

Report  
of  
The Waitangi Tribunal  
on  
The Orakei Claim  
(Wai-9)

November 1987

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*The clouds in yonder horizon  
Across the sea, are playing with  
The winds, whilst I am here  
Yearning and weeping for my son—Ah! he's  
More than a son to me;  
He's my heart's blood . . .*

Te Kawau  
Orakei  
19 December 1853

Hon K T Wetere  
Minister of Maori Affairs  
Parliament Buildings  
WELLINGTON

Te Minita Maori

Te Rangatira tena koe. Tatari tonu koe i te ao, e te po. Tenei ra katahi ano ka puta, ka puea nga whiriwhiritanga a to ropu whakamana te Tiriti. Kohikohi noa te marama hei tirohanga atu i nga wai ki Rangitoto, to takutai moana, e whanga mai ra.

Whakatutu ai nga kapua i Maungapohatu, he puhanga ka rere i te hau. Tena koe i te ringa ka motuhia atu nei, Te Rangihau, hauraranga noa ana i nga rerenga.

Nga tama toa kei te rangi e haere ana. Tangi awhio atu te karoro ki waho te moana.

In 1975 Joseph Parata Hawke of Orakei became the first claimant to the Waitangi Tribunal on a matter relating to fishing rights in the Waitemata Harbour. He was also the first to bring a claim when our jurisdiction was extended in 1985 to cover Crown policies and practices from 1840.

It is appropriate these intital claims came from Orakei. The Maori people there were first to promote British settlement following the Treaty of Waitangi. They moved to protect the settlers from threatened attacks on the new town of Auckland and rallied support for the Crown when New Zealand was on the brink of civil warfare. They led some of the earliest pan-tribal conferences that rank high in Maori history. They developed and through all adversity maintained a policy of respect for law, order and due process. Yet it was this group of Maori people who suffered at the hands of the Crown one of the worst cases of cultural genocide this country has known.

We now report to you on the Orakei claim and the history of the Orakei people. It is not only a troubled account but complex and has been the subject of many earlier enquiries. Our analysis differs in that the story of Orakei now falls to be measured against the yardstick of the Treaty that preceded the settlement of the Orakei people's lands.

The length of this report is not just because this is our first 'old land claim'. The story of Orakei gives sharp relief to the same problems that beset other people in other places and covers national policy from 1840 to the present day. For Orakei is a microcosm of the country and we have hoped that our full anaylsis of this case will aid the settlement or more ready disposal of others. To assist you we open Part I of our report with a summary of the major findings and an outline of our recommendations. The claim itself is described in chapter 2 while chapters 3 to 10 review the relevant history. The application of the principles of the Treaty to the data so compiled is considered in Part II where we conclude with our full findings and recommendations.

Nga tumanako enei a matou. Tenei te tangi atu nei ki a koe, me Tamati, i runga i nga ahuatanga o tenei wa.

"Te Rangi toku torona, Te Whenua toku turangawaewae."

Heoi.

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PART I  
BACKGROUND

Chapter 1

## Summary of Report

Ngati Whatua have been told often enough why they lost their land. In official findings the winds of change, the growth of Auckland, modern technology and native inexperience have all been blamed. The people's dispossession has been rationalised. Ngati Whatua were conquerors too it has been said, and others have added they were recent immigrants to Auckland, they were a dying race, they wanted to sell and in any event they were better off in the country 'to live the free life they prefer'. In Parliament it was said the native people needed to 'divest themselves of their trappings', which included of course their land, in order to progress.

These things Ngati Whatua have been told, but they are not the tales of Ngati Whatua. They are the judgments of others, those who have assumed the prior rights of western development and have blamed the results on the inevitability of fate rather than admit to greed. It is time to hear the Ngati Whatua side of the story, to listen and to understand.

The story of Orakei is not a record of cultural misunderstanding at all. The wrongs that were done were not simply mistakes born of an early ignorance. They were breaches of a Treaty composed by the Europeans themselves. From reports to the House of Commons only shortly before settlement here began, Britain was well aware of the bad effects colonisation had had on native people elsewhere and had resolved that certain mistakes should not be repeated here.

They were, but in New Zealand we were forewarned, the caveat of our forebears' concern being formalised in the Treaty of Waitangi. If ignorance of the law is no excuse, is disregard of that Treaty any better? It might arguably be seen as the source of all New Zealand law. Little wonder, in the light of what happened, that not only was legal recognition of the Treaty denied, but it was ranked as unworthy of even mention in the many Orakei reports, save for one dissenting opinion.

In this report we have tried to balance a mass of official opinions and records with the story Ngati Whatua know. To capture the latter we spent time with the people, shared their meals, listened to them and discussed with them at their marae. The result we stress, is not a history of Ngati Whatua of Orakei, for we have limited our report to matters relevant to the issues on the claim brought to us.

From the evidence we have made some findings, and have found the need to dispel some myths. Ngati Whatua were dispossessed by people not by fate. They were not new-comers. Their roots to the land were planted before the

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Normans invaded Britain. They were not conquerors but victors in civil warfare—and peaceful nonetheless for they welcomed and supported the establishment of Auckland in their midst. As a tribe they did not willingly sell the Orakei block but fought for over a hundred years to keep it. Relocation was never in their best interests. Their spiritual links to the land make a mockery of that suggestion. Nor were the wrongs all committed in the days of blankets and beads when one race barely knew the other. They began much later and worse, they continued to modern times as though one race has yet to know the other today.

Certainly as the lines of historical perspective narrow to a distant past, people and events do assume new characters re-shaped by opinions now in vogue. But in this claim, many events complained of are well within living memory. The final expulsion of Ngati Whatua from their ancestral village did not occur until 1952. The event is too recent and too graphic to tax judgment, and the landlessness of Ngati Whatua that ensued is testimony in itself.

At Orakei the present makes its own judgment on the past. A proud and loyal tribe that supported Auckland and the Crown, was through the connivance of both made virtual refugees, a disillusioned, scattered and landless people. If we have any understanding of the Maori attachment to tribe, home and place, only the most insensitive could fail to appreciate the enormity of Ngati Whatua's loss, or the latent danger in the legacy of bitterness and anger that was theirs to inherit. For this is also a tribe that has refused to die.

In brief, Ngati Whatua held the mana of the central Auckland lands when Europeans arrived. They welcomed settlement and on the signing of the Treaty invited Governor Hobson to establish a township on their lands. Thousands of acres were made available for the purpose, the cost of Auckland's establishment being funded from vast profits on the resale of their lands to settlers. Ngati Whatua bargained for 10% of the resale profit after the first land deals but, it appears, the greater part of even that went to public roads, hospitals and schools.

Ngati Whatua backed Auckland when warring tribes threatened the fledgling town. When the main wars loomed in the 1860's, they hosted a two month conference of two hundred chiefs from throughout the country to secure their allegiance to the Crown. Later they called at Orakei the first Maori Parliaments.

Ngati Whatua were not only leaders in the Maori world, but were involved in business and in civic and national affairs too. Their chief, Te Kawau, was a confidant of Governor Grey; Tuhaere, his successor, an advisor to several Governors. They established the tribal policies for which Ngati Whatua became renowned, of allegiance to the Crown, support for the Europeans and commitment to "the necessary laws and institutions" that the Treaty referred to. They were proud of the fact that their hands never touched a gun after the Europeans came. But they were also strong supporters of the rights of tribes to manage their own affairs, as shows from the reports of the Maori Parliaments that Tuhaere arranged.

Ngati Whatua sold thousands of acres—indeed all but the 700 acres of Orakei that comprised the tribe's main base. Even from 1840 they had made it clear

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that that block was special. It was not for sale. They wanted it reserved to them forever, Te Kawau seeking from Governor Grey “a Deed to make it safe”. It is not at all that they wished to separate themselves from European contact. Part of the Orakei land they gifted to the Anglican Church to support a chapel and school, for they had a close association with the Church at that time. They had also an alliance with the Crown and in 1859, when it was thought the Russians were coming, gave a headland of Orakei for defence. They were gifts however and in the customary Maori way were meant to return if no longer required.

Similarly they had hopes of leasing parts of Orakei to Europeans for residential purposes, the rents to maintain tribal programmes. At Orakei, it was intended, the tribe would retain control and the land would be their endowment, the assurance of their continued existence as a people. It was important to Ngati Whatua that that land should remain in tribal ownership.

We find that the Treaty obliged the Crown to ensure each tribe retained a proper reserve. Orakei was Ngati Whatua’s last land and we find that the whole of it should have been kept for them. We find also, in terms of the Treaty, that the Crown was obliged to uphold the tribal form of ownership that the people clearly preferred.

In fact, the laws that were to be made were not to permit of tribal ownership. Tribal authority had been the main bulwark to the Crown’s land acquisitions and had been the cause of prolonged wars. In the course of those wars the Crown established a Native Land Court, and the Court was directed to award native lands to individuals. The troubles at Orakei all stem from that law. The Native Lands Acts that we refer to, we find, were contrary to the principles of the Treaty.

At Orakei, as in many other places, the problem was made even worse. In 1869 the Native Land Court awarded the whole block to only thirteen members of a tribe that evidence suggests numbered well over 300. With the stroke of a pen the majority of a large and compact tribe were disinherited.

At first it did not seem to matter. The tribe assumed that the owners were meant to be trustees (though the law said they were not). Tuhaere arranged a special Act of Parliament to enable him to complete a subdivision at Bastion Point on land opposite that earlier gifted. He sought to assure the maintenance of Ngati Whatua homes, lands and programmes from the rents of long term residential leases to Europeans. In that respect he seems to have emulated the Anglican Church which was doing the same thing on its nearby lands to fund church work and St John’s Theological College.

Two things put paid to Tuhaere’s scheme. In 1886 the Crown took part of the land under the Public Works Act for more defence work. Then in 1898 the Native Land Court partitioned the whole of the rest of the block, dividing it between the thirteen owners or their successors. That ended any prospect of future tribal control and underlined the legal position that the thirteen original owners had not been mere trustees.

The law that enabled those partitions we find, was contrary to the Treaty.

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Once it was apparent that the handful of owners were in law, owners not merely trustees, there were numerous protests from within Ngati Whatua. They took the form of Court actions and a Parliamentary petition seeking the restoration of tribal ownership or at very least the inclusion of everyone of the tribe on the title. It was all to no avail. Without tribal sanction, many individual owners effected leases of their lands.

Tuhaere passed on and Auckland grew. Building was going on an around Orakei by the 1890s, but not much within it. Most who lived in the village on the block had no titles to build on while many left to find homes elsewhere. But the land was desirable housing land. Orakei was the choice block in the area and from 1898 the Crown began investigations to buy the block for European settlement.

Meanwhile the Government was under immense pressure to buy more Maori land throughout the North Island and it appointed a Commission comprising Chief Justice Stout and A T Ngata (later Sir Apirana Ngata) to decide what land was excessive to Maori needs and should be sold and what parts the Maori should be allowed to keep. In 1908, when the Commission reached Orakei, it determined that none of that block should be sold. The whole should be kept, the Commission found, as a tribal reserve for it was the tribe's last land and the tribe was still living on it. That finding of the Commission, was entirely consistent with the Treaty. What was inconsistent was that shortly after, the Crown set about acquiring the block anyway.

It did so under some pressure. In 1910, the Orakei lessees lobbied Parliament for the right to buy the freehold to their lands. Because of the improvements put upon them, it would have been difficult in any event for the owners to recover the lands at the end of the lease terms. Soon after, the Auckland City Council, with the support of Auckland Members of Parliament, promoted a Bill for the compulsory acquisition of all but the native village.

Ngati Whatua reacted once more with a petition challenging the title of the handful of owners, warning off the would-be purchasers and seeking restoration of tribal ownership. That plea had previously failed before Parliament and the Courts, but the new petition received the support of the Native Affairs Committee of the House. After hearing lengthy evidence, the Committee recommended an inquiry into the title. The inquiry was never held.

Meanwhile the villagers were experiencing another foretaste of what compulsory acquisition meant. Under a special Act of Parliament a sewer pipe was laid across the beach in front of their village, despite their objections, and Auckland's raw sewage was discharged into 'their' bay. The large raised pipe also blocked their harbour access and caused the village to swamp. Many more left Orakei to find a place elsewhere and the tribe began to break up.

The Act, the taking of land and the discharge we find were all contrary to the Treaty.

The proposed compulsory acquisition of Orakei received wide publicity. Early in 1912, some of those who were owners sold to the lessees. We suspect they saw the writing on the wall. The Crown reacted promptly and noting the

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owners' wish to sell though they were but a few, announced its intention to buy the whole block. By Order in Council all private purchases were then forbidden.

The Crown's decision to buy we find, was contrary to the Treaty.

It was also taken four years after a Commission had recommended that the block be retained as a Native Reserve and while a petition challenging the ownership of those who were about to sell was before the House of Representatives with a favourable recommendation for an inquiry into the title.

Through successions there were by then many owners in several allotments on the block. The petition discloses that owners and non-owners were opposed to sales. In the year that buying began, in 1913, the Government changed the law to enable it to deal privately with individual owners and to buy their individual shares. Previously the Crown had been able to buy an allotment of Maori land only on the majority vote of owners assembled at a meeting. We know that the owners were not all agreed on selling. It may be that even the majority were not in favour. The law change, we find, was contrary to the Treaty. It was the final denial of any tribal or group right, yet group identity is at the heart of Maori society.

Crown buying began in 1913. Many claimed to have sold on a promise that the village would be spared. In fact, nothing was spared. Several sold, they said, on undertakings that house sites would be reserved for them. None were. House sites were reserved only for the European lessees. Others simply gave up and sold once the Crown had acquired several shares in the blocks in which they had interests.

There is quite a deal of evidence to support the allegations that were made. We are satisfied however that many of Ngati Whatua wanted to retain the native village and house sites and that the Crown took no sufficient steps to guarantee either, as it was required to do by the Treaty of Waitangi. The documentary evidence discloses that the Crown intended to acquire the whole block, without the reservation of any parts for Ngati Whatua. In the reports of Crown purchasing officers we have also discovered recommendations that compulsory acquisition be used to dislodge unwilling sellers and there is some evidence to suggest that owners were threatened with that prospect.

Nonetheless resistance to sales hardened and buying dragged over many years. The non-owners of course had nothing to either sell or to try to secure. Many left but some stayed on as squatters. Some shifted to the sanctuary of the land given to the church and built upon it, for a church had not been there for many years. In 1926 the church sold that land to the Crown. Some still stayed on and would not be moved until 1935, when after a Supreme Court action had failed, the remnant of twelve adults and ten children were evicted. A special Act was necessary to enable the sale of the church land. That Act we find was contrary to the Treaty. That land should have returned to Ngati Whatua.

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The acquisition of interests took thirty-seven years from 1913 to 1950 the process being slowed by intervening events like World War II. In the 1930s, after the greater part of the land had been purchased, a model suburb was laid out and development began. The Auckland City Council exerted considerable pressure on Government to acquire the remaining Ngati Whatua interests and to relocate those who continued to cling to their ancestral village, to other parts of New Zealand.

Buying was also slowed by the people's resistance to sales. Throughout the whole period Ngati Whatua people maintained a constant plea to stop the buying and to keep the Crown out. We have not unearthed a complete record of the people's complaints and actions in their endeavours to save their land, village and homes, but have counted eight actions in the Maori Land Court, four in the Supreme Court, two in the Court of Appeal, two in the Compensation Court, six appearances before Commissions or Committees of Inquiry and fifteen Parliamentary Petitions. Those were the efforts of a people whom the Crown was to brand as "willing sellers".

The evidence, as we have said, suggests that many who sold, sold under duress or in the hope that by selling part the village would be saved and house sites would be secured to them. The evidence is clear that several were opposed to any sales. No doubt some sold willingly, but it is obvious Ngati Whatua did not sell for Ngati Whatua as a tribe were denied the title and that was the nub of the tribe's complaint. Those given an interest were but a small minority.

In this claim however we are mainly concerned with the propriety of the Crown in buying. The Crown's purchase of Orakei we find, was contrary to the Treaty of Waitangi.

As it turned out, compulsory acquisitions were made in any event. In 1950 the Crown used the Public Works Act to take the interests of those who still held out. The takings were contrary to the Treaty of Waitangi.

The village, where a large number continued to live, with or without title, was required for a park. Many families nonetheless continued to reside upon the land. In 1952 they were evicted and relocated as tenants of 35 state homes on another part of the block.

The final eviction was a most traumatic experience for those who had fought so long, their petitions to Parliament still continuing at the time. Homes and buildings were pulled down and burnt by the Crown. Many of the elders involved died within a year of relocation.

The removal of the people and the destruction of their marae and homes, we find, was contrary to the Treaty of Waitangi.

Other land was set aside for a Ngati Whatua marae in 1954, near to where most of the State homes were. But other people were wanting a marae for Auckland or a national marae and in 1959 the Crown allowed the land to be given over for that public purpose. The marae however was part of Ngati Whatua ancestral lands and adjoined homes where the remnants of the tribe were living. They had no control of it and in the events that followed the tribe

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was to witness the take-over of even their culture, as a marae was built and named, by others, for the tribal ancestor.

