Government or the Board of Maori Affairs should make every effort to purchase some other land upon which Ngati Paoa can re-establish themselves as a tribe. I realise that the Board is not expected to re-establish Ngati Paoa as a tribe but because of their past history and the suffering endured of 150–200 years, it would be a worthwhile exercise to find a relief for this particular tribe. History is there to inform us of what they have suffered.

In the event of that development investigations should be made for the purpose of finding alternative land uses so as to provide a place where the young people can be employed and trained at the same time.

## M J Q POOLE

- 1.1 The Chairman's opinion may be summarised from extracts appearing earlier in this Report:

*"To consider then that the object of the pre-emptive rule was to protect the Maori in the alienation process, is in my view, to state the purpose too narrowly. The duty corresponding to the Crown's right of pre-emption is properly to be stated, in my opinion, as a duty to ensure that each Tribe maintained a sufficient endowment for its foreseen needs."*

*". . . it ought to have been a reasonable expectation of the Treaty that Ngati Paoa would retain sufficient land for its own needs."*

(The words italicised are my own emphasis).

- 1.2 I incline to Mr Nathan's approach:

*"I realise that the Board (Board of Maori Affairs) is not expected to re-establish Ngati Paoa as a tribe, but because of their past history and the suffering endured for 150–200 years, it would be worthwhile to find relief for this particular tribe. History informs us of their suffering."*

- 2.1 The complaint must be considered in the light of our jurisdiction under the Treaty of Waitangi Act 1975, prior to its substantial amendment in 1985. The limits on the jurisdiction of the Tribunal (set out more fully in Chapter 8) are that the policy, practice or act prejudicially affecting any Maori or group of Maoris by any Act of Parliament or subordinate rule making procedure; or by any policy or practice of the Crown; or by any act which is proposed to be done or omitted by the Crown . . . is inconsistent with the principles of the Treaty after *the year 1975*: Section 6 Treaty of Waitangi Act 1975.
- 2.2 The Chairman's statement of principles to be adopted in the interpretation of Treaties is accepted, but it does not follow from them

<sup>8</sup> whanaungatanga situation—recognition of family bonds and responsibilities

<sup>9</sup> whanau—extended family

that the right of pre-emption vested in the Crown cast a duty upon the Crown to ensure that each Tribe maintained a sufficient endowment for its needs. The right of exclusive pre-emption reserved to the Crown was abolished in 1862 prior to the determination of Maori land title to any specific area of land pursuant to the Native Land Act 1865. The right of pre-emption was replaced by many measures from then on. Annual statutes affecting Maori land have been a feature of the New Zealand law making process. Examples of protection are afforded by Section 23 of the Native Land Purchase and Acquisition Act 1893, the Native Land Act 1909, the Maori Land Act 1931. As *all* these alterations to the right of pre-emption occurred before 1975, this Tribunal has no jurisdiction to even explore, let alone pass judgement upon the consequences of the abolition of the Crown's exclusive right of pre-emption and its substitution with specific areas of land (as in the 1893 legislation) or what the Court deemed necessary for a Maori to retain as essential for his livelihood contained in the 1909 and 1931 legislation.

- 3.1 Article II of the Treaty of Waitangi refers to "the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof". Legislation affecting Maoris from 1865 to 1953 dealt with individuals who were descendants of the aboriginal race of New Zealand of 50 percent or more Maori blood. Decisions of the Supreme Court and the Maori Land Court and its Appellate Court were concerned with members of an aboriginal race likely to be exploited by European. The concept of tribal ownership or tribal rights or tribal territory, in my opinion, formed little part of Court decisions until early in the 1970's. The Maori Affairs Act 1953, as amended in 1974, introduced two important departures from earlier statutes:

- (i) A "Maori" was a person of the Maori race of New Zealand and included any descendant of that person, irrespective of the percentage of blood line.
- (ii) Provisions governing the alienation of interests in land upon intestacy or by way of sale or gift were altered considerably.