The people's culture we find, was meant to be protected by the Treaty. The Crown's gift to the nation of the marae intended for Ngati Whatua was a breach of Treaty principles.

In 1976 the Crown moved to a final disposal of its remaining lands at Orakei. Ngati Whatua had notified their interest in that land for resettlement of their claims. The move to dispose of that land without prior resolution of the Ngati Whatua claim was contrary to the Treaty.

In the event, a section of Ngati Whatua led a protest by occupying Bastion Point for 506 days. It was a culmination of 100 years of Ngati Whatua petitions through formal channels. It followed dispossession, and a legacy of bitterness.

The protests however involved a trespass. They also caused a split in Ngati Whatua ranks as many could still not countenance a departure from the old tribal policy of maintaining "peace and good order" and "the necessary laws". The claimants were arrested and now seek a pardon for their trespass convictions and compensation from the Crown.

We find however that as the protests involved a trespass and were thus outside the law, they were contrary to the Treaty of Waitangi for the Treaty is directed to the maintenance of law and order. There were mitigating circumstances however that we draw to the attention of the Attorney-General.

In 1978 the Crown effected a settlement with certain of Ngati Whatua. The settlement was limited to some of the land taken under the Public Works Act, land not used for the purpose taken. Within those terms it was a generous settlement. It was most significant that the descendants of those whose lands had been taken asked that the Crown land given in exchange return not to them but to the tribe as a whole. That was agreed to. That agreement gave effect to what had been sought in actions and petitions over 125 years, be it in respect of only a small part of the land that remained.

The Crown's action in 1978 was consistent with the principles of the Treaty, but it was inconsistent with the Treaty that reparation was not provided in respect of a wider range of grievances and was limited to only two blocks taken under the Public Works Act.

Having reached a conclusion that the whole of the 700 acre Orakei block should have been secured to Ngati Whatua, and all in tribal ownership, we have considered what remedies might now be provided. We have not considered the compensation payable for the loss of that block, but rather what might be done to re-establish Ngati Whatua as a tribe on its ancestral land in keeping with certain original tenets of the Treaty of Waitangi.

The claim itself was couched in concessionary terms. No claim was made in respect of any land currently used for roads or homes so as to upset private interests. The claim was limited to the Orakei parks and other lands in Crown or 'public' ownership. The parks however are extensive and of considerable value to the city.

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Despite the Ngati Whatua losses and the claimant's natural desire to 'recover' as much as practicable of the block that ought to have been secured, we consider the 'return' of the parks would sow the seeds for further discord. They could not be developed to the tribe's advantage, at least not without much rancour.

The greater Ngati Whatua need, we consider, is for more homes, work-generating schemes, an economic base and the restoration of the tribe's status, a status severely put down by the City though the tribe was its founding partner.

As a result of the 1978 settlement, Ngati Whatua have presently some homes and some ground for building more, all vested in the Ngati Whatua of Orakei Maori Trust Board. As part of that settlement they also have a debt of \$200,000. They have no cash assets.

To achieve the economic objectives described we recommend adding to the current land base the Youthline House site, the Community House site, and certain Housing Corporation lands that adjoin, all of which are vacant Crown lands, and the remission of the \$200,000 debt to the Crown. \$3,000,000 is the minimum cash contribution we consider necessary to begin urgent housing and other programmes to re-establish Ngati Whatua on the land and we recommend payment of that amount.

For the proper restoration of the tribe's status in Auckland's affairs, we recommend that the greater part of the parks of the Orakei headland including the former village site, be vested in the Ngati Whatua tribe, but for the purposes of a public park and with the management vested in a Board comprising a partnership of Ngati Whatua and Auckland City Council representatives. We recommend that the parks be given such name as the tribe approves.

Most importantly, we recommend that the Orakei marae be also vested in the Board.

Our understanding of the background history, our findings on the principles and application of the Treaty and above all, our full recommendations and the reasons for them, are given in the report that follows.



## Chapter 2

# The Claim

### 2.1 Background to present Claim

The Orakei claim was first defined in a statement filed in February 1984 by Joseph Parata Hawke of Orakei and twelve others whose names are recorded at the end of appendix I.

At that time this Tribunal's jurisdiction was limited to Crown policies and practices postdating 1975. The claimants were clearly concerned with matters before then but brought their claim on the basis that a settlement of grievances in 1978 was an unjust arrangement. The Orakei Block (Vesting and Use) Act 1978, which gave effect to that arrangement, was contrary to the Treaty in their view, for though it established and endowed the Ngati Whatua of Orakei Maori Trust Board, it failed to settle a wide range of outstanding issues. It should have provided a more handsome settlement, they said, and to establish that contention the history of Orakei was traversed in detail.

The proposed sale of Housing Corporation land on the Orakei block was also opposed. In their opinion, that land too should have passed to Ngati Whatua in the 1978 settlement.

After public and individual notices the claim was heard at Orakei in May 1985. In the course of that hearing another issue emerged, the control of Orakei marae. The marae contention was not apparent in the first written claim that was filed, but it soon transpired that to the chagrin of many the Orakei marae was vested in trustees comprised mainly of persons other than Ngati Whatua. The claimants, and many others who spoke sought the vesting of that marae in the Ngati Whatua of Orakei Maori Trust Board.

More public and individual notices had then to be given to advise those principally affected by this development, and the claim to Orakei marae was heard at a second hearing, in July 1985, in conjunction with other matters left over from the previous sitting.

By then a Bill was before Parliament which proposed extending the Tribunal's jurisdiction to cover events from 1840. Rather than argue jurisdictional niceties on the basis of the 1978 settlement, the case was adjourned, at the claimant's request, to await the outcome of the Bill. The Bill was passed and the current new claim was then filed, a claim which seeks a full review of several events extending over a long period from last century.

### 2.2 Nature of the Claim

It needs to be stated that the claimants were not elected to bring the claim for Ngati Whatua of Orakei. Indeed, although the claimants are all Maori they are

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not all Maori of Ngati Whatua. They hold in common two convictions each for trespass on Bastion Point in 1982. They had grouped to bring this claim as a pardon for those convictions is an aspect of the relief sought.

Even the land claim however had not the concurrence of the whole tribe and at the first hearing there was tribal opposition.

We do not think tribal consensus necessary to enable a claim to the Waitangi Tribunal. The proof of a claim is not dependent on popular support but on evidence and argument adduced. It is sufficient in this case that J P Hawke and some of the others claim that they and the tribe are prejudicially affected in terms of the Treaty of Waitangi Act. Support, or the lack of it, is more relevant to assessing the extent of any proven prejudice and the consideration of appropriate remedies.

Before the end of the hearings however, opinions had changed. A tribal meeting was held during our last sitting in 1986 and declared unanimous tribal support for the claim. The result of that meeting was conveyed to us by the Acting Chairman of the Ngati Whatua of Orakei Maori Trust Board who added that the Board now also supported it. Some had been unhappy with the claim being made by a protest group that had acted outside the law. Since the claim had been filed however, the law had been changed and 'old land claims' could now be protested within the law! We shall see, in the course of this report, that adherence to the due process of law has been Ngati Whatua policy for 147 years. The policy has been maintained despite every influence to suggest that the people's faith in lawful process was misguided.

### 2.3 Content of the Claim

The full text of the reformulated claim as filed on 7 April 1986, is set out in appendix I.

In the first part of the claim those claimants who are of Ngati Whatua refer to a range of events that they say were contrary to the principles of the Treaty of Waitangi and allege that as a result of various policies and practices the tribe, of which they are members, was wrongly deprived of the 700 acre Orakei block. That block, they claim, ought to have been reserved for the tribe as a whole, in tribal ownership and control and in accordance with custom.

It is significant that the claimants do not seek the return of the whole of the 700 acre Orakei block, though it ought, in their view, to have been reserved for the tribe as an inalienable endowment. They say

. . . being cognisant of the Tribunal's obligation to make recommendations on the practical application of the Treaty of Waitangi to our claim, we do not seek the return of the entire 700 acre Orakei block to Ngati Whatua but we claim that the Tribunal should declare that we are rightly entitled to the whole of it.

But they also maintain that the 1978 settlement was not nearly enough. They claim . . .

that any land in Orakei block which is presently vested in the Crown or which has been vested by the Crown in other bodies, corporations or authorities, and which remains unused for housing or roading purposes, [should] be vested in the Ngati Whatua of Orakei Maori Trust Board.

*Orakei 1987*

They therefore claim the extensive parks of Orakei—but not the Savage Memorial site (for as J P Hawke said, it is now a sacred urupa!). They claim the Housing Corporation land, though it has been developed for subdivision, and the Okahu Sports Domain, though they would seek that subject to existing leases and licences. They ask that the park land be held by the Board rate free so long as free public user is maintained. They claim the title to the marae of Orakei, extinguishment of a \$200,000 debt on Ngati Whatua land borrowed to meet the tribe's contribution to the settlement of 1978, and "such other and additional relief as to [the Tribunal] seems just." In the second part of the claim the claimants as a whole seek a pardoning of past convictions, remission of fines and compensation.

## 2.4 Record of Proceedings

The original claim was heard before the Tribunal as provided for under the then law and consisting of three persons. The Tribunal constituted under the amending Act of 1985, to hear the new claim, comprised six persons, the same Chairman but with five others all new to the case. To avoid repetition of the long and complicated history of the Orakei block, documented in 1985, it was proposed that the tapes of earlier hearings and the written submissions and documents filed be admitted as evidence in the new claim.

It was further proposed that a Report of the background history, as gleaned from the earlier evidence and additional research, should also be sent to interested parties well prior to the hearing of the new claim. Copies of that Report and a memorandum from the Chairman were distributed in August 1986. The Chairman explained the Tribunal would hear any objections to this procedure. Subject to any ruling the Tribunal would then hear argument on the content of the Report. Earlier witnesses could be recalled and fresh evidence could be given. The Tribunal would then consider the application of the principles of the Treaty, assuming prejudice was proven, and the recommendations that should be made.

To enable parties to research the compiled data and the Report the Tribunal did not sit until November 1986. There were then no objections to the procedure outlined and although much additional evidence was given, the Report was largely unchallenged. Part I of this report is substantially the same as that distributed to parties in August 1986.

This procedure, we consider, gave all persons affected a proper opportunity to challenge the background history that would form the data base for any findings and recommendations. A record of the proceedings, the notices given, the hearings held, and the material put in, are summarised in appendix II.

## 2.5 Introduction to Orakei and Terms Used

In this report some names have been shortened and some new terms applied. The Orakei block, the subject of this report, is part of Auckland or Tamaki Makaurau (Tamaki of a hundred lovers). We use the abbreviated name,

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Tamaki. Orakei itself has been literally translated as ‘the place of adorning’, but is probably named after Rakei, the east coast chief who once lived there. We refer to Orakei block as the 700 acres as shown on appendix III. It appears however the Maori used ‘Orakei’ to describe a much larger area taking in quite a deal of what is now Remuera.

The block is a headland extending to Waitemata Harbour from a southern plateau in two distinct ridges. The western ridge, with Coates Avenue now running along its spine, leads to Pokanoa Point and the area now circumscribed by Paritai Drive. We call it Orakei ridge for it extends from what used to be Orakei Village.

The eastern ridge, with Kupe Street now marking its central line, we call Takaparawha ridge. It extends to the harbour in two points, Takaparawha point, where the Orakei jetty now stands, and Bastion Point where lie the remains of a defence battery. Opposite was a large stone outcrop sometimes called Bastion Rock, since flattened and with its base now occupied by the Tamaki Yacht Club. We prefer the Maori name for this area, Kohimarama Point, but because it had wide publicity as Bastion Point we sometimes use that name too. Kohimarama, literally ‘a point of light’, appears to be an abbreviation for the original name Kohimaramara which records that the remnants of many tribes once gathered there.

Collectively the plateaus and ridges are called the farm lands for throughout the greater period covered by this report the original people of the Orakei block once farmed them. The people themselves lived mainly in a secluded basin between the ridges fronting Waitemata Harbour at Okahu Bay. The communal village there was called Okahu Papakainga or the papakainga for short. But there was, until about 1870, another settlement on the southern plateau overlooking Okahu Bay. We refer to Orakei Village which lay between what is now Coates Avenue and Ruatara Street, near to Kepa Road.

Kepa Road marks the first route across the Orakei block. It was developed as a link between the township of Auckland and the church owned Mission Bay on the opposite side. Indeed Orakei village may have grown through its nearness to that road.

At Orakei village was built the first school house and church on the Orakei block. We refer accordingly to the Orakei schoolhouse and Orakei Church. Though the latter was more correctly ‘St James’ (Hana Hemi) it is called Orakei Church in most other reports on Orakei, and we call it that too. It also serves to distinguish the church built in the papakainga about 1903. We call that the Okahu Church.

The main village, the papakainga, was without road access for most of the period covered in this report. The harbour was its main highway. Today the papakainga area adjoins Tamaki Drive, an elevated arterial route that severs the site from its former coastal aspect. But the village is no longer there. Indeed all that remains of either village is the Orakei Urupa (cemetery) on Ruatara Street, and the Okahu Urupa on Tamaki Drive. Even the tribal marae of the papakainga has gone.

*Orakei 1987*

For the people of Orakei Village shifted off many years ago, and more recently those who then lived in the papakainga, were relocated at Kitemoana Street on Takaparawha Ridge, where they are today. Near to them is a new marae. We refer to the old marae which was once in the papakainga to distinguish it from the new one, called Orakei marae.

Central to this claim are the large open spaces of the Orakei block and in particular the following parks—

- M J Savage Memorial Park on Kohimarama Point, dominated by the memorial to Prime Minister Savage overlooking the entrance to Waitemata harbour,
- Takaparawha Park which is largely undeveloped,
- Okahu Park, an open space of trees and lawn where the papakainga once stood, and
- Orakei Sports Domain, a name we employ to describe the active recreation part of the Orakei Domain.

The areas above described are depicted on a map at appendix III.

The native people, or tangata whenua, are known as Ngati Whatua of Orakei. They are called Ngati Whatua unless it is necessary to distinguish them from their Ngati Whatua ‘cousins’ of Reweti, Haranui, Kakanui, Araparera, Putahi and other parts of Kaipara.

From amongst them many emerged to take predominant roles.

Following custom one name only is sometimes used to describe them, like Te Kawau for Apihai Te Kawau Te Tawa, a leading chief in the 19th century, Tuhaere for Paora Tuhaere, Te Kawau’s nephew and political successor, Pateoro for Te Hira Pateoro, Te Kawau’s grandson, and Otene for Otene Paora, Ngati Whatua’s persistent advocate for tribal ownership.

The relationships of the tangata whenua figuring in this report are given in a genealogical table at appendix IV.

This century saw the proliferation of organisations with something to do with the Orakei Maori community and it has been convenient to shorten their names—the Orakei Maori Committee to the Maori Committee, the Orakei Maori Committee Action Group to the Action Group, the Orakei Marae Centre for Education and Cultural Exchange Inc (and its several predecessors using various similar names) to the Education Centre, the Orakei Marae Reserve Trustees to the Marae Trustees and certain others that are introduced in the report.

Similarly, many Acts and orders affected the land and its people and their proper titles have been abbreviated. The Order of the Native Land Court on Investigation of Title to the Orakei Block 1869 is shortened to the Orakei Order 1869, the Orakei Native Reserves Act 1882 to the Orakei Act 1882, and the Orakei Block (Vesting and Use) Act 1978 to the Orakei Act 1978 for example. The Act last mentioned constituted the Ngati Whatua of Orakei Maori Trust Board which is referred to in the chapters following as the Ngati Whatua Trust Board.

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There were many inquiries into the affairs of the Orakei people. The Commission on Native Lands and Native Land Tenure is called the Stout–Ngata Commission 1908, the Native Land Court Inquiry into the Petitions of Pateoro and Others is called the Acheson Inquiry 1930, the Committee of Representatives of Government Departments and Auckland City Council appointed by the Native Minister to report on the Orakei Church site, Papakainga, Roadlines, Battery Reserve, Health and Development is called the Lee Committee 1936 and the Royal Commission to Inquire and Report on Grievances alleged by Maoris with regard to certain lands at Orakei is called the Kennedy Commission 1939.

This claim by J P Hawke and twelve others is called the Orakei Claim. A bibliography in appendix V records various publications referred to in the text in abbreviated form.

## Chapter 3

# The Pacific Winds of Polynesia Pre-1840

### 3.1 The Origins of Ngati Whatua

“Whakarongo te taringa ki te hau raki e pupuhi nei, i takea mai i Hawaiki nui . . . Listen to the north wind blowing from the great Hawaiki”, wrote Sir James Henare for the launching of the Polynesian Trust in 1983, for that is what brought the Maori to Aotearoa and made this country a part of the Polynesian home-land. Polynesia, or ‘many islands’, a name given by European explorers, belies the Polynesian view that their ancestors conceptualised the islands as one home, Hawaiki, and the people as one people. Today the ancestral home is variously called Hawaii, Havaiki, Savaii, Hawaiiiti or Hawaiiiki. These dialectal variations emphasise not the differences but the common origin of many, the descendants of South-East Asian voyagers who peopled the first islands some 3500 years ago, then spread across as many miles of ocean to populate the outer islands until eventually the family extended to Aotearoa (New Zealand). Traditionally, New Zealand and Polynesia constitute one family, the Polynesian Trust points out, the family of Hawaiki. “The story of Polynesia”, Sir James continued, “is the story of a people establishing their identity against daunting odds and then maintaining that identity by absorbing and adapting to their needs all outside forces that threaten to overwhelm them.” That is also the story of Ngati Whatua. An ancient tribe half as old as time, Ngati Whatua begins before the journeys to Aotearoa. Some say the tribal ancestor, Tumuturnuwhenua, came from the Gods, not from human kind.

Others say the name ‘Ngati Whatua’ indicates descent from four Gods. But how and when the people came to Aotearoa, is not entirely clear.

Certainly it is not true the Maori came together in a fleet of canoes, about 1350, to wipe out the Moriori and carve out separate territories. That story can not hold, especially in the North as D R Simmons has explained (Simmons, 1976).

According to tradition, Toi came in the dawn of time, one section of his people called Ngati Awa occupying the northern peninsula, another called Ngaoho, after Toi’s son Ohomairangi, an area from South Auckland to Tauranga, merging, around Tamaki with other early arrivals to form Waiohina.

Then over a long period a large number of canoes came, landing anywhere from North Cape to East Cape, moving around after landing with crew members settling in dispersed places to be absorbed into the established villages of earlier arrivals. Of the many that made an impact on the north, Kurahaupo, Mataatua, Mamari, Matahourua, Mahuhu and Moekakara stand

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out. Because some of these travelled about the country, or because divisions moved to distant places, southern tribes also trace descent from these canoes. Two deserve special mention. The Tainui canoe passed through this way, some of the crew members settling at Manuka, or Manukau as it is now known. The Arawa canoe arrived at about the same time, later to rest at the Bay of Plenty. Kahumatamomoe, the son of the Arawa canoe captain, was to live for a period at Orakei. The village he established there bore his name, Okahu, and of course it retains that name today. Kahumatamomoe later shifted and made a permanent home in Kaipara, where later, his people were to merge with Ngati Whatua.

Tamaki was a choice spot sought by many, and many sayings explain why—*te pai me te whai-rawa o Tamaki*—the luxury and wealth of Tamaki, and so it acquired its extended name, *Tamaki makau rau*, the bride sought by a hundred suitors. We need not record the many challenges and changing occupations over hundreds of years but some in the period up to 1700 stand out, the invasions of Turangi-i-mua, son of Turi the captain of the Aotea canoe, Maki of Waikato, Kawharu of Ngati Whatua, the Hauraki tribes and Rau-*tao* of Marutuahu.

Kiwi Tamaki of Waiohau held sway in the early 1700's but like all Maori he based his claim not on might but ancestral connections. He included in his ancestry Arawa, Tainui and the people of Toi. The trouble was, as we shall see, many others could boast similar prestigious lines.

And so while parts of the country came in time to be associated with particular canoes, like Tainui in Waikato or Te Arawa in Rotorua, the North was always a mixture of many groups. All were related through intermarriage, but through fighting there was a waxing and waning in ascendancy, an emerging and disappearing, a grouping and re-grouping. Often groups shifted, for territoriality was not at first defined and each could lay claim to the whole of the North as their ancestral entitlement.

When Ngati Whatua emerged as a predominant group in the far North they had already established kin links to many tribes, including the original Ngati Awa, and had connections to several canoes. In their northern remoteness they retained the rituals and arts of their very ancient past (which yet survive in the most distinctive carvings at Orakei marae). But in those days blood relations were alternately friends and foes and through fighting they began a movement south that continued over hundreds of years. They began the process of absorbing and adapting to outside forces that Sir James described, and for which they are now renowned. This process of tribal metamorphosis was still continuing when the Europeans arrived.

In their move south, under the leadership of Kawharu, Ngati Whatua established an ascendancy around Kaipara, where they remain to this day, absorbing members of other tribes, the settlers of Mahuhu canoe, the northern section of Ngaoho and Waiohau, certain of the Kawerau people of Moekakara canoe, and the section of Te Arawa then living there and who had earlier lived at Orakei. Some had connections with yet others. Kawharu, for example, was part Tainui.



*Orakei 1987*

So it is that in this complex world, Maori belong relate and connect. They belong to a tribe but relate and connect to many tribes. They belong to a place but relate and connect to distant places. It was seen more important to belong to the land than to possess a defined part of it, for although the tribes were fiercely independent, they were at once inextricably inter-related.

### 3.2 Ngati Whatua of Orakei

It is important to appreciate the inter-tribal relationships that came into being at Tamaki, for the name 'Ngati Whatua of Orakei' camouflages the descent lines that exist from earlier occupants.

About 1740 Ngati Whatua extended its long move south to Tamaki. There had been earlier skirmishes with the Tamaki people over the previous hundred years or so, leaving more than a few unsettled scores, but eventually Tuperiri and a section of Ngati Whatua called Te Taou, defeated and took Tamaki from Waiohua. Following the pattern of the past they incorporated the Waiohua survivors into their ranks. Waiohua in turn had intermarried with some of Tainui. The marriage of Tuperiri's son to a woman of Tainui-Waiohua lineage cemented a pact and resulted in the restoration of the old name Ngaoho to describe one line of descent. The name Uringutu described the result of other Te Taou alliances. Through common blood and shared destiny the combined group of Te Taou, Ngaoho and Te Uringutu came to live as one, on what is now Greater Auckland.

In 1840, when English settlers came, the Tamaki Maori acknowledged as their paramount chief and leader, Apihai Te Kawau Te Tawa. Though Te Kawau's father, Tarahawaiki was the youngest son of Tuperiri, the lands had been divided between Tuperiri's children and the mana of Tamaki had passed to Te Kawau. He was 'a man of many cousins' who through lineage and leadership brought together under one cloak those of Te Taou, Ngaoho and Te Uringutu. Through his father, Tarahawaiki he linked to Ngati Whatua. His mother, Mokorua held high status on both Waiohua and Tainui lines. Te Kawau himself maintained these connections, living, from time to time, at both Manukau (where he signed the Treaty), and Kaipara.

The unity under Te Kawau needs emphasis, for when English law supplanted tribal law, tribal evolutionary processes were suspended and the Native Land Court awarded land in the area to 'Te Taou, Ngaoho and Te Uringutu', freezing in perpetuity the component parts of those who under Te Kawau, were really one group.

That group came to be called 'Ngati Whatua of Orakei'. It is not clear when the name was first applied. In evidence to us Ani Pihema thought the appellation was of recent origin. She explained her mother's aversion to the use of the name as denigrating the people's link to Tainui through Ngaoho. Clark Tamariki, speaking for herself, her mother Makareta and cousin Rangiaho Puriri and others of the Hawke family pointed out they always used 'Ngaoho' to describe themselves, not Ngati Whatua, and though they are direct descendants of Te Kawau. She went on to say that 'te kei o Tainui' (the stern of the Tainui canoe) is still their name for the area. She thought the

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distinction and the lineage from Te Kawau explained many differences of opinion that were to beset Orakei in subsequent years and why, in modern times, her family could not vacate their ancestral village there.

But Te Kawau was the grandson of Tuperiri and there can be no doubt that from the killing of Kiwi Tamaki of Waiohua, Te Taou of Ngati Whatua held the mana of Tamaki isthmus. It is in the nature of tribal dynamics that the name, Ngati Whatua, serves to fix the paramount source of mana and does not deny the existence of other links. Whakapapa (genealogy) not tribal nomenclature remains the means whereby Maori people uphold their status and ancestral rights. The Maori preference for extended relationships makes a nonsense of rigid exclusiveness.

We suspect moreover that some current objections to the name 'Ngati Whatua' reflect more the divisions of recent years, exacerbated by outside pressures to remove the people entirely. For the name has in fact been around for a long time, and does not seem to have caused strife until after the people's continued occupation of Orakei was threatened. Te Kawau himself preferred that name, using it in his land dealings with the Anglican Church and the Crown, in the 1830's and 1840's. Three leading chiefs used only that name in farewell addresses to Governor Grey on behalf of the tribe in 1853 (Davis, 1855:65). The Stout-Ngata Commission in its Report of 1908 referred to "the ancient Tribes of Ngaoho, Te Taou, and Te Uringutu, more generally known as Ngatiwhatua" (1908:1). The name appears regularly in the transcript of tribal meetings held at Orakei last century and the trust fund established to support the Orakei church in 1860 was called 'the Ngati Whatua Trust Fund'. We have therefore decided to stay with the name for if we err, then at least we do so in good company and with some precedent, and nor do we thereby deny the important Ngaoho connection.

Indeed we must not. In evidence in the Supreme Court in 1978 the Commissioner of Crown Lands considered Orakei was not ancestral land of the Ngati Whatua for, according to his interpretation, ancestral land is that which was occupied by the various tribes from the time of the arrival of the canoes, a view said to have been confirmed by Mr B P Puriri, then District Officer of the Department of Maori Affairs. We doubt very much that tribal boundaries were fixed following canoe landings in the manner contended, that the canoes arrived together, or that territories were any more certain than state boundaries in Europe over a similar period, (and European states are no less the ancestral lands of current occupants because of it).

The more important point however is that we are talking of Maori ancestral land, and it is proper to use Maori determinators, not those of the Europeans, to settle whose ancestral land it is. The Maori method is clear—it is done by whakapapa, the recitation of ancestral genealogies as is regularly done today. There is not one person of Ngati Whatua who cannot link to the ancient Ngaoho occupation, that begins in the dawn of time, simply by reciting that person's line from Te Kawau.

*Orakei 1987*

The people of Orakei belong not only to the invading Te Taou line. The position is rather that by virtue of the Ngaoho connection, the ancestral entitlement of Ngati Whatua in Auckland predates the main canoes.

The point is also that Maori community maintenance is not dependent upon western concepts of statehood and territoriality, particularly in the north. For in the waxing and waning, grouping and re-grouping of the Polynesian explorers in the North over hundreds of years, and in the constant shifting and drifting, the whole of the North belonged to them all—the great mix of Polynesian migrants on the tail of the fish of Maui. It is from that convolution of circumstance that Ngati Whatua of Orakei are tangata whenua of what is now central Auckland, and what is now central Auckland is also their ancestral land.

### 3.3 The Ngati Whatua Stand

To maintain their place in Tamaki, Ngati Whatua fought not just with Waiohua. They fought with Ngati Paoa (a section of Tainui in the Marutuahu compact of Hauraki), who had also shifted to Tamaki to occupy lands as far south as Otahuhu. They fought also with other tribes arriving from the south for as we have seen many coveted the isthmus. But tribal warfare in those days did not usually result in extermination. People were not so much wiped out as absorbed into the ranks of victors or required to shift over.

In any event the fights were small compared to the fight against annihilation from diseases introduced by Europeans. Epidemic out-breaks in 1790 and 1810 so weakened the tribe that it was forced to abandon several fighting pa, including a main pa at Maungawhau or Mt Eden. The next disease was the musket. In 1820 Hongi Hika from the north travelled abroad to obtain an advance supply. He used them to settle old scores with Ngati Whatua and others and wreak a havoc unknown to conventional tribal warfare. In the Ngapuhi onslaught that followed, Ngati Paoa on the isthmus were virtually wiped out. The bloodshed was so great that their lands were considered too tapu to return to, and were later readily ceded to the Crown.

Ngati Whatua suffered defeat too, at the great battle at Te Ika Aranganui near Kaiwaka in 1825. Some retreated south and gained protection and succour from the Waikato tribes. Others moved north. Te Kawau went to his relatives at Mahurangi.

The northern tribes did not hold the lands at Tamaki. Their various raids and conquests were not followed by occupation. Ngati Whatua returned when they could, or until the next raid. They lit fires on the land maintaining ownership in accordance with the custom of ahi ka. They made a permanent return in 1835.

They returned to Mangere, Onehunga, Horotiu (Queen Street) and Okahu (Orakei) but the latter was their principal abode. Te Kawau built two fighting Pa there in 1839 and 1843, in case of further raids from Ngapuhi.

Orakei, at this time, was a distinctive geographic entity strategically located on the harbour near the border with Ngati Paoa. Surrounded by water on three

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sides and with commanding ridges on the fourth it was a well chosen defensive site.

### 3.4 The Ngati Whatua Land

At that time land was held under Maori customary tenure. As has been seen, before the Europeans arrived it was a tenuous tenure, and as shall be seen, it was still tenuous after they came.

Tenuous or not, the land was important for Ngati Whatua as an economic resource and symbol of their existence—their politics, myth and religion. The extent of the relationship of a tribe to its land is something that has been only imperfectly understood.

As customary land it was a communal resource.

All land was held tribally; there was no general right of private or individual ownership except the right of a Maori to occupy use or cultivate certain portions of the tribal lands subject to the paramount right of the tribe” (Salmond 1909, 1931:87).

Translated to early colonial times, when land could be sold, it was thought

A hapu (family group) could not alienate part of its territory without the consent of the rest of the tribe (Metge, 1976:16).

Only the group with the consent of the chief could alienate land (Walker, 1982:69).

This accorded the communal nature of Maori society where individual rights were subordinate to the maintenance of unity and cohesion.

Decisions affecting land, like all decisions of moment, were announced by tribal heads, elders, or a paramount chief, but only after a decision of the tribe as a whole had been sought. The chiefs or elders were rarely divorced from their people. They were not autocrats but the facilitators and locators of consensus.

A chief who persistently flouted majority opinion committed political suicide (Kawharu, 1977:58).

Customary Maori land tenure was displaced, in Orakei as elsewhere in New Zealand, by a system of land ownership with little in common with custom and traditional preference but customary attitudes to the significance of land still survive. It survives with better hopes in Orakei because although the people lost their land, part of it has been restored to them, and is now held on more customary lines.

Tribal authority and tribal unity were also displaced and yet, tribal orientation and the vestiges of tribal authority continue to exist. At Orakei it exists but unity was severely impaired. It reached the nadir of its existence in the protests of 1977 and has only recently shown signs of repair.

## Chapter 4

# The Winds of Change 1840–1869

### 4.1 The Treaty of Waitangi and Birth of Auckland

Auckland was borne on strong northern winds. At 1840 Ngati Whatua held Tamaki under the mana of Te Kawau, but in fear of the next Ngapuhi raid. Years earlier tribal tohunga Titahi had foretold of hope in the winds of change, prophesying

He aha te hau e wawa ra, e wawa ra  
He tiu, he raki, he tiu, he raki,  
Nana i a mai te puputara ki uta.  
E tikina atu e au te kotiu,  
Koia te pou whakairo e tu ki Waitemata  
Ka tu ki Waitemata i oku wairangitanga,  
E tu nei, e tu nei!

Professor Kawharu updated the translation for us as follows

What was the wind that was roaring yonder?  
It was the north wind, the wind from the north  
It was indeed the north wind I was perceiving driving the puputara ashore.  
And then to my amazement there was the carved post standing by (the shores of) Waitemata, standing, standing thus.

Reed considers

It was a prophecy in 1780 and long remembered by the Maori people for, they said, the nautilus (puputara) represented the white man's ships, and the carved post was the flag of England (1955:15).

It would be consistent with tribal experience had Ngati Whatua interpreted the vision of a seer to determine upon an arrangement with new arrivals from a distant place. Several years before the Waitangi Treaty Te Kawau had learnt of a likely visit of the white-man's chiefs from another source, the missionaries. He was one of those who welcomed Rev Samuel Marsden to Kaipara in 1820 and who treated with other missionaries like Reverend Robert Maunsell at Port Waikato. Marsden met often with Te Kawau whom he described as 'an old friend'.

Some tribes had secured Europeans to live with them and their patronage was considered a good thing in raising tribal status and securing trade. The missionaries prophesied that government arrivals would end the lawlessness of traders and the devastations of Maori musket warfare. It would have been consistent with his experience if Te Kawau had sought to add Hobson and his people, to his depleted tribe, gaining protection from enemies and the material advantages that those of the white tribes seemed able to give. He was not to know the white tribes were unaccustomed to communal sharing or the patronage of 'heathens' and that eventually, numerical strengths would

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change and patronage would be reversed. In any event, with hindsight 1840 was an important year for Ngati Whatua of Orakei. It was in that year that Te Kawau and other leaders signed the Treaty of Waitangi and the first sale agreement that led to the establishment of Auckland, in that order.

For Ngati Whatua, Te Kawau, Reweti and Tinana signed the Treaty of Waitangi at Manuka (Manukau) on 20 March 1840 with W C Symonds signing on behalf of the Crown. It was a Treaty that opened with reference to “Peace and Good Order” and the “necessary Laws and Institutions”. But Te Kawau sought more than words to gain security against the northern tribes.

On one account he sent his tamaiti, Reweti, to the Bay of Islands to ask Governor Hobson to come to Tamaki. Reed, 1955:40 records

And then, a few days after the signing of the Treaty, seven chiefs from Orakei came to the Bay seeking protection against their old enemies the Nga Puhi, and asking the Lieutenant-Governor to take up his residence amongst them. They offered him land if he would live at Tamaki.

Hobson, anxious to find a more central location for his capital, agreed and made an inspection of the area on 23–28 February 1840. Popular Maori opinion is that he was welcomed at Orakei but no record of this can be found in the ships log. Whether Hobson did in fact visit Orakei on this occasion remains in doubt but of a later and more important visit to Okahu Bay, Orakei there is no question.