The 1974 Amendment Act, which might be considered to be contrary to Article III of the Treaty, represented a new direction for future legislation affecting Maori land.

- 3.2 It is abundantly clear from the express words of Article II (of the English version) and from the words guarantee exclusive and undisturbed possession in the Maori version that if a tribe, prior to the Maori Land Court ascertaining the interests of the individual owners in that land, chose to sell all its land the Treaty said it might. The Chairman asserts that the right of pre-emption carried a correlative obligation on the Crown to guarantee an endowment for the Tribe's present and future needs. Read as a whole, Article II provides that the exclusive and undisturbed possession of the land is subject to the right of the owners or the Tribe to alienate such lands to the Crown. The English version of Article II uses the words "so long as it is their wish and desire to retain the same in their possession". There is no corresponding clause in the Maori version. The additional words in the English version merely clarifies that alienation or retention depends upon the wishes of the owners whether as individuals, or as a family or as a Tribe. Both versions are official: see Section 2 of the Treaty of Waitangi Act and the Power of the

Tribunal in respect of the two texts set out in Section 5 (2) of that Act. The right of “*undisturbed possession*” precedes the grant of “*exclusive right of pre-emption*” in favour of the Crown. That limitation must be read, in my opinion, as being subject to the prior declaration of willingness to sell on the part of the Tribe or its individual members. If the Tribe or an individual member wished to sell then he could do so. The limitation was that the only purchaser could be the Crown. Where the meaning of words in a treaty, or any document for that matter, are clear and unambiguous, there is no justification for a Court, or in this case the Tribunal, to embark upon an investigation of possible alternative constructions. It is only when the words used in a document give rise to a doubt as to their meaning that a Court may depart from construing them in their normal usage. So here with Article II. At page 76 the Chairman notes that in interpreting a Treaty recourse may be had to “the subsequent conduct and practice of the parties”. This is true so long as the conduct and practice is so clearly established that a party is estopped from denying the same. The Chairman also states that the Treaty of Waitangi Act requires the Tribunal to have regard to the “*principles of the Treaty—it refers not to its provisions*”. With respect the provisions of the Treaty expound the principles and we are limited, subject to the rules of interpretation, to what the Treaty states. It could well be argued that Article II also imposed upon tribes, Chiefs and individuals the *obligation* to retain sufficient land to constitute a resource base for the future in exchange for the *right* to alienate land at will.

- 4.1 The investigation and determination of Maori ownership to Maori land was authorised by the Native Land Act 1862 and 1865, The Maori Land Court established under the 1862 Act was superseded by the 1865 Act before it really commenced its task. Under the 1865 Act the Court was empowered to determine the ownership of lands and vest the title in individuals (see Chapter 3). Before the Court was brought into being the Maori Land Wars erupted. Members of Ngati Paoa were torn between supporting their kinsmen in the Waikato or the Queen. Given the mores of the day, the reaction of the New Zealand Government was clearly predictable as less than ten years had elapsed since the Indian Mutiny. The influence of the various Missionary denominations was being eroded by the increasing numbers of European immigrants who sought to lay up treasures on earth. Our Parliament enacted the New Zealand Settlements Act 1863. On the face of it, the title of the statute suggested settlement of land in a normal manner, by way of Government purchase, subsequent subdivision and allotment. Its real power lay in the provisions permitting the acquisition of large areas of land by proclamation; providing for compensation for the owners by way of allocation of land or money and depriving members of tribes proclaimed to be “rebel” from any right of compensation! There was no right of review or appeal whatsoever. This, in my opinion is crucial to consideration of this claim.
- 4.2 Ngati Paoa lands were the corridor or front entrance leading from Auckland to the Waikato (see Chapter 2). Their Chiefs and Tribal members were divided between allegiance to the Queen and to the Waikato tribes according to reports submitted by the Governor to the Colonial Secretary. There was no clear majority in favour of the Waikato. Members of Ngati Paoa lost areas of land at East Wairoa

and Miranda under the Land Settlements Act. It should be acknowledged that legislation was subsequently passed intended to compensate tribes and individuals for excessively harsh confiscation. Ngati Paoa, for many reasons, did not accept that the payment made to the Tainui Trust Board in any way related to their loss. This led to the position where no child of Ngati Paoa might obtain education grants from the Tainui Trust Board. The Tainui Trust Board, for its part, felt the way was open for Ngati Paoa to change its mind. Both opinions were validly held, but with the passage of time Ngati Paoa declined in effectiveness. This is not surprising considering that tribal land resources had been reduced by the seizure of areas of land, which in today's terms, would be considerable.

- 4.3 It is in the context of the land confiscations and the failure of the Board of Maori Affairs to recognise that it had an obligation to Ngati Paoa in terms of Part II of the Maori Affairs Act 1953, that I view this complaint. The consequences of the "confiscations", and that is not being emotive recognising that there was no right of review or appeal, were deprivation of tribal land resource with its ability to maintain a sufficient standard of diet for the members of the Tribe to maintain its presence in the area and reproduce. On the evidence we heard the picture was painted of a tribe reduced in numbers, with low morale and a lack of leaders.
- 4.4 The land confiscation and their consequences for the Tribe members, occurred 100 years or more before the Board of Maori Affairs was forced to make a decision on the future operation of the Waiheke Island Development Scheme. It is my view and, from the extract of Mr Nathan's opinion quoted earlier in this section he would share this, the treatment of the Ngati Paoa in the Land Wars was a matter to which Part II of the Maori Affairs Act 1953 (enacted in 1974) required the Department of the Minister to have regard in the Department's plan for the development and utilisation of the Scheme. The Department had no real wish to purchase the area from Mrs Scott, or even at an earlier date to develop it. There was some political pressure brought to bear, according to B S Robinson, Deputy Secretary at the time. That may well be so, but the Board minutes lead to the view that the Field Section of the Department saw the area as a means of promoting a viable development scheme totally under the control of Department Officers who would not be bothered by complaints from any beneficial owners. There would be only one beneficial owner, the Board of Maori Affairs, which was, naturally enough, pleased to see that its activities were being expanded out of new money from Vote Maori in the Budget. At no stage was any consideration given to the position of the Ngati Paoa. Accepting the defects of hindsight in judging a decision of years before, the promotion of the Development Scheme on Waiheke was an exercise affecting the field and Administration Sections. At no time was consideration directed to the social needs of Ngati Paoa and the obligations under Part II of the Maori Affairs Act 1953 (objectives of the Department). Ngati Paoa and the Tainui Trust Board could have done more to promote the Ngati Paoa cause. The reality of the situation was that all the expertise and knowledge lay within the province of the Minister and the Department to give effect to its statutory objectives. For these reasons I believe that



members of Ngati Paoa have been prejudicially affected by the policy or practice of the Crown.

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We return now to our common opinion. For our separate reasons we are of one mind that in terms of the Treaty of Waitangi and the Treaty of Waitangi Act 1975 the Crown acted contrary to the principles of the Treaty in enabling the disposal of the Waiheke Scheme through the Board without providing for an inquiry into the Ngati Paoa position, and the prospect of furnishing relief. Having made that inquiry ourselves we are of opinion that if all else were equal the scheme should now pass to Ngati Paoa in a way that assures a viable endowment for the Ngati Paoa people.

All else is not equal however. The Evans partnership acquired its leasehold and freeholding rights for value and in good faith. The Evans family is an innocent party in this affair. We do not recommend any disposition of the Waiheke Station so as to prejudice the partnership's position. It is out of keeping with the spirit of the Treaty that it should be seen to resolve an unfair situation for one party while creating another for another.