Subsequently Felton Mathew, Surveyor-General was sent to reconnoitre the area in May. Following his report, Hobson visited the area again on 6 July and by the end of the month a decision had been taken to establish Auckland.

Meanwhile the area was visited by a party under Doctor John Logan Campbell, later to be described as the father of Auckland. The occasion is described in Campbell’s book, *Poenamo*. It was rumoured that the land would be the site of the future capital, and Campbell wished to buy there. The occasion has significance for us however as the first recorded indication that while Ngati Whatua sought a settlement on their lands, Orakei was specially regarded and was definitely not for sale. Reed records the account as follows

They rowed up the harbour close to the shore and, turning south, landed at the head of what was later known as Hobson Bay. They saw a small Maori village, but there was no sign of life, and as it was suspected that the inhabitants had gone on a shark-fishing expedition to the Manukau Harbour, the white men decided to follow them across the isthmus. When they reached the beach, they could see the Maoris on the further shore at Mangere. They crossed by canoe and greeted the patriarchal chief of Ngati Whatua, Apihau [sic] Te Kawau, who had befriended Marsden twenty years before, and his son Te Hira.

The white men knew what they wanted—the land of Remuera where it slopes down to Orakei Bay. Unfortunately the Maoris were just as determined, and the answer was an uncompromising “No”. They would sell land further up the harbour, but as for Remuera and Orakei—Kahore, kahore! [No, no!] (Reed, 1955:48).

On Friday, September 18, 1840, a party was sent to raise a flagstaff at a point which is now the top of Queen Street.

Captain Symonds read a preliminary agreement with the Maori land owners, by which the Ngati Whatua tribe agreed to cede to the Government an area

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of land of approximately three thousand acres temporarily (the later agreement of 1841 said “for ever and ever”) until its purchase could be effected by a proper officer of the Crown. (Reed, 1955:54)

On 20 October George Clarke, the Protector of Aborigines who also had the responsibility of purchasing Maori land, followed up by formally effecting the purchase of some 3,000 acres of land running along the Waitemata foreshore from Hobson Bay to the Whau creek and inland to Mt Eden (Maungawhau), from Te Kawau, Reweti, Tinana and Horo. They received cash and goods worth £281, with a second payment of £60 in 1842. Ngati Whatua were soon to receive a rude awakening to European commercial speculation when a mere 44 acres of that block were sold at public auction, six months later, for £24,275. The commercial lots were in turn quickly subdivided and resold at even greater profits as government officials, merchants and speculators scrambled for choice sites in what became the central business district of the new capital. A second auction of suburban and rural lots in October 1841 also fetched high prices.

Reed’s account continues as follows

In January 1841 the remaining officials and all the documents and papers that the Government had accumulated were brought from Russell, but Hobson did not take up official residence until March 14. With this simple act Auckland became the capital of New Zealand . . . There were two ceremonies to be observed when Hobson arrived, one for the Maoris and one for the pakehas. The Ngati Whatua people were glad to see the new arrivals, for the white man’s guns spelt security. It will be recalled that a deputation had visited the Bay of Islands to extend a welcome to the Governor. Hobson now repaid the visit, greeting Apihau [sic] Te Kawau on the foreshore at Okahu, later known as the Orakei Native Reserve. Over a thousand Ngati Whatua had assembled to meet the Governor. Te Kawau spoke for them all.

“Governor, Governor, welcome, welcome as a father to me! There is my land before you.” He waved his hands towards the upper reaches of the harbour. “Governor, go and pick the best part of the land and place your people, at least our people upon it!” (Reed, 1955:58).

Apart from occasional depressions, the new European settlement progressed steadily. The seat of Government was established there and as Titahi had prophesied, a new post stood at Waitemata. Auckland was off to a propitious start for the settlers came not as conquerors, not as interlopers, but as Te Kawau’s invitees to share the land with Ngati Whatua.

Maori and Pakeha needed one another in those days. The Europeans were completely outnumbered. The 1840 census gave 2050 Europeans with 1200 in Wellington as New Zealand Company settlers and the remainder thinly spread in widely dispersed settlements. A return of the native population laid before the Legislative Council at Auckland in 1845 disclosed an estimated 70,000 natives within three hundred miles of Auckland. It led James Cowan to comment

Let it not be forgotten that had it not been for the true benevolence, the hospitality and the continued friendships of such men as Tamati Waka, Patuone, Te Kawau, Te Wherowhero and Te Puni the British flag might not be flying in New Zealand today (Cowan, Vol I 1922:6).

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But conversely Ngati Whatua needed the settlers for the same return gave 2,000 Ngati Whatua (which included the Kaipara section) and Ngapuhi 12,000. It needs to be borne in mind that a further Ngapuhi raid seemed likely for many years. Heke and Kawiti were seeking support from other tribes for a combined attack on Auckland. In April 1846 it was rumoured Heke and 2000 men were about to descend but the attack never came. Potatau Te Wherowhero of Waikato made it clear he would stand against any attempt and Paora Tuhaere conveyed the same response from Ngati Whatua. But eventually peace followed settlement, tribal warfare became a thing of the past, and so all in all, the 'treaty' for the sale of Auckland was a good bargain.

But by 1845 the European population of 3,828 already far exceeded that of Ngati Whatua scattered over kainga at Okahu, Orakei, and at various localities around the Manukau harbour. By 1852 the European population of Auckland had risen to 9,159.

Nevertheless, for a start, the relationship between Ngati Whatua and the Europeans was mutually beneficial. Both sides gained the security they needed against further Ngapuhi raids. Ngati Whatua benefited from a rapidly expanding market for their produce, and, in exchange, a supply of European goods. Other tribes, like Ngati Paoa and Waikato, moved closer to Auckland to enjoy the commercial opportunities. Yet, in time, they all had to pay their price, since increasing European settlement multiplied the demand for Maori land. Ngati Paoa, also gravely weakened by the earlier Ngapuhi raids, were next: in May 1841 they sold some 6,000 acres along the waterfront from Mission Bay to the Tamaki estuary for £358 worth of cash and goods. A month later Ngati Whatua sold a second block of some 13,000 acres lying inland from the original Waitemata block, from One Tree hill (Maungakiekie) to the Whau, for £389.

By this time all of the Waitemata foreshore of the Tamaki isthmus except Okahu Bay and the headland, had been sold. But Ngati Whatua retained their foothold on Waitemata, a strip of territory running back through Orakei and Remuera to Manukau and most of the land around the extensive Manukau harbour.

Their possession of this territory was soon put under threat. European settlers who resented the Crown's monopoly to purchase land, according to the second article of the Treaty, and having to pay a minimum price of 1 an acre for Crown Land, were soon agitating for the abolition of pre-emption. In March 1844 Hobson's successor, Governor FitzRoy, gave way and issued a proclamation which allowed settlers to buy land directly from the Maori owners, on condition that they paid a fee of 10/- per acre to the Government. Few were satisfied with the concession and only some 2,000 acres were purchased. The agitation was renewed and in October FitzRoy again gave way, this time reducing the fee to 1d an acre. There was then no hesitation and by the end of 1845 European settlers claimed to have purchased some 100,000 acres of Maori land, most of it in the neighbourhood of Auckland.

Then a new Governor, Captain George Grey, arrived with instructions to resume the Crown's right of pre-emption. He also began an inquiry into the



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purchases under FitzRoy's proclamations. They were, in due course, reduced to some 20,000 acres. Some of the surplus was returned to the former Maori owners, though much of that was later bought by the Crown. Some 16,000 acres however was retained by the Crown without compensation. (The 1947 Surplus Lands Commission, chaired by Chief Justice Myers, did recommend payment of compensation for this area, but members were divided amongst themselves over the amount—AJHR 1947, G-8).

By 1850, as a result of Crown and private European purchases, Ngati Whatua were left with only one area of land on Tamaki isthmus. They called it Orakei though it was much larger than the Orakei block as we know it today. Nevertheless, it was assumed that it would gain in value from the European settlements that now surrounded it, and that Ngati Whatua would acquire the arts of civilization. Certainly they continued to derive advantages from their association with the Europeans of Auckland. A mission school had been established at Orakei since the 1830's and later the Anglican Church acquired a substantial foothold from the Crown around, of course, the adjoining Mission Bay. The Church had acquired other nearby lands too and St John's Theological College originally established at Waimate in 1842, was reopened at Meadowbank in 1844.

The Church taught more than a new religion. It taught a new way of life, how to read and write, health care, new techniques in house building and horticulture, animal husbandry, trade and industry and new modes of dress and manners. Ngati Whatua learnt eagerly of these things and formed a close alliance with the Anglican Church (though Bishop Selwyn was to convert the school at Mission Bay to a training place for Melanesian rather than Ngati Whatua students). It was soon thought Ngati Whatua were more literate than most settlers. They grew maize, cabbages and potatoes for sale. They acted as merchants for other tribes supplying produce to Auckland, hosting at Orakei those who came by sea or land. W Swainson describes Maori economic growth in the 1850's mentioning

... In a single year 1,792 native canoes entered Auckland harbour bringing to market by this means alone 200 tons of potatoes, 1400 baskets of onions, 1700 baskets of maize, 1200 baskets of peaches besides very many tons of firewood, fish, pigs and kauri gum. (Swainson, 1856:66)

Their demand for coastal trading vessels was such that they formed the basis of a local shipbuilding industry, Governor Grey making loan advances to tribes to assist the purchase of vessels. By 1858, 53 trading vessels registered in the Port of Auckland were in native ownership. It was a natural development that Orakei became a place of inter-tribal deliberations as tribes gathered from places as distant as Gisborne, to discuss their common concerns en route to market.

Ngati Whatua joined also the settler society. They supplied produce, worked on building projects and became members of the Police force. Their horses were entered in race meetings, their chiefs attended balls at Government House (Platts, 1971:79, 185).

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Naturally there were moments of misunderstanding. There was uneasiness in 1841 when Te Kawau sheltered one of his people convicted of larceny to prevent his incarceration. Te Kawau responded to criticism with a caution to the settlers—“the love of many is growing cold” (*Great Britain Parliamentary Papers Relative to New Zealand*, 1844 p40). There was further disquiet later when a huge inter-tribal feast was held at Remuera. But the differences were sorted out, Te Kawau protesting he misunderstood the settlers’ ways and expressing a desire to accept the law and learn more about it (see FitzRoy, 1846 and Thomson, 1859). In fact, Te Kawau became committed to law and order, exhorting his people to settle differences through Courts and proper procedures. Ngati Whatua support for law and order, and for the Europeans in their midst is expressed in the recorded addresses of their chiefs, Te Kawau, Uruamo Whangaroa and Te Ara Te Tinana, in 1853 in farewelling Governor Grey as he returned to Britain. We quote here from Te Kawau’s opening as translated into English, and move then to the substantive part to which we refer.

Friend, the Governor, salutations to you. This is our speech to you; do you hearken to it—we your people and your children, namely the Ngati Whatua, wish to bid you farewell . . .

We have never resisted your authority. It will be seen that the hands of the Ngati Whatua have not touched a gun to molest the Europeans. You will remember that the Ngati Paoa sought a quarrel with the Europeans and came to our place, but we rendered them no assistance. We put our lives in jeopardy when we sought out Mr Meurant to take us to your presence, for we did not reflect that you were surrounded by troops:—no, we sought you out nevertheless.

This is our love—the love of the people who protect the Europeans, and you know that this statement is correct. (Davis, 1855:64).

Later, Te Kawau’s authority passed to his nephew, Paora Tuhaere, for he had a better understanding of laws than Te Kawau’s own son. Paora himself was a staunch supporter of the Governors and settler Governments, and until 1977, over 100 years later, Ngati Whatua were to use only proper channels for the resolution of their many grievances.

#### 4.2 The ‘Land Treaties’ of Ngati Whatua

Though the Treaty of Waitangi has dominated Maori attention, as settling the broad blueprint for colonisation, many Maori point to other ‘treaties’ dealing with particular lands or claims. It has been our New Zealand tradition to regard these transactions not as treaties but as deeds of gift, sale, or settlement, and yet our counterparts in North America took an opposite approach. There the tribes were treated as separate sovereign entities and similar deeds are listed as treaties.

The separate approaches have led to different results. The documents in New Zealand have been construed according to English legal understandings and culture. As long as the deed is clear, oral evidence of what took place and Maori cultural understandings and oral tradition have been discounted. That has not been the case in North America as *R v Taylor and Williams* (1981) 62 CCC (2d) 227 demonstrates.

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There, land was sold without any reservation of Indian hunting rights. Though the documents were not lacking for clarity, the Ontario Court of Appeal read into the arrangement a presumption that hunting rights were retained having regard to tribal understandings that were corroborated by Indian custom and surrounding circumstances.

If we too are not to apply mono-cultural assumptions to arrangements between two people, we also must look to the expectations of both parties in the light of their different experiences when considering the several 'land treaties' of Ngati Whatua, entered into after Waitangi. Some have already been referred to.

The earliest sales though seen by settlers as simple conveyances, may have been seen by Maori as treaties of cession of tribal lands to the intent that both parties to the agreement might belong to them. The Maori soon learnt the value Europeans placed on their lands and became better bargainers, but it is doubtful they knew the European understanding of the first sales. Conversely, there are doubts the Europeans appreciated or understand yet the nature of Maori transactions. The execution of early documents is not proof of a common intent and there are many instances where the oral tradition recording a people's understanding of an agreement, varies markedly from the words of the executed deed. To the early Maori it was proper to extend hospitality to new arrivals, to provide them with a place for their homes and cultivations and to expect gifts in exchange. It did not follow, in the customary perspective, that the land was irrevocably given for their exclusive use. Te Kawau referred to Auckland as "the township on our land", as though he had still an interest, as late as 1853 (Davis, 1855:65). It might also have been considered the Treaty of Waitangi made the Crown the parent of both Maori and European so that a cession or sale to the Crown was a cession to the combined group of Maori and European. At the other end of the island Wakefield's policy of creating Maori reserves within each block sold, at least showed an intention to secure a place for the Maori within ceded lands and a share in increasing capital values.

Ward (1986:259) considers 'Maori hosts' may be a better term than 'Maori vendors' to describe early sales in the light of customary expectations. He considers not only the paramount right of the tribe, as distinct individuals, to engage in land transactions, but the Maori understanding of them, agreeing in that respect, with a reported statement of the present Governor-General, Sir Paul Reeves, that

There were marked differences between European and Maori conceptions of sale, gift or trust. A Maori gift was sometimes intended to create a continuing relationship and obligation.

Sales, unknown to the Maori, were likely seen as involving an exchange of gifts to bind both parties in common cause. Ward considers it necessary to examine the terms 'hoko' and 'homai', which illustrate the customary preference for reciprocity and continuing obligations, shedding light on what the Maori signatories may have understood by 'hokona' in the Maori version of the Treaty (or 'sale' in the English text).

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In those days, apart from the period when the pre-emptive right was lifted, these ‘treaties’ were effected by direct negotiation between government agents and those persons whom the agents thought to be the leaders of those tribes who were thought to be the owners.

That ‘title’ to Maori land lay basically with ‘tribes’, not individuals, was a conclusion reached by a Board of Inquiry appointed by Governor Browne in 1856 under the Surveyor-General, C W Ligar. It is of interest that the Board went on to note that certain individuals of “Ngatewatua” had sold land around Auckland to Europeans during the waiver of the Crown’s right of pre-emption, and subsequently to the Crown itself but

no after claims have been raised by other members of the tribe. . this being a matter of arrangement and mutual concession of the members of the tribe.

There are real doubts however that Te Kawau saw it that way and considerable evidence that Maori individuals were dealt with to circumvent customary tribal controls.

After the initial sale of land for settlement Te Kawau and his people felt the need for caution. It was soon apparent the ‘treaties’ did not mean a sharing in the land at all. It was also obvious that one had to bargain for a proper price. As we have seen, the original sale of 3,000 acres taking in what is now central Auckland was for cash and goods to the value of £34. That was cheap even in those days but at that time the price was not as important as obtaining security, learning and prosperity through an association with the new settlers. Within nine months the Crown had sold 44 of those acres in 119 allotments for £24,275, a per acre increase of over 8,000 times. This profit met the initial cost of those things that go with good order and government—roads, buildings and services. It also provided more money to buy more land.

As land sales continued Te Kawau became concerned not only with the prices obtained but with the absolute loss of land. By the end of the 1840’s Ngati Whatua held only Orakei, or ‘Orakei Reserve’ as it was also called. As we have seen it was several times larger than the 700 acres called the Orakei block today and it included part of what is now Remuera. The larger problem was whether the law-abiding Ngati Whatua could lawfully retain what was still theirs.

In 1850 the Government started to nibble at the Orakei reserve when H T Clarke bought 700 acres on the Remuera side. Years later, Clarke admitted that the chiefs had set that land aside as ‘a nest egg for their children’, that they had then demanded £12,000 for the land, but, after ‘prolonged and wearisome interviews’, he had beat them down to £5,000. Certainly this was much more than the Crown had paid in the early 1840’s, but there was still an enormous profit on re-sale. One third of the block was sold immediately for £32,000 and, according to Clarke, the whole of it realised £100,000. (Clarke, 1901:7).