In terms of our governing Act our recommendations may be in general or specific terms. Our recommendation is in general terms in this case. We recommend that the Crown negotiate with the Board, Mr Evans and the Ngati Paoa Development Trust (Inc), through a negotiator appointed by it, with a view to releasing the Waiheke Station to a Ngati Paoa tribal trust and establishing a viable operation upon it, or failing agreement, that the Crown seeks for Ngati Paoa some other endowment that involves a land base within its ancestral territory.

In concluding we refer briefly to a request from the claimants that we recommend an amendment to the Maori Trust Act to admit two representatives of Ngati Paoa to the Tainui Maori Trust Board. We must decline to do so. It is beyond our brief to recommend on matters within the domestic jurisdiction of the Trust Board and the Ngati Paoa people.

Counsel sought also

- (i) recovery of the expenses incurred by the Ngati Paoa Marae Committee in respect of the hearing that was abandoned after the sudden death of Mr W Herewini, a member of this Tribunal;
- (ii) a general claim for legal costs on the hearing during the week 2-6 September 1985.

With regard to the latter claim, clause 8 of the Second Schedule to the Act precludes the Tribunal from entertaining such an application. On the first part of the claim the Tribunal believes that reimbursement is well merited. Under the Treaty of Waitangi Act in force at the date of hearing the Tribunal can only sit if all members are present: Clause 5(4) of the Second Schedule to the Treaty of Waitangi Act. The enforced cancellation of the earlier hearing twenty-four hours before it was due to commence was at some expense to Ngati Paoa. The cancellation was a requirement imposed by the statute. While we have no jurisdiction to make a recommendation under this head of the claim, its merits are undoubted. We draw the attention of the Minister of Justice and the Minister of Maori Affairs to this aspect of our report. The amount we feel sustainable as a proper claim is \$5,000.



## SUMMARY OF RECOMMENDATIONS

1. That the Crown negotiate with the Board of Maori Affairs, Mr H M Evans for the Waiheke Station Evans Family Partnership and the Ngati Paoa Development Trust (Inc), through a negotiator appointed by it, with a view to releasing the Waiheke Station to a Ngati Paoa tribal trust and establishing a viable operation upon it, or failing agreement, that the Crown seeks for Ngati Paoa some other endowment that involves a land base within its ancestral territory.
2. That Government consider (and we put the matter no stronger than that) the release of funds to the Board of Maori Affairs for the establishment of tribal land endowments having regard to the opinion expressed in this chapter.
3. That Government pay \$5,000 to the Ngati Paoa Marae Committee towards costs of the abandoned hearing.

DATED at Wellington this 2nd day of June 1987.



A handwritten signature in black ink, appearing to read "E T J Durie", written over a horizontal line.

E T J Durie, Chief Judge, Chairman

A handwritten signature in black ink, appearing to read "E D Nathan", written over a horizontal line.

E D Nathan, JP, member

A handwritten signature in black ink, appearing to read "M J Q Poole", written over a horizontal line.

M J Q Poole, member

## APPENDIX I

### THE WRITTEN CLAIM AS FILED BY HARIATA GORDON ON 8 MARCH 1985

I am Hariata Gordon . . . I have been authorised by Ngati Paoa Whanui to present these submissions on their behalf regarding the lease with the right to purchase of the property on Waiheke Island known as the Waiheke Development Trust (sic). We bring the following grievances related to this lease with the right to purchase before the Tribunal as being actions taken by the Crown prejudicial to the Maori people and in contravention of Article 2 of the Treaty of Waitangi. We submit that these grievances are within the jurisdiction of the Tribunal under Section 6 (1) of the Treaty of Waitangi Act 1975.