Te Kawau had reluctantly acquiesced in the later sales. The Land Purchase Officers were threatening the control of chiefs by dealing only with those willing to sell, without prior tribal meetings, and many chiefs sought to maintain their mana by joining in rather than be seen as having lost land

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without their approval. Unfair tactics in the wholesale acquisition of Maori lands, although occurring mainly after the establishment of the Native Land Purchase Department under D McLean in 1853, have been well documented (see Sinclair 1957:53–58). The purchasing officers, tended increasingly to deal only with the sellers of a tribe, though they were but a few, ignoring chiefs and others as though the few were solely entitled.

For his part, and from at least the early 1850's, Te Kawau urged his people not to sell more lest they fall into a position of inferiority, but he also urged the Government not to buy, and to protect the Maori from the ill effects of unregulated acquisitions. He became determined to hold to the Orakei lands, stating in his farewell address to Governor Grey in December 1853

Friend, when you arrive on the other side, tell the Queen about the good arrangements you have made in regard to the formation of a township on our land and let this land [Orakei] be reserved for our own use for ever and let us have a Deed for it so that it may be safe (Davis, 1855:65).

Te Kawau's song, composed for that occasion, may be read as referring to both his sense of loss at the Governor's departure and his fear of losing Orakei

The clouds in yonder horizon  
Across the sea, are playing with  
The winds, whilst I am here  
Yearning and weeping for my son—Ah! he's  
More than a son to me; he's my heart's blood . . . !  
(Davis, 1855:64).

Nonetheless, in 1854 the Crown purchased two more blocks in Orakei now known as Meadowbank, but called Pukapuka 1 and 2, for £770.

Ngati Whatua of course, had been effectively funding the cost of developing Auckland from the resale of their lands. Their concern resulted in a ten percent clause in their later land sale 'treaties' by which ten percent of the resale price was to be returned to Ngati Whatua in cash or services. More particularly, according to the Maori translation, it was

. . . for the founding of schools in which persons of our race may be taught, for the construction of hospitals in which persons of our own race may be tended, for the payment of medical attendance for us, for annuities for our chiefs, or for other purposes of a like nature in which the Natives of this country have an interest—ten percent, or ten pounds out of every hundred pounds, out of moneys from time to time received for land when it is resold.

The principle of the clause may have been a good one but it led to arguments that the ten percent was not in fact being returned, or that the services provided were not principally for their benefit. C B C Chittenden, who conducted research into the matter, was called by the claimants to explain his findings. They are not complete but he thought it obvious there had not been a full accounting to Ngati Whatua or a proper return to them. Where ten per cent monies were used they were marginally for Ngati Whatua's benefit. The Orakei bridge linking Remuera to the southern portion of Orakei was built in 1862 entirely from ten per cent monies though it benefited as much, or more, the settlements at Mission Bay, Kohimarama, St Heliers and beyond, there being no link road to the Maori settlement at Okahu which in any event relied

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on water transport. Most went for hospitals and schools and only about 32% of the fund was returned to Ngati Whatua in cash.

Still, for some twenty years ten per cent of the profits on the resale of different parts of the land were set aside in the way described, whereafter the system was abandoned (Heaphy to Lewis, 29 May 1874, MA 13/32, National Archives).

Ngati Whatua complaints over non-payment after 1874 were referred to the 1927 Royal Commission on Confiscated Lands. The Commission calmly accepted Crown counsel's argument that over the years, Government had spent more than £2,000,000 for educational and health services for Maoris (nationally) and that 'this expenditure ought to be treated as a performance of the obligation created by the covenants' (AJHR 1927, G-7, p 33). We shall see that an inability to see Ngati Whatua as other than simply 'Maoris', has plagued the Orakei people throughout this century and with the most serious consequences for them.

The deeds had provided for expenditures for 'persons of our race' ('nga tangata maori' in the Maori versions) and had not referred specifically to Ngati Whatua. Obviously the Commission did not consider that a bicultural approach might be needed for the interpretation of such documents, or that some enquiry should be made as to the Ngati Whatua understanding of the arrangements. It kept instead to the letter of the law as the Commission saw it. There is no doubt however that after 1874, at least, Ngati Whatua were denied payments which they had hitherto received.

The claimants questioned the propriety of the early sales and the implementation of conditions but did not challenge them. They referred to the sales not because they dispute them but because they show, in their view, that Ngati Whatua met the initial cost of establishing Auckland, and because, in their opinion, Auckland ought now help them retain a part of the Orakei lands that should have been kept as theirs forever. For by the mid-1850's the real concern was not the price or the principle of peace and prosperity. Ngati Whatua had sold most of Auckland. From 1854 all they had left was the 700 acre Orakei block containing the principal marae and villages of the Ngati Whatua people. The Pukapuka sales of 1854 were to be their last—at least until 1913. It was clear by then that what was left had to be kept in perpetuity. As Clarke had acknowledged, it was meant to be 'their nest egg'.

No part of the 700 acre block was in fact sold under the old land purchase system. That system fell into disuse and discredit in the 1850's as disputes over the ownership and sale of land merged amongst other tribes. Instead, only small parts of the Orakei block were to be acquired, first to provide for a mission school and church, and secondly to provide for defence.

#### 4.3 The 'Treaty' to Provide for a Church

If the North American bi-cultural method of treaty interpretation has application to Maori deeds, the approach has special significance in the case of gifts. In pre European times sales were unknown but gifts were commonplace and

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a variety of customary laws applied. Many gifts created reciprocal obligations of a kind unknown in English law, the essential element being the duty of the receiver to honour the giver, so that an ongoing relationship was established. In every case the obligation was to the donor tribe, certainly not ‘all Maoris’ especially since that could include old rivals. It was the mana of the giver that had always to be respected.

This needs emphasis because most of the deeds of gift, drawn by only one party to them, reflect not Maori culture but the English concept that a gift once given is gone forever and no strings are attached. The Maori way was to create ties with the social objective of binding people together. It follows that it was not impolite for a Maori to ask for a gift—be it an article, land, or a child—and somewhat impolite to refuse.

The difficulty that a Maori account of a gift may depend on a recollection of events well removed in time, is not such a problem with the Orakei gifts, for there is at least some contemporary writing corroborative of the current Maori view.

In the 1830’s the main clusters of Maori homes on the Orakei block were in settlements called Orakei and Okahu respectively. A chapel was built at Orakei, the fifth suburban church in the Archdeaconry of Waitemata, from equal contributions from the Anglican Church and Ngati Whatua. It was dedicated St James in 1837. By 1844 a school was operating under Wiremu Hopihana Te Karore, a native teacher described as “excessively tattooed” in the journals of Rev V Lush (Barnett, 1976) and as the spiritual teacher of Ngati Whatua by C O B Davis (Davis, 1855:64). As was usual the chapel and school were staffed by local Maori under the supervision of a visiting circuit priest. They were, in law and fact, the chapel and school of the people for it was not at first thought necessary for the Church to own the land from which the Word was pronounced in order to spread it.

Apihai Te Kawau was considered a faithful Christian (Martin, 1884:144). Indeed, Te Kawau Te Tawa, as he was formerly known, was baptised Abishai (Apihai) Te Kawau, in the same St James Church. In 1858 Te Kawau and other leaders conveyed to the Crown 4.25 acres in the south west including the chapel and school, in order that the land could be entrusted to the Church.

Because of later events there is need to examine the gift. (We have been assisted in this examination by the research of R M Ross for the Anglican Church, in 1981, and kindly made available to us by the Church.) The Deed was in Maori. It was executed pursuant to the New Zealand Native Reserves Act 1856 which enabled Maori land to be given for Church purposes through the Crown. In Maori, the Deed (or Treaty) acknowledged the purpose of the gift, to provide for a chapel, a burial ground and *the* school. (The italicising here and below has been added). The official translation changed this to read “a site for a church, for a burial ground and for the *endowment* of a school . . .”. That was the basis on which the land was said to pass to the Crown, but when conveyed to the Church in 1859, by Crown Grant No 14422, the land was vested in the Bishop of New Zealand “upon trust as a site for a Church and Burial Ground and as an Endowment *for Schools for the benefit of the*

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*Aboriginal Inhabitants of the Colony of New Zealand.* As was noted by Bishop Gilberd in his submissions to us in 1986, “the particular had become the general”. The grant followed the form of others made at that time but it did not follow the pact with Te Kawau and nor did it follow Maori custom. In the Maori way of thinking the land would have been given to secure a church and a school for the people, not a church and a school for the Church, and ‘people’ in this case, would have meant Ngati Whatua, not all Maori. The grant did not match the reality on the ground either. To all outward appearances the chapel and school still belonged to the people for they helped build it and continued to maintain it. Some of the villagers then erected homes on the church grounds. Later they had difficulties in finding a lay officiant or priest amongst their own number and from 1860 to 1863 subscribed funds to secure a salaried preacher from outside, though without success.

That was the position when shortly after, Orakei village was largely abandoned following a major fire. According to the evidence of A Cutler in 1938, given in the Supreme Court, there had till then been “as many as 150 Maoris living in raupo whares”. The villagers joined with those at Okahu Bay, where the greater number lived, and a new church site was provided there, where the present church in Okahu Park now stands. The Orakei church, school and some of the homes on the site were destroyed by later fires, but some families continued to live on the old site, and later, more homes were built there. In customary lore, the land still belonged to the people. Once vacated by the Church, it became ‘returned’. In English law that was not the case as the occupiers were to find in 1926 when the Church sold the site to the Crown and the occupiers had to vacate.

#### 4.4 The Defence Treaties

There is need to look at other transactions too because of other claims made later. In 1859 the Port of Auckland was thought to be threatened by an imminent Russian invasion. On 5 August Te Kawau and others agreed that nine acres at Takaparawha Point (7.5 acres plus 1.5 acres access) be given to the Crown on condition that the land revert to the people if it were no longer needed for military defence. The actual words were

The conditions upon which we surrender this land are these—that it is to be held by the Government for purposes of military defence and that in the event of the Government ceasing to require it for such purposes of military defence it shall not be disposed of to private individuals but shall revert to us, upon which conditions we hereby surrender the aforesaid piece of land without receiving payment for the same.

We need to examine closely what happened because later the military never built there but on the opposite headland now called Bastion Point. It was thought the Government paid no compensation, but took the Bastion Point land in exchange for the 9 acres at Takaparawha. That is not what in fact happened but that impression was likely conveyed by the course of events.

In the first place the 1859 deed was not registered, as it could have been, for the military built its battery closer to the city and did not take up the 9 acre



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offer. Later, in 1869, the Native Land Court issued a title for the Orakei block to include the 9 acres as Maori land, because the Crown had elected not to use it and had not registered the deed.

Later the Defence Department decided to establish another battery reserve, selecting for the site the opposite headland at Orakei called then Kohimarama but now, Bastion Point. Fort Bastion was built there in 1885. Soon after the 13 acres affected (11 acres reserve and 2 acres access) was taken from the Orakei block by proclamation dated 26 August 1886. (*New Zealand Gazette* No 47 p 1091). At that time Paora Tuhaere was trustee for the Orakei block. Almost immediately after the Public Works Notice, on 21 October 1886, Tuhaere lodged a claim with the Compensation Court, seeking extensive damages of £5,000. The Government Land Purchase Officer, T Mackay, had not anticipated such a large claim and sought to delay a hearing. What had happened was that Tuhaere had completed a major survey of the Point for residential development on one acre allotments and had arranged with his local member, the Hon Dr Pollen, to promote an Orakei Native Reserve Bill that would enable Tuhaere to lease the sections to settlers on 60 year terms, to build access wharves and construct roads. He sought compensation based on the subdivision then in train.

It was then the Defence Department 'discovered' the 9 acre deed and had it registered in the Deeds Office Auckland (on 24 June 1887 as Deed No 103920). Then, while Tuhaere's Bill was before the Private Bills Committee, the Public Works Department proposed an amendment to the Bill, to the effect that the 13 acres at Bastion Point, said to be worth less than the 9 acres at Takaparawha, would be taken in exchange, thus obviating the need for a settlement with Tuhaere. On 7 June 1887 the Private Bills Committee postponed its consideration to the next session. It came before the Legislative Council again in November 1887 and was again referred to the Local Bills Committee to be considered in November and December whereupon the Committee, apparently willing to accept the proposed amendment, called for an amended Crown Grant for the Orakei block with full survey. Tuhaere responded to the Crown's initiatives by withdrawing the Bill altogether and demanding a hearing by the Compensation Court. The hearing, which did not take place until July 1889, was fully reported in *New Zealand Herald* 26 July and 5 August 1889. The award was £1,500. The land was taken and Tuhaere's proposals were thwarted.

It was then argued that Tuhaere's title was doubtful. Could he receive the compensation when he was only a trustee, it was asked and who were the beneficiaries, twelve others named on the Deed or the whole tribe? To resolve the impasse, as far as the Public Works Department was concerned, the money was paid not to Tuhaere but the Public Trustee (in 1890). Tuhaere however had incurred considerable survey and other costs relating to his aborted project so the money was eventually paid to his lawyer and set off against outstanding legal costs and disbursements. Tuhaere died in 1892.

So it is, we know now that an exchange did not take place, and compensation was paid. The people may never have known that for an exchange had been

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publicly promoted, cash was not distributed but applied to the costs of a wasted subdivisional exercise, and Tuhaere died before the matter was finally settled.

Meanwhile the Crown's claim to Takaparawha Point was dropped. It continued as Maori land while the Crown held to the Battery Reserve and work progressed. During the course of that work it was found necessary to cut Kohimarama Rock, which limited the range from the Battery, to a height of six feet above high water. The rock, a coastal outcrop occupying 13 perches off the Point was an important landmark and mooring facility for Ngati Whatua and was part of the Orakei title. It deserves mention for that reason but also because the compensation question has been confused with this matter. The rock was taken separately, when Ngati Whatua sought compensation, by a proclamation of 26 October 1901. It was stated that nothing had been done to prevent the Maori use of it for fishing and mooring. "We shall not stop Maoris landing on the islet so long as it does not interfere with defence matters . . ." it was said, and on that basis compensation of £18 (only) was awarded—for division amongst the 26 owners then on the title. The levelled rock is now occupied by Tamaki Yacht Club.

Then the Crown was interested again in Takaparawha Point, and again for defence purposes, but this time it was neither gifted or taken but sold. It was purchased, in 1916, by what is called the meeting of assembled owners procedure whereby owners are asked to vote on an alienation, votes being counted according to shareholding. Eleven voted for sale, fourteen were against, but the sellers won as they held the most shares.

And so both headlands (and the rock) legally passed to the Crown and not by gift or exchange but for cash; but none of it passed with general approval. In June 1928 the Army notified Crown Lands it no longer needed the Battery Reserve at Bastion Point, but it was not until June 1935 that that was officially announced in the papers; whereupon, Judge Acheson of the Native Land Court reported in 1936, he was "waited on by a deputation of natives who informed me that the Orakei people had a claim to this eleven acres" (Lee, 1936) It was alleged then, many years after the event, the Battery Reserve had been taken in exchange and without compensation. That allegation was never investigated or explained and that in turn reinforced in the minds of Ngati Whatua, the propriety of their view. The defence status was finally revoked in 1941 and the area handed to the City Council to administer as a Reserve.

Shortly after the Army advised it no longer needed the Takaparawha Reserve either and that reserve became vested in the Auckland City Council to administer in 1946.

It appears the Maori understanding of the 'treaties' relating to the Church and defence sites was that the lands were merely held on trust, to be returned if no longer required for the purpose intended so that the Orakei block would be held intact. That view can be readily explained in customary terms. In the case of the Church site the customary view was expressed but not transcribed in the legal documentation.

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It is not necessary to give any stress to these opinions at this point for it is more relevant to later events. In the 1850's no Maori saw the need to express the view, for although there was a growing disquiet over the continual arrival of more settlers, and some dissatisfaction with the transactions and events of earlier years, there still seemed to be a place for the Maori view in the overall laws and policies of the country. There was still a concept of 'one country—two people' even although demographic changes showed the former Maori power base had passed. (The European population increased seven fold in less than two decades—from 11,500 in 1843 to 79,000 in 1860 by which time the declining Maori population had been surpassed). Still a particular place for the Maori was provided for in the Treaty of Waitangi and affirmed by the Imperial Government in the New Zealand Constitution Act 1852. It was not until a home Government was established, and war followed that it was patently apparent the place of the Maori was not in fact secure.

We therefore leave Orakei to consider initial policies and the change that came with Responsible Government and the Wars.

#### 4.5 The Main Treaty, Initial Policy and Constitution

New Zealand was settled in enlightened times. Political thinking had been influenced by the Evangelicals, the Humanitarian Movement, and the decisions of Chief justice Marshall of the United States Supreme Court on the rights of indigenous inhabitants in new colonies. An 1837 report of a Select Committee of the British House of Commons on aborigines in British settlements also had an enormous impact. It revealed the appalling effects of contact and strengthened British resolve to provide greater protection. The Colonial Office generally insisted that New Zealand Governors provide punctillious recognition of Maori rights, and, after execution of the Treaty in 1840, that the Treaty's terms be scrupulously upheld.

The Treaty of Waitangi reflected these policies and concerns. It is sufficient to say here (for the Treaty is examined fully in chapter 11 of this report) that it opens and ends with the conferral of a "Royal Protection" on the native people.

To Te Kawau it must have seemed a good arrangement. It appeared to promise not just the retention of Maori land by Maori people but the ownership of that land in accordance with customary tribal tenure. We find that that was indeed the case, for reasons given in chapter 11. That finding is important in assessing subsequent developments at Orakei.

More importantly, though the Ngati Whatua leaders may have assumed the point, the Treaty envisaged a British settlement in which a place would exist for both people. Read with the undertaking of protection and the prevailing British policies of the time, as is also more fully explained in chapter 11, the Crown's Treaty right of pre-emption carried an obligation to buy wisely, so as not to leave tribes landless or without a sufficient endowment for their future needs. That finding also bears heavily on the subsequent history of Orakei.

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At a more mercenary level, but not without humanitarian concern, the exclusive right of pre-emption was seen as a valuable tool for meeting the cost of colonisation by buying cheaply and selling well. The Maori people would profit in the long term from the increased value of their unsold lands through the development of that ceded (see the instructions to Captain Hobson from Secretary of State Lord Normanby quoted later, in chapter 11).

The key to the success of that policy lay in the presumption that the Maori would in fact retain a good sized area of land for if they had none there was nothing from which to profit a capital gain. Accordingly, (as is more amply explained at 11. 9) the exclusive right of pre-emption was seen to carry duties and responsibilities not only to ensure that the tribes wished to sell, but to see that they sold only those lands excessive to their needs and retained a sufficient endowment for themselves.

The Courts at that time reflected the official Imperial policy, Chapman J stating, in *R v Symonds* (1847) [1840–1932] NZPCC 387, 391 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 evil 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. (*R v Symonds* supra at 391 but with emphasis added).

The Court considered, however, it was simply recognising established principles, it being said in that respect

. . . The Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice anything new and unsettled.

The Crown moved to institute an exclusive right of pre-emption even before the Treaty, in a proclamation of January 1840 issued by the Governor of New South Wales to prohibit wholesale trafficking in native lands. It was promulgated again in Act 4 Vic No 7 of the New South Wales legislature in August 1840 and then enacted for New Zealand as a separate colony in the Land Claims Ordinance of 1841. For a brief period from 1844 to 1846 the Crown's exclusive right of pre-emption was lifted (by Governor FitzRoy) but with that exception it was retained until 1862 (when the right was finally disbanded).

Sinclair (1957:50–53) considers the right of pre-emption was a basic tenet of contemporary British colonial policy to prevent the native inhabitants from being swindled for while it limited the tribes chances of selling for the best price, it also limited their ability to sell (see also Robson 1967: 10). The brief waiver of the pre-emptive right followed complaints from settler buyers and Maori sellers alike but Sinclair states “according to FitzRoy, settlers offered large rewards to agitators to stir the Maoris into protest against the Crown's pre-emption.”

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Wards (1968:170) reviews the Colonial Office policy of the time and its instructions to Governors to “honourably and scrupulously” fulfil the conditions of the Treaty of Waitangi and to adhere to its stipulations “as a question of honour and justice no less than of policy”. The Imperial Government itself, while New Zealand was still a Crown Colony, strove to maintain that policy, agreeing to such things as Governor FitzRoy’s waiver of the pre-emptive right only on FitzRoy’s advice that that was necessary to prevent war. Sinclair (1967:20) adds

. . . it was the almost invariable insistence of successive British Governments that Maori interests were not to be subordinated to those of the settlers

adding, with reference to a dispatch of 1859

The Imperial Government had declared unequivocally that even colonization must be a subordinate consideration to the duty of maintaining the substantial rights of the aborigines . . . (p147).

The broad principle in the Treaty of Waitangi that the Maori people might retain their own lands in accordance with their own customs and their own customs to govern their dealings with each other, found expression in the New Zealand Constitution Act 1852. It was an Imperial statute to introduce Representative Government to the Colony. Section 71 provided for native laws to govern native people and native districts in which those laws would be supreme.

The principle was important for Maori people. Our history is marked by continuing Maori attempts to assert tribal law and autonomy, both before and after the Constitution Act 1852. There is good reason to believe native laws would have adapted and developed had tribal autonomy and native districts been allowed. In fact, they were not. The colonists were wedded to a view of one law for all, which was of course to be their law. The Colonial Government was to move very strongly to assert British law over Maori people, Maori lands and Maori society and there was never any support in the General Assembly for applying section 71. Still, it was not until our times, in 1986, that section 71 was formally repealed and a new Constitution was introduced without provision for Maori law at all.

Section 73 of the Constitution Act acknowledged the communal nature of native land ownership and affirmed the Crown’s right of pre-emption. The colonists were equally anxious to overturn this provision too. By the end of the decade the settlers, resentful of the inability of the Crown’s Land Purchasing Officers to acquire sufficient Maori land, campaigned for the abolition of pre-emption. In 1859 the General Assembly passed a Native Territorial Rights Bill to that end but it was disallowed by the British Government (which had still the control of native affairs at that time) as an infringement of the Treaty of Waitangi (see Sorrenson 1963:38). Eventually however, in 1892 section 73 was repealed.

The right of the tribes to retain their lands in accordance with their own customs, and not to be exposed to settler pressure to sell them was soon abrogated in domestic laws. The election of the first House of Representatives in 1855 was rapidly followed by overt War (1860–1867), the relinquishment

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of Imperial control of Native Affairs (1861), the confiscation of Maori lands (1863), and the individualisation of remaining Maori titles (1865). The general view of the Colonial Office, that laws should not contravene the Treaty of Waitangi, suffered a sudden decline.

Seen from a Maori perspective the position was even worse. The Treaty that to their mind should have been the fundamental law and was a constitution in itself, was effectively overturned by a settler population no longer a minority. Maori powerlessness to influence the unfettered authority of the newly established Parliament, was affirmed in 1867. Maori parliamentary representation was limited to four seats in the House, when fourteen or fifteen seats were due on a population basis.

The trouble was also that the Imperial policy had rarely been applied at the frontier in the manner intended. From the beginning Government Land Purchase officers were more intent on buying all they could see than ensuring the tribes retained sufficient for their needs. In fact Ngati Whatua were down to their last 700 acres, the Orakei block, and Te Kawau was not convinced that even that was safe. As Sinclair drily comments

[the British Government's] solicitude for the welfare of the Maoris was not shared by many of the colonists, whose aim in sailing so far from home was to benefit themselves (Sinclair 1957:1).

The settlers then had not sought the 1852 constitution in order to advance their responsibilities to the Maori and nor did they welcome it for the opportunity to provide for Maori laws and districts. They had sought instead, and had soon gained, self Government freed of Imperial controls. Still the broad principle that the tribes or tribal individuals should retain sufficient land for their needs did find expression in many policies and statutes of New Zealand's own Government (see 11.9).

An important question in this case therefore, in assessing the fortunes of Ngati Whatua against the principles of the Treaty of Waitangi, is not whether they willingly sold land, but whether the Crown took sufficient steps to guard against excessive alienations and ensure that the tribes retained a proper land endowment.

Such a policy was little match for the settlers' impatience for more land. The 'one country—two people' concept was decidedly inconvenient. Amalgamation became the predominant policy and while many early legislators promoted it with the best intentions for the Maori race, for others 'amalgamation' was used to rationalise overt policies to acquire all that could be got. Those were the conflicting policies when New Zealanders went to war with one another.

#### 4.6 Land Wars and Land Laws

Though the New Zealand Wars had little to do with Ngati Whatua, they were severely affected by the laws that resulted.

The old land purchase system was unsatisfactory. Some Maori sold land they did not own and there were continual arguments as to who had the right to

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sell. But some of the more powerful tribes pulled their people together to forbid the sale of tribal lands. Things came to a head in 1859 when Teira assumed an individual right to sell land in Taranaki and Wiremu Kingi imposed a tribal veto. Governor Gore Browne backed the seller and a war started. In Waikato the tribes refused to sell at all and the war went there, and soon, to other places as well.

We need not go into the wars for with only one known exception the Orakei people were not in them. They were nonetheless concerned with the events for with over 11,000 settlers in Auckland it was perfectly clear Ngati Whatua had lost the position they once enjoyed. Still, while Maoridom became divided, at Orakei there was total co-operation with the Government. Te Kawau remained committed to peace, law and order and the belief that the Government would afford protection for his people and their remaining block of land. As the war progressed in Taranaki, and tribes rallied to the Maori King the Governor sought a conference of chiefs to isolate the Taranaki tribes and weaken the King movement. As a tribe considered solidly loyal, Ngati Whatua of Orakei were asked to host the hui and in July 1860 a conference of chiefs from throughout New Zealand met at Kohimarama. There, two hundred chiefs expressed loyalty to the Queen, faith in the Treaty of Waitangi and a desire to end the division created by the election of a Maori King. But the Government was also sharply criticised. Some spoke of the Government's failure to include Maori representatives in the recently established institutions of State. Others referred to the Government's inaction on land claims, fishing rights, and the maintenance of customary law (see Kohimarama Conference AJHR 1860, E-9).

Governor Gore Browne was there and also Donald McLean, Native Secretary and Chief Land Purchase Officer. Te Kawau was there too. He repeated his request for a deed to reserve and protect the Orakei block for all time.

There was in fact not a great deal of difference between the loyalist Maori and King movement supporters, as New Zealanders shaped up for war. Paora Te Ahura stated the vision of the latter, at a Maori King conference at Rangiriri in 1857

The King on his piece; the Queen on her piece; God over both; and Love binding them to each other (Sorrenson 1963:36)

Significant, for Te Kawau, were the laws that came from the fighting in the south, for it was from those laws that he got his deed. But looking back on those laws, the protection of the Maori in the ownership of his land seems hardly to have been the objective.

To deal with the problem of suspect sellers, a Native Land Court was appointed to determine ownership prior to any sale. To deal with the problem of tribes unwilling to sell, the Court was to apportion the land to individuals who might then be individually dealt with. To deal with the wars and those who fought against the Crown, lands were confiscated, and to deal with a major cause of the war, the settlers need for more land, policies were established to expedite the rapid acquisition of Maori land for European settlement. These policies continued well into the 20th century. At Orakei

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they went so far the people became totally landless—and yet these people did not join the War.

F Hackshaw explained in her submissions that it was following the wars and the relinquishment of Imperial control that attitudes changed within the Courts too. In *Wi Parata v The Bishop of Wellington* (1877) 3 NZLR 72 the Supreme Court of Prendergast CJ and Richmond J held that the Maori had only those rights expressly given by statute and that the Treaty was “a simple nullity”. The wars had left their own scars, deepened by the ferocity of battle, or as Belich suggests in his account of the wars, by the narrowness of victory (Belich, 1986). In *Wi Parata* (supra) the Court no longer spoke of “aboriginal natives” or “Maori New Zealanders” as Chapman J had done thirty years before, but of “savages” and “primitive barbarians”.

The Privy Council challenged these views in *Nireaha Tamaki v Baker* (1901) (1840–1932) NZPCC 371. It considered the 1841 Ordinance declaring the title of the Crown subject to “the rightful and necessary occupation of (the Maori) a legislative recognition of the rights confirmed and guaranteed by the Crown by the second article of the Treaty of Waitangi”. Other instructions from the Colonial Office and Imperial Acts of the British Government, including the New Zealand Constitution Act 1852, were considered to acknowledge the Maori right to hold land and administer their own affairs in accordance with custom. In the Privy Council’s view *Wi Parata* “went too far” and it was “rather late in the day” not to take cognizance of aboriginal and customary rights. The Privy Council affirmed its view in *Wallis v Attorney-General* [1903] AC 173, strongly criticising the New Zealand Court of Appeal. Our Courts responded with a formal *Protest of Bench and Bar* (1903) (1840–1938) NZPCC 370, implying that the right of appeal to the Privy Council should be done away with. Thereafter, and although the decisions of the Privy Council were meant to be binding, the New Zealand Courts pursued the *Wi Parata* view. It seemed sufficient to say, as Stout CJ said in *Hobepa Wi Weera v Bishop of Wellington* (1902) 21 NZLR 655 that the Privy Council “did not seem to have been informed of the circumstances of the Colony”. A host of subsequent cases show the view was soon entrenched in legal opinion, that the Maori people have no particular aboriginal rights, save those conferred by statute, and the Treaty of Waitangi no persuasive let alone legal status.

The Native Lands Act 1862 was the first relevant statute. It provided for the investigation of customary lands and the grant of freehold titles to specified native owners. The Act was barely used. It did not limit the Crown’s power to acquire uninvestigated land by purchase or cession and the Act was to be applied only in such districts as might from time to time be proclaimed. The first proclamation of a district was not until December 1864 and the first claim was not heard until June 1865.

Dr D V Williams pointed out in his submission

not surprisingly, it was blocks of land belonging to the Ngati Whatua in the near vicinity of Auckland which were the subject of the first cases for the new Court. Before the procedures of the 1862 Act were completed in these first cases, the law was superseded by the Native Lands Act 1865, and it was this 1865 Act which laid the foundation for the work of the Native Land Court in the ensuing decades.



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The 1865 Act also provided for the individualisation of native titles and the grant of freehold titles to specified native owners. But this Act went further to prohibit the sale or leasing of Maori land unless the title had been investigated and a certificate of title had issued. Once a title had issued, the land could be sold, or leased, and to anyone. There was now an incentive to use the Act. A permanent Native Land Court was established to promote it and did so with success.

Many Maori claimants, stimulated by the direct offers from settlers and speculators, had begun to resort to the Native Land Court which was soon adjudicating on customary land at the rate of three-quarters of a million acres a year (Ward, 1974:212).

The rationale for the Native Lands legislation, as seen at the time, is apparent in the preamble to the legislation and the statements of the early politicians. The preamble to the 1862 Act, while purporting to give better effect to the Treaty of Waitangi, declared

. . . it would greatly promote the peaceful settlement of the Colony and the advancement and civilization of the Natives if their rights to land were ascertained defined and declared and if the ownership of such lands when so ascertained defined and declared were assimilated as nearly as possible to the ownership of land according to BRITISH LAW (with the emphasis as appearing in the Act).

The preamble to the 1865 Act stated the objective

to encourage the extinction of (native) proprietary customs.

In 1870 the Honourable Henry Sewell declared in the House of Representatives

The object of the Native Lands Act was two-fold: to bring the great bulk of the lands in the Northern Island which belonged to the Maoris, and which, before the passing of that Act, were extra commercium—except through the means of the old purchase system, which had entirely broken down, within the reach of colonisation. The other great object was the detribalisation of the Maoris—to destroy, if it were possible, the principle of communism which ran through the whole of their institutions, upon which their social system was based, and which stood as a barrier in the way of all attempts to amalgamate the Maori race into our social and political system. It was hoped by the individualisation of titles to land, giving them the same individual ownership which we ourselves possessed, they would lose their communistic character, and that their social status would become assimilated to our own. [IX NZPD:361 (1870)]

Opposition to tribal ownership was nothing new. Governor Gore Browne considered the destruction of the tribal system would be as beneficial for the Maori as, he believed, the destruction of clanship and chieftainship had been for the Scottish Highlanders after the rebellion of 1745. (Turton Report 20 November 1861, AJHR, E-5A pp7–8)

Today virtually every acre of Maori land in New Zealand has been through this 'individualisation' process. The legislation also established the Native Land Court (which continues to this day). It will be seen at once that tribal ownership and tribal authority and control were each done away with. Land was awarded to individuals and those individuals could sell their individual shares without reference to the tribe.

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Ward (1974:213) considers “the worst consequence of the new system . . . was probably the marked decline in responsibility and trust between members of a kinship group formerly bound by reciprocal ties” as the Court favoured one witness over another, and did not so much enquire as act on such evidence as was presented to it irrespective of the deponent’s tribal status. The consequences were far reaching. Individual claims and individual ownership exacerbated family disputes, always present but formerly controlled through the influence of chiefs and elders. The individual assumed an unaccustomed authority and traditional leadership waned, in Orakei, as elsewhere. Yet all this was rationalised by the policy of amalgamation, which was really assimilation, and the oft cited maxim of the day that there should be ‘one law for both races’ with the implied presumption that that law should of course be the English one. Maori communities came to place reliance on tribal members thought to have knowledge of the new laws and systems. Sometimes these ‘agents’ were not at all well versed. Sometimes they were simply dishonest. As the authority of traditional leaders diminished so also did hopes for tribal self determination.

In addition the individuals could now sell to anyone. The Crown’s pre-emptive right removed in 1862 was not restored. It may be argued that this was repugnant to section 73 of the New Zealand Constitution Act 1852, (for the section was not repealed until 1892 and see section 2 of the New Zealand Constitution Amendment Act 1857, UK, preventing its repeal) but it may also be argued that section 73 was to be construed as affirming the pre-emptive right only in respect of customary land. That fine point need not be determined. It is more significant that earlier, in 1859, when Britain had still the control of native affairs, local legislation to do away with the pre-emptive right was disallowed by the Imperial Government as an infringement of the Treaty. The tribes were opposed to the new land legislation but inexorably they were drawn into it. There were petitions to have titles vested in the tribes as a whole as some sort of corporate entity (see for example the memorandum to the House of Representatives by W L Rees in 1884 with regard to the East Coast Tribes).