### SUBMISSIONS

- 1 That Part XXIV, and in particular Section 342 of that Part of the Maori Affairs Act 1953, is drafted in such a way that it is able to be construed to the prejudice of the tangata whenua
- 2 That Ngati Paoa as a Maori group has been prejudicially affected by the policy and practice adopted by the Crown.
- 3 That Ngati Paoa has been prejudicially affected by the acts of the Board of Maori Affairs and the Waikato/Maniapoto District Maori Land Advisory Committee in the granting by them of a lease with the right to purchase to an individual or small family unit the members of which family not being recognised as members of the Ngati Paoa tribe.
- 4 That Ngati Paoa have been prejudicially affected by the omission of those two bodies to:
  - (a) Consult with Ngati Paoa Whanui on the disposal of ancestral land
  - (b) Create a Section 438 Trust over the land on behalf of Ngati Paoa
- 5 That Ngati Paoa claim they have been prejudicially affected by the policies, practices and acts of the above boards which acted in ways inconsistent with Article 2 of the Treaty of Waitangi.

### RELIEF SOUGHT

Ngati Paoa believing that these grievances are just and right under the Treaty of Waitangi as interpreted in the Treaty of Waitangi Act 1975 seek the following relief

- 1 That the Tribunal recommend that the lease be declared null and void in that it contravened the policy of the Maori Affairs Department, the spirit of Part XXIV developments as expressed in the Maori Affairs Act 1953 and Article 2 of the Treaty of Waitangi.
- 2 That the Tribunal recommend that the Maori Land Board open negotiations with Ngati Paoa Whanui with a view to setting up a (section) 438 Trust on the land or alternatively that the present (section) 438 Trust in the name of Ngati Paoa be extended in its

reference to include the land previously known as the Waiheke development block.

- 3 That financial aid, double that received on two occasions by the present lessee from the Board of Maori Affairs, be given to Ngati Paoa Whanui to continue development and use of the land returned to them by the nullification of the aforementioned lease. This claim is based on the lack of Maori Affairs loans granted to any development of land belonging to Ngati Paoa people.
- 4 That training and educational help be given to Ngati Paoa by the secondment of skilled people to aid in the development of our young people so that they may take full advantage of the return to their people of part of their original turangawaewae.
- 5 That the Tribunal recommend that all ancestral lands of significance to a tribe be protected from any legislation presently or in the future being applied and that the tribes be made guardians of all such sites.

## APPENDIX II

### RELIEF SOUGHT IN COUNSEL'S CLOSING ADDRESS

That the Tribunal recommend to Government

1. That the Waiheke block be conveyed to Ngati Paoa;
2. That administration be entrusted to the Tainui Maori Trust Board pending the ultimate vesting of the land in some Ngati Paoa organisation;
3. That two representatives of Ngati Paoa be appointed to the Trust Board;
4. That Government provide training and educational programmes to Ngati Paoa youth to assist the management and development of the land; and
5. That ancestral land of significance be protected against future legislative infringement and that the tribes be made guardians of such land.

## APPENDIX III

### RECORD OF HEARING

The claim was first notified by a letter of 19 January 1984, was redefined in a "submission" dated 24 June 1984 and finally defined in a further "submission" dated 8 March 1985 which appears in Appendix I.

The Tribunal was constituted to comprise Chief Judge Durie (Chairman), Mr W Herewini QSO, JP and Mr M J Q Poole. Notice of the initial claim and of a hearing scheduled for Paoa Whanaunga marae, Kaiaua on 25 March 1985 was despatched on 22 February 1985 to—

The members of the Board of Maori Affairs being the Minister of Maori Affairs, Hon M B Couch, the Secretary for Maori Affairs Mr I K Puketapu, the Director-General of Lands, the Valuer-General, Mr K T Wetere MP (as he then was), Sir Graham Latimer, Sir Hepi Te Heuheu, Mrs G Kirby, Mr J Bennett, Ms D Henare, Mr P Kaua, Mr J Karetai, Mr B Mackie and Mr T Te Kani.

The Director and Assistant Director of Department of Maori Affairs, Hamilton

The Member of Parliament for Northern Maori

Mr G Evans and the Evans Family Partnership

The Secretary, Tainui Maori Trust Board

Mr G Rogers for Waiheke Land Action Society Inc,

Mr G Blair and Ms V Rickard

Public notice was given in the *New Zealand Herald* and *Auckland Star* on 23 February. The further particulars of claim subsequently filed were despatched to those abovenamed on 14 March 1985.

Following the death of Mr Herewini on 24 March 1985, those abovenamed were individually advised of the postponement of the hearing and public notice of the postponement was given by radio and newspaper on 25 March 1985.

The Tribunal was constituted to comprise Chief Judge Durie (Chairman), Mr E D Nathan JP and Mr M J Q Poole.

Notice of hearing at Paoa Whanaunga marae, Kaiaua on 2 September 1985 was despatched 2 August 1985 to those abovenamed and to Mr T Pihama, and Dr D V Williams who had since expressed an interest.

Public notice was given in the *Auckland Star*, *New Zealand Herald* and *Waikato Times* on 3 August 1985 and 17 August 1985.

The hearing opened at Paoa Whanaunga marae, Kaiaua on 2 September 1985 and closed on 6 September 1985.

At the hearing

Ms C Shaw appeared for the claimants

Mr W Archibald appeared for the Board and Department of Maori Affairs and Miss I Te Uira was appointed Interpreter.

In addition to Counsel, those who gave evidence or submissions were, in this order

Hariata Gordon of Ngati Paoa

Kaaho Andrews of Urikaraka/Ngati Paoa

Pateriki Thompson of Ngati Hura/Ngati Paoa



Dan Rawiri of Ngati Paoa  
Tanu Andrews of Ngati Tamariki/Ngati Marutuahu/Ngati Paoa  
Roro Puke of Ngati Paoa/Ngati Wairere  
Wharetoroa Kerr of Waiohua  
Huhurere Tukukino of Ngati Tamatera/Ngati Paoa  
Dick Rakena of Ngati Tamatera/Ngati Paoa  
John Clark of Ngati Paoa  
Hemi Watene of Ngati Whatua  
Hera Kahi of Ngati Hura/Ngati Paoa  
Des Castle of Ngati Paoa/Ngati Hako  
Tupu Rawiri of Ngati Paoa/Ngati Whanaunga  
Shirley Cox of Ngati Maniapoto  
Pat McDonald of Ngati Hei/Ngati Paoa  
Rickard, Archeologist, Historic Places Trust  
Bulmer, Regional Archeologist, Historic Places Trust  
Mr G M Evans of Waiheke  
Dr T Reedy, Secretary, Maori Affairs  
Mr B S Robinson, Deputy Secretary  
Mr P Little, Director of Land Development, Department of Maori Affairs  
Mr B Mackie, Member of Board of Maori Affairs  
Mr D Wright, Director of Maori Affairs, Hamilton  
Mr N Waaka, Deputy Director of Maori Affairs, Hamilton  
Mr G Rogers, Waiheke Land Action Society Inc  
Mr G Blair, Waiheke  
Gilbert Thompson of Ngati Hura/Ngati Paoa  
Dr D V Williams, Senior Lecturer in Law, University of Auckland  
Kaaho Andrews Jnr (on behalf of several named Rangatahi or youth of Ngati Paoa)  
Ted Andrews of Urikaraka/Ngati Paoa  
William Andrews of Urikaraka/Ngati Paoa  
Miria Andrews of Urikaraka/Ngati Paoa  
Glenys Rink of Ngati Paoa  
Tuku Morgan of Ngati Paoa  
Ina Te Uira of Waikato/Ngati Paoa  
John Temaru of Ngati Paoa  
Reitu Hobson of Ngati Paoa  
Mr R T Mahuta for Tainui Maori Trust Board.

54 documents or batches of documents were admitted to the record of the proceedings.