Many chiefs sent petitions direct to the Queen or the United Kingdom Parliament but the former had no real power to intervene and the latter had relinquished control of Native Affairs. King Tawhiao and a Waikato party sought personal audience with the Queen seeking Maori control of Maori lands. In England Sir John Gorst kindly counselled Tawhiao to put his petition to the New Zealand House of Representatives, which he did, in May 1886, drawing attention to section 71 of the Constitution Act 1852 and asking for a tribal council for his district and an end to surveys, the Native Land Court, “and the many other things that create evil”.

Heke, the member for Northern Maori took up the Maori call introducing, in 1894, a Bill for the establishment of Maori Councils to administer Maori land, but his additional proposal for an overriding body, effectively, it was considered, a Maori Parliament, drew immediate fire. Heke was armed with numerous petitions, one from twenty chiefs representing different areas and

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others with some 6000 Maori signatories. The House took the unusual course of hearing a representative, Te Wahanui of Ngati Maniapoto, who said

I do not wish the action of the Native Land Court to be brought into force over my lands . . . [they are] ancestral lands and the hands of the Europeans have never touched them. No whiteman's foot has trodden upon these lands, nor has any European obtained authority over them, either by lease or otherwise . . . we should have the administration of those lands (NZPD, 1894:).

Heke's Bill faced enormous opposition. Members spoke emphatically of the need for one law, and not unkindly, of the amalgamation of the Maori with European people as speedily as possible. In 1894 the Bill was defeated by the simple expedient of members vacating the House, and when Heke re-introduced it in 1896 it was formally lost by 5 for and 36 against.

Only the Tuhoe people appear to have met with a measure of success. Their petition of 1895 for tribal control of their lands resulted in the Urewera District Native Reserve Act 1896 but that Act never really worked. In other areas more direct action was taken. The Court was boycotted in some cases. The Te Arawa people physically prevented the Court from sitting at Maketu. It was to no avail. The Court would sit at a distance. Any one Maori could bring a claim to ownership. The Court acted on the evidence put to it. It took only one person to attend to create a run on the Court, for one had either to be there or miss out and there were several complaints of people being left out who were actually resident on the land. Bitter divisions developed. Some people had lived on the land for years with the implied consent of the group as a whole. Formerly people were not threatened by such arrangements for occupation by one person did not represent a denial of the rights of others or the group as a whole. But once it was proposed to formalise arrangements, whether to award titles to occupants or to the members of a group, people were threatened and arguments arose as to which family group held sway over what area, who were its members and whether occupations had been properly authorised by the appropriate group. In a short time people were compelled to submit to divisive Court procedures and to pay for lawyers and surveyors. The chiefs had now to submit to the authority of the Court.

In a report to the Native Secretary in 1871, Colonel Haultain noted that from 1865 to 1870 the Native Land Court heard 3,489 applications for investigation of title in the North Island and had ordered certificates or Crown grants in 2,619 cases for an area of more than 2,400,000 acres. (Appendix to Return Relative to the Working of the Native Land Acts AJHR 1871 A-2A p 24).

Two years after the passing of the 1865 Act the legislature yielded to pressure to allow for a form of tribal representation. Section 17 of the Native Lands Act 1867 specifically enabled titles to be awarded to individuals to hold for all the members of a tribe. It was required that each member of the tribe be named and listed in the records of the Court but at least it was possible to put in the name of everyone. The trouble was, as shall be seen, this was rarely done. Some who knew of this provision considered it was still part of the unwanted individualisation process, for individual beneficiaries could thereafter partition their interests, but at least it was a half-way position. The main trouble is

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that most Maori people did not know of section 17 and the Courts rarely told them or gave effect to it. We need to consider not just the statutory tools that were available but how they were seen and used by the first Native Land Court Judges.

#### 4.7 Operation of the Native Land Laws

This section begins with a broad overview of what happened at Orakei, and then reassesses that overview in the light of specific evidence on the operation of the Native Lands Act, for it is crucial to a consideration of the Orakei claim. After Te Kawau's repeated requests over some fifteen years for a Deed to "make safe" the Orakei land, it was the Orakei people's turn to have their remaining lands investigated, in 1868. By then Te Kawau was on his deathbed and the Orakei block was all the land that remained. Given that the tribe then numbered over a hundred people, it would not be unreasonable to expect that more than a hundred people would have been found entitled and had their names recorded in a separate record of the Court. In fact thirteen were held entitled and no other names were recorded. Given that only thirteen were held entitled it would not be unreasonable to presume that they were meant to be trustees only. In fact, in later succession and partition orders the Native Land Court presumed they were not trustees and the partitions were later upheld in the Court of Appeal. In the ultimate result the land was lost to both tribal and Maori ownership.

Consequently the old complaint survives, that the land ought to have been vested in the tribe as a whole. That states the case clearly enough but the issue is obscured by arguments over whether or not the Court meant to appoint trustees only.

It was Chief Judge Fenton of the Native Land Court who investigated the Orakei title. Some say the Chief Judge sought to give effect to the Maori preference by awarding title to trustees (only) to hold the land for the tribe. That claim was referred to the Courts by certain of the Orakei people many years ago. There it fell to be considered within the strict confines of law and within those confines it failed. That did not prevent the continuance of the claim in petitions to Parliament, submissions to Courts and Commissions, and in popular debate. The debate continues and has continued for over one hundred years.

That is not to say everyone agreed with the implied trust claim. Some benefited from the view that they were absolute owners. Divisions developed between some of the few who got a lot and the many who got nothing, and some of those who got, had reason to get rid of it as soon as they could or for so long as the debate continued. Accordingly the issue, not of what should have been done, but of what was in fact done, has been a most bitter contention within the tribe. The survival of that contention, and the argument that Chief Judge Fenton intended the land to be held for the tribe, compels a close look at what happened in the past and the implementation and operation of the early native lands legislation. In doing that it seems patently clear that Chief Judge Fenton did not intend to create a trust in favour of the tribe as a whole, despite the

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expectations of the people. It is necessary to consider why he did not, for to revert to the real issue, it is patently clear that the award to a few, to the disinheritance of many was demonstrably wrong.

For some reason it had been decided that native land titles under 5000 acres could not be awarded to more than ten persons (section 23 Native Lands Act 1865). It is not certain why this was so. One view is that the land could be more readily alienated if there were no more than ten owners to deal with. Another view is that the provision reflected a prevalent but fallacious colonial opinion, still apparent sometimes, that only chiefs counted in Maori society and that there should never be more than ten of them to a tribal group. Another view is that it was thought undesirable to clog titles with too many names. At this time administrators favoured what was known as 'the Torrens system' of land recording (a system now fully integrated into our current land law). The early forerunner to the Torrens system, the Land Registry Act 1860, had recently been introduced to provide for the orderly registration of titles, and it may have been thought then, as it is thought today, that too many owners on titles would make the system unworkable.

In any event the 'ten only rule' was established from the beginning. The principle of it survives today. The District Land Registrar may still retain the title to Maori land on the provisional register if there are more than ten owners, and different rules apply to the alienation of such lands (see sections 165(2) and 215 Maori Affairs Act 1953).

The 'ten only rule' was a major cause of grievance to Maori especially since it was applied even to blocks measured in miles (see Haultain to McLean, Report 18 July 1871, AJHR 1871 A-2A p4). It led to the alienation of the majority from their lands and to substantial sales for the enrichment of a privileged minority (see for example, the sale of the 250,000 acre Umutarora Block of the Rangitane tribe in 1870 described by Sinclair, 1981:1).

To ameliorate the effect of that rule the Court was empowered, if the claimants agreed, to divide the land into several allotments and award each lot to not more than ten (section 24 Native Lands Act 1865). In practice the claimants did not agree. It admitted more people to the title but fragmented the tribal estate, and above all, added substantially to the survey costs the Maori claimants were obliged to bear, even assuming they could pay.

As earlier described, section 17 of the Native Lands Act 1867 empowered the Court to vest title in not more than ten as tribal representatives provided that the Court had to maintain in a separate record the names of each and every member of the tribe, and provided it was specified on the title, that the grant was issued under that section.

Thus by 1867 there were four options. They must be kept firmly in mind

- (a) To award the whole block to not more than ten as absolute owners—section 23 Native Lands Act 1865
- (b) To divide the block into lots and award each allotment to not more than ten—section 24 Native Lands Act 1865, or

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- (c) To award the block to not more than ten, as tribal representatives, the names of each and every member of the tribe being then recorded in a separate record of the Court and the title noting that the grant was pursuant to the enabling section—section 17 Native Lands Act 1867.
- (d) To award the block to a tribe, but since that applied only to blocks in excess of 5000 acres, it has no application here.

We now examine the steps taken by the Court to dispose of claims, for it is necessary to know the procedures to understand what happened at Orakei.

As a first step the Court determined the tribe or hapu entitled on evidence as to actual occupation or other customary entitlement as at 1840. As a second step the Court determined the persons in whom the land, or various divisions of it, would be vested. The method chosen was to call upon the claimant group, or the successful group in the case of a contest, to submit its own list of names. At this point the advice of the Court was important. Would it alert those present to the three options? There is evidence that in many cases the Court did not and sometimes claimants were directed to settle a list of names not exceeding ten as though that were the only option (AJHR 1871, A-2A). If there was a dispute over names the parties were urged to settle the matter amongst themselves. Settlements happened in most cases. The result is Maori Land Court records contain a wealth of data on the determination of tribal entitlement, but very little on how individual entitlement was settled.

Difficulties have arisen from the failure of the Court to determine who should take title or to even record the basis or reasons for any selection or settlement. Subsequent allegations that the wrong people made the choice, that key people were not at the discussion, or the like, can be neither proved nor disproved. Original owners remain unsucceeded to this day, because they cannot be identified and no-one knows who put that name in. (In one case it was unsuccessfully argued that a person submitted six names for a family, each being an alias for himself. To this day five 'names' remain unsucceeded to.)

In the Orakei case there are problems in determining who was put in for which family, whether there was an exchange deal, and whether it was intended to include a father and son for a full share each.

It is also necessary to consider the principal actors upon the stage of the Court. They too have a bearing on the operation of the first laws.

Chief Judge Fenton was the first appointee to the Native Land Court. He settled its rules and procedures and gave the imprint that was to survive long after him. He was a political person. Fenton began his career in the Registry of Deeds writing numerous memoranda to politicians and Government officials on Maori affairs and Maori lands. He was appointed Resident Magistrate to a native area in 1853, was briefly Native Secretary in 1856, and shortly after Resident Magistrate again. In that capacity Fenton made two circuits into Waikato in 1857 and 1858, on the appointment of Governor Gore Browne and under a policy of extending British law to Maori districts. It was seen as an attempt to undermine tribal land titles and customary law and Fenton

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merely stirred up opposition, finally goading the Waikato tribes into the selection of a Maori King as an answer to Fenton's magistracy and all that it implied (see Sorrenson. 1963:41–53). On McLean's advice Fenton was withdrawn but while still a Magistrate and later as an assistant law officer, Fenton drafted and promoted laws for the Maori.

Fenton held strong views on what native laws should be. They led him into lasting conflicts with Government officials (notably Native Secretary McLean) and Governments of the day. In 1865 he was appointed the first Chief Judge of the Native Land Court and of the Compensation Court set up to apportion confiscated lands. He was to administer Acts he had helped draft. For a year, 1869 to 1870, Fenton was Chief Judge and a member of the Legislative Council at the same time and in the latter capacity, introduced the Native Reserves Bill. As Chief Judge he submitted draft bills and law reform suggestions to Native Ministers and Government Members. As both Chief Judge and a Crown agent he promoted the division of Maori lands for European township settlements. On his retirement he acquired, divided and settled Ngati Whakaue lands to create the township of Rotorua.

Fenton has been described as “ambitious, conceited and fractious”. A contemporary politician warned that Fenton “may neutralise the best Act that can be passed if it does not originate in his brain.” A brother judge asserted that the Native Land Court tended to ask “not what is right or is constitutional but what does the Chief Judge say” and a Native Court Assessor complained “it would appear, when a block was going through the Native Land Court, as if the land was owned by the Court itself and not by the litigants” (see Ward, 1974:94,181,212–7,251–5).

This background has particular significance for the Chief Judge was the author of the 1865 Act, and following his appointment to the Bench, an opponent of any amendment. Ward (*supra*) considers Chief Judge Fenton intentionally negated the operation of the tribal representation provision in section 17 of the 1867 Amendment. It amended the Act the Chief Judge had drafted. He favoured the law as it was awarding large blocks, undivided, to ten persons only as absolute owners. Ward writes

. . . Fenton arbitrarily adopted the practice of awarding whole blocks, unsubdivided, to ten of the principal owners. Moreover they were named as absolute owners, not as trustees. The chiefs naturally welcomed this process and traditional values inhibited rank-and-file kinsmen at this time from pressing themselves forward to be added to the list. Maori communities were also anxious to avoid the expenses of subdivision surveys. They did not realise that the ten nominated owners would soon be drawn into mortgaging or selling the patrimony of their hapu who were without legal means of redress . . . (1974:213)

Reform in Maori land law was frustrated to a considerable extent by the wilfulness and self-aggrandisement of Chief Judge Fenton. There was truth in Fenton's contention that the prestige and acceptability of the Court depended upon its being entirely independent of Governments. But Fenton extended this to independence from Parliament also, to the extent of deliberately trying to frustrate legislation. He not only objected to the power accorded to the Government by the 1866 Act to postpone Court sittings if they threatened the

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peace of a district; he objected to the whole attempt by Richmond in 1866 and 1867 to place legislative restrictions on alienation . . . (1974:216)

There were claims from Maori people that they never knew of section 17 and that the Court led them to believe they could do no more than submit ten names for their tribal estates. Some of those complaints are collated in the Appendix to Return Relative to the Working of the Native Land Acts, AJHR 1871, A-2A, together with the opinion of the Chief Judge (at p 40) as given in open Court at Auckland on 7 April 1868. Ward writes

As for section 17 of the 1867 Act, requiring all owners to be listed on the Court records, Fenton claimed that he had a 'discretion' whether or not to apply it and continued to issue Certificates of Title to ten owners as if they were the only claimants. He made no effort to explain section 17 to Maori applicants and as late as 1871 Hawkes Bay hapu did not even know of its existence. In Parliament Richmond reported that "the Government, finding themselves foiled by the unwillingness of Mr Fenton to cooperate with them, had sent hurriedly round to discover cases where the 17th Section had been overleaped by the Court and to obtain declarations of trust on the part of those Natives who had received grants for their tribes". Fenton himself later claimed that when he perceived that the ten nominated owners were alienating the patrimony of their hapu, he urged upon the Government the necessity of getting trust deeds executed. This was a bare faced lie. He had known of the excessive alienations in 1867 and opposed the introduction of restrictions; he continued to foster the ten-owner system, publicly expounding the view that the principal men of each hapu should be established in property and allowed to live as gentry, while the remainder were compelled to labour for a living; and in 1880 he was still resisting the argument that the ten owners should be regarded as trustees, stating: "The whole theory of the Native Lands Act, when the Court was created in 1862, was the putting to an end to Maori communal ownership. To recognise the kind of agency contended for would be to build up communal ownership, and would tend to perpetuate the evil instead of removing it." (Ward, 1974:213–216).

Dr D V Williams referred us to a letter from Chief Judge Fenton given to supplement his evidence to a Commission of Inquiry on Native Lands in 1891. By then the Chief Judge had been retired for several years. He wrote

I think the practice originated in this way: At the period of the early Courts there was a great demand for land, and most frequently land was purchased by a European paying the cost of the survey. The clause limiting the number of owners in the certificate to ten compelled the Court to refuse titles until the estates were reduced by division to ten. By arrangement out of Court ten names were selected, and described to the Court as the owners, the object being to avoid the expense of divisional surveys . . . The natives fell rapidly into this system (Correspondence, AJHR 189, G-1, p 86).

In 1891 the former Chief Judge was still defending his use of the 'ten only' rule to create absolute owners, but by then as a matter of convenience and practice and with the insistence that the Court was compelled to follow the course it did. But earlier, in his response to the complaints of 1868, the Chief Judge was clearly opposed to the use of the section 17 option for policy reasons and held to the opinion that the Court was not obliged to use it. The Chief Judge's response was written and minuted in a Court Minute Book at Auckland on 7 April 1868. That was the very time the Orakei case was before him, and as we shall see, the complaints had done nothing to cause a change of heart.



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So it is to Orakei we now return to consider the decision given there in 1869.  
For Ngati Whatua it was the beginning of the end.



## Chapter 5

# The Clouds Before the Storm 1869–1912

### 5.1 The Orakei Decision

Surrounded by water on three sides, and with a ridge separating it from Mission Bay on the fourth, Orakei was a distinctive headland separated from the rest of the Auckland isthmus. It had potential as a tribal haven for though it was readily reached by boat or the steamer that ran from town to the Orakei wharf, it was in every aspect, or at least until Hobson Bay was bridged, a separate entity, with water access only from Auckland. The Orakei Bridge, built in 1862, made little difference to the block. The road skirted the southern perimeter, provided no access to Okahu village, and was built to service other areas. A bowl of hills secluded the basin fronting Okahu Bay on the Waitemata Harbour and it was there the people lived, in Okahu papakainga or village on the beach, for in those days people did not live on farm allotments but moved out each day to tend the outlying cultivations. The only noticeable differences were changes in building styles and a blending of animal husbandry with traditional horticulture. All that was needed, in Te Kawau's view, was 'a deed to make it safe'.

Te Kawau had sought such a deed for many years and the Native Lands Act 1862 seemed to make one possible. But it also opened the way for rival claimants backed by European purchasers. In May 1863 Hetaraka Takapuna of Ngati Paoa claimed Orakei. He maintained Ngati Whatua were squatting on it and had made a secret agreement to sell to a European (*Southern Cross*, 23 May 1863). Representatives of Ngati Whatua replied that it was Takapuna who was trying to sell the land (*New Zealander*, 6 June 1863). The dispute bubbled on, with the rival claimants trying to occupy Orakei. In September 1864, T S George, a lawyer representing Takapuna, suggested the only way to solve the dispute was to proclaim Orakei a district under the Native Lands Act 'which would settle this case once and for ever' (*Southern Cross*, 13 September 1864). However, the Act was repealed and replaced by the Native Land Acts 1865. It was not until November 1866 that a case was begun before Judge Monro, under the new Act. Both sides were represented by Auckland lawyers (*Southern Cross*, 3 November 1866). The case was to drag on for two years. Chief Judge Fenton took over the case and delivered judgment on 8 December 1866—in favour of Ngati Whatua who, he said, had beneficially occupied the land in and since 1840. Fenton went on to make a revealing and prophetic observation

That in this case interests to the amount of tens of thousands of pounds are involved, and, moreover, that principles are concerned which will tend either to settlement

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or to the continuous confusion of titles involving enormous values (*Southern Cross*, 10 December 1866).

Takapuna refused to accept the judgment and two years later the case was reheard. No fewer than ten groups then made rival claims, for this was the last of the Auckland Maori lands, and while Te Kawau's claims for Ngati Whatua could not be disputed, there were others who relied on the extended genealogical lines of Maoridom, past fighting and occasional occupations, to seek a share of the block.

On 22 December 1868 the Court found in favour of the three subtribes of Ngati Whatua—Te Taou, Ngaoho and Te Uringutu. It was a lengthy decision famous for its recitation of the long history of the area but not remarkable for its finding except to say had it been otherwise, Auckland would have been sold by the wrong people!

What happened after that is not so famous. The Court adjourned to enable three lawyers representing three factions of the successful Ngati Whatua to meet with the people and seek an arrangement as to the actual persons to take title. A meeting was held in 1869. We do not know who attended or what was said for no record of the meeting was kept but from subsequent accounts it appears that Te Kawau was not there. He was thought to be over 90 years old, and was to die that November.

In the recent past, Te Kawau had sent his nephew, Paora Tuhaere, to be his agent in the Native Land Court hearings at Kaipara and Helensville. Tuhaere was present at this meeting, but although he was a leader in the affairs of the people, and had enjoyed recognition as an authoritative spokesman amongst European officials, he was not then recognised as paramount at Okahu or as 'heir apparent' to Te Kawau. Eventually on 9 February 1869 the lawyers advised the Court a settlement had been reached. The Court resumed and a list of names was handed in, one lawyer, for Te Kawau and others putting in seven names, another for Wiremu Watene and others submitting four, and the third representing Arama Te Karaka putting in one, a total of twelve.

Immediately there were objections that people were left out. Tuhaere was one of the objectors. He was opposed to the list for although his own name was on it, too many others were not. As was usual, the Judge's notes or minutes did not record the full debate. It could well be that Tuhaere was aware of the section 17 option and argued it. His knowledge of the 1865 and 1867 laws in the award of titles is apparent in his statements to the first Maori Parliament on 1879, of which he was chairman (AJHR 1879, G-8 at p17). The Court would also have known of Tuhaere's status amongst Government officials, and that he had represented Te Kawau in the past, but still Tuhaere's objection was not upheld and does not seem to have been given much thought. The Chief Judge dealt briefly with each objection and dismissed them all.

The Court was still left with a problem. As a matter of law no more than ten could go onto a title. It was open to the Court to direct a further meeting and insist that the list be cut to ten, but in view of the number of objections, and especially that of Tuhaere, that may have seemed unwise for the people might insist on extending the list further and the whole settlement could fall

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apart. The lawyers were ready with an answer. To avoid further argument they proposed that only one person go onto the title, the paramount elder Te Kawau, to hold the land on trust for all twelve.

The Court chose that expedient and minuted as follows

Ordered that a certificate of title issue to Apihai Te Kawau and that the names of the following persons appear in the grant as cest qui [sic] trusts and that they be tenants in common and not joint tenants. . . . (there followed the names of Apihai Te Kawau and the others).

As a matter of law the order as minuted had then to be drawn and sealed, and because the sealed order enables broad intentions to be spelt out with particularity, the sealed order prevails over the minute. The order as sealed simply vested the land in Te Kawau upon trust for himself and the others. No mention was made of cestui que trusts or tenants in common and not twelve but now thirteen names appeared as beneficiaries. This is because one name on the list, Wiremu Watene Ngawaka Tautari, was rendered as Wiremu Watene and Ngawaka Tautari in the sealed order. There are therefore thirteen beneficiaries, at law, and not twelve as suggested in the minute.

The next step was that the order was referred to Government for a Crown Grant to issue, and from the grant, a Certificate of Title was drawn. The Crown grant did not issue until 1873, but it did issue, and both the grant and the title followed the form of the sealed order.

## 5.2 Analysis of the 1869 Decision

It is pertinent to analyse the 1869 decision in view of the later debate and the conflicting conclusions of later Courts and Commissions. We have little to go on, for an historical account, for we are bound to rely on the Courts minutes and sealed order. The minutes are merely the Judge's own notes and are of necessity only brief summations of what to the Court seemed important to record. In adjourning the matter, for a settlement to be reached, we are not informed whether the Court alerted the people to the various options. That seems unlikely, given the account of the personal preferences of the Chief Judge in para 4.7.

We cannot say for sure whether Tuhaere raised the option in section 17. It seems he may well have done but that the Court—and possibly also the lawyers—were minded to have their own way and to do what they thought easiest or best. Although he had acquired a grasp of many laws, Tuhaere, like most laypersons, Maori or European, could not have matched the lawyers use of phrases like 'cestui que trusts', 'tenants in common' and 'joint tenants' to describe the proposed arrangement. The word 'trust' was probably all he noticed.

Irrespective of what was said or intended we know the third option was not used. Section 17 of the 1867 Act required that the section be cited in the order, grant and title. We have examined the sealed order. It does not cite section 17 but instead purports to be made under the 1865 Act. The grant and title do not cite section 17 either but, using a printed form, refer generally to 'the Native Lands Acts'.

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Section 17 also required the compilation of a list of each and every member of the tribe to be recorded separately on a memorial entered in the records of the Court. We know for a fact that such a memorial was not entered. Even if that had been intended, although on the face of the record it was not, the thirteen names did not comprise the total membership of Ngati Whatua. We know there were over a hundred. There are contemporary references to 150 living at Orakei village on the plateau, as mentioned earlier, while the 'majority' were said to live at Okahu in the valley. No women were included on the list but we can safely assume that women were included in the tribe. Forty years later Otene Paora sought to upset the 1869 decision upon the grounds, amongst others, that women had been excluded and that tribal membership was well over one hundred.

We know the second option was not chosen, to divide and apportion the land and so we are left with the first. It seems clear to us that the first option of vesting the whole estate in absolute owners, was the option chosen. The trust proposal was simply a device to circumvent the requirement, which incidentally was common to all three options, that no more than ten could take the legal title. The expedient, in legal language, gave to Te Kawau (alone) a legal estate vested in possession, and to the others, a beneficial estate. It did not create a tribal trust. It made it perfectly clear that the thirteen were absolutely beneficially entitled.

Did the people understand this? We know there was a meeting. We know that afterwards many of the people presumed that the thirteen were trustees only. They acted on that presumption—and that is not surprising for it is inconceivable to us that so many would voluntarily have disclaimed all interest in their tribal homeland. It seems natural to us that various groups within the tribe would have wanted their own representative and all under the cloak of their one leader.

We do not know the true basis for the settlement. In later evidence Wiremu Watene thought five names were put in for Te Taou, eight for Ngaoho and none for Te Uringutu. This does not tie in with the submission of seven, four and one names.

We cannot explain why Wiremu Watene Ngawaka Tautari appears as one name on the lists and two names on the order. Wiremu Watene was a son of Ngawaka Tautari aged only 20 years. It explains why he was still alive in 1930 long after the other grantees had died. It seems unusual that a father and son were both put in to give the son a double entitlement later and it raises the question of whether that was intended.

It was later claimed in a petition to Parliament that some were left out because they took bigger shares in Kaipara. Others hotly disputed that. We can only say that if that were so, it ought not to have happened because there was no provision to effectuate an exchange of interests on an investigation of title. It had properly to be the subject of a separate and subsequent application for exchange and a separate determination by the Court. There is also no evidence that some took bigger shares in Kaipara.

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Later, Wiremu Watene implied Tuhaere was trying to keep some out but that claim was made in 1930, sixty years after the event. There is some evidence, although also much later in time, of an objection to the inclusion of one, Arama Te Matuku, but Arama took part in the Wars against the Crown, and it would have been well known to the likes of Tuhaere that on the division of lands at that time any award to a 'rebel' was to be confiscated to the Crown. At the hearing itself, it was in fact Tuhaere who urged the inclusion of more names because some of his people had been left out, thereby proposing a diminution in his own share.

But most significantly of all, an important chief, Uruamo was left out. At Orakei Uruamo may have ranked equally with Te Kawau. He was one of the first two chiefs to return to Okahu after the Ngapuhi raids, to uphold the people's entitlement, while Te Kawau went to Mangere where he remained for some time. Uruamo himself died shortly before 1869 but none of his children was 'put in'. It was usual in Maoridom, that a 'successor' was not named when a leader died, for only time could prove who was best equipped to fill the vacancy.

Some of the descendants of Uruamo, like Otene Paora, later came in as owners as a result of intermarriage but for lesser entitlements than they would ordinarily have received and the exclusion of the Uruamo line was to cause considerable consternation in later years.

It seems more likely the main argument would have centred on the extent of representation for the three sub-tribal groups, for that debate was to continue for many years. Native Minister Bryce, speaking in the House of Representatives in 1882 on the Orakei Native Reserve Bill, gives credence to that view. He thought Te Kawau was chosen as trustee because he was the Chief "descended from both sections of Native claimants—namely, the conquerors and the conquered" (NZPD 1882:). He also went on to claim that the thirteen were not meant to be owners. He claimed to have been informed officially by Te Kawau of a "distinct understanding" that when Te Kawau died the case was to come before the Court again for final adjudication. Mr Sheehan, who was one of the lawyers in the case, was also in the House at that time. He denied that any such arrangement was ever put to the Court (though that is not to say that no such arrangement was put to the meeting of the people).

The main problem is that the Court neither determined nor recorded the basis of the settlement. Had it done so the picture would be much clearer. The Court was an inquisitorial titles Court and we think it ought to have determined the matter and recorded its reasoning.

Some play has been made of the fact that the Crown grant did not issue to Te Kawau until 1873, well after his death. At law no significance attaches to that. It is usual that survey delays the drafting of orders and grants and the law provides that grants, once issued, relate back to the date of the order as minuted. The law goes further to provide that Native Land Court orders and Crown grants are not invalidated by an intervening death (see now section 35 Maori Affairs Act 1953).

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In any event we conclude that while many if not all of the people thought the original thirteen were representatives only, the Court ensured that they were absolutely entitled to the exclusion of all others. But no-one had real cause to be concerned at that time. We have yet to mention that the Chief Judge did that which Ward considers he did rarely, he made the land inalienable, that is to say, it could be neither sold nor leased.

The effect of the restriction on alienation was to make the owners mere paper owners unless they were minded to physically remove the majority from their homes and cultivations, a most unlikely course. The decision to exercise the Court's authority to impose such a restriction is not remarkable either, despite the Chief Judge's usual reluctance to exercise that power, for Orakei was all that the people had left, section 11 of the 1867 Amendment cast a duty on the Court to consider the need for such a provision in such cases and Te Kawau had lobbied for many years for such an arrangement.

In this claim great reliance was placed on the decision of the Court to make the land inalienable and to decry the resolve of the Government to remove all restrictions on alienation in 1909. In fact the Crown had no policy favouring reservations in any manner akin to those secured for North American Indians. Restrictions on alienation were regarded as temporary aberrations to maintain a status quo until things had settled down. They could be removed by the Court or the Crown at any time! Orders in Council were regularly used to remove existing restrictions on particular blocks when owners wished to sell and the Crown wished to buy. The 1909 Act merely opened Maori lands to all comers, and while it removed old restrictions it also enabled new restrictions to be made.

The same comment can be made of Native Reserves, those areas reserved for tribes within early deeds of sale. These Reserves were supposed to be inalienable but were in fact alienated through particular or general legislation and then by the Crown as their trustee rather than the owners, if that seemed necessary or desirable at the time. This was particularly so if the Reserves were in town areas. Ward (1974:215) refers to the Pipitea and Te Aro Pa Reserves in Wellington and "the continued hostility of the settlers to the Maori communities in their midst". He refers to "the unusual steps" taken by the Native Office in 1886 to explain the sale restrictions in the law in a press release to local papers as follows

It is not meant to restrict permanently the alienation of any native land, but only to retard the alienation of some small portion till the Maori race have taken their ultimate position in the colony, and can be relied on to provide for themselves as the European does.

But at least Orakei was on a headland with some geographic severance from the rest of Auckland. And Apihai Te Kawau must have died happy. He had the authority for a Deed and a restriction on alienation that seemed to make the land safe. With symbolic significance he died in the year of the Court's decision in November 1869. It was certainly the end of an era. The old order passed yielding place to one that was entirely new. And Te Kawau's mantle passed to his nephew Tuhaere.



### 5.3 Paora Tuhaere and The Orakei Reserve

In his administration of the Orakei lands the ageing Paora Tuhaere demonstrated clearly his place in two worlds. The remarkable transition of Maori society is summed up in this one man. He appeared first in this story of Orakei as the tattooed warrior that he was, and a tribal mediator with Potatau Te Wherowhero and Hone Heke in 1846, seeking alliances against a pending attack on Auckland, and promoting the safety of the new town on his lands. He figured again in this story in the hearings before Judge Fenton, when Te Kawau was dying, seeking the admission of more names to the Orakei title. He was to bring his enormous experience to bear on both the maintenance of the customary tribal principle for Orakei, and the attempted propulsion of Orakei into the cash economy of the modern world by seeking to lease sections to settlers to provide an endowment for his people. Had he lived longer he may have succeeded for he was on the verge of success when he died.

Tuhaere was also a national figure in both European and Maori political affairs. He was a loyal peacemaker who took up both the assertion of Maori demands and the challenge of European settlement. His obituary in the *New Zealand Herald* described him as a good friend to the Europeans, loyal to the Crown during the wars, an honest and straight-forward adviser to Governments and a conciliator between races in times of trouble. He was an adviser to Governments for over thirty years. He was involved not only in the worship of the Anglican Church but its parochial and synodical management. Governor Gore Browne appointed him to chair the Kohimarama conference in 1860, the nearest gathering to a Government sponsored Maori Parliament in New Zealand history. In 1869 Tuhaere tried to reconvene the Kohimarama Conference (Ward, 1974: 272). Ten years later he erected at Orakei a large meeting hall named Kohimarama in commemoration of the 1860 conference. There he conducted further major tribal meetings, specifically called Maori Parliaments, in 1879, 1880 and 1889 (the proceedings of the first two gatherings have been officially recorded, Kohimarama Conference AJHR, 1860 E-9, First Maori Parliament AJHR Sess II 1879 G-8).

Tuhaere was a mature man of considerable experience when his uncle Te Kawau died. From the transcript of the proceedings of the 1879 Orakei Maori Parliament we learn something of his thinking. He was both pragmatist and visionary wanting tribal ownership of lands but aware that neither Government nor the Court favoured it, opposed to the sale of lands but alert to the reality that as the Crown could not be restrained from buying he could only urge his people not to sell. He knew that restrictions on the alienation of prized blocks were continually being removed either by the Crown or the Court whenever it suited the Crown to buy. Tuhaere realised further the Maori were now living on European terms, liable for taxes and rates and subjected to loans but in the case of Ngati Whatua at Orakei, with no lands that ought properly to be sold to provide ready cash. He urged the tribes to hold the Government to the terms of the Treaty of Waitangi while planning the management of the remaining lands by Maori themselves to provide an economic base for the

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people as a whole. All this was well before Carroll and later Ngata were to espouse the same policies.

Tuhaere had no love for the Native Land Court. Perhaps still smarting from his treatment before Chief Judge Fenton, when tribal ownership was denied, he addressed the chiefs assembled at Orakei in 1879, with reference to Maori lands generally,

It was the Native Land Court that took away the authority over the land from the owners and put the authority in a Crown grant . . . if the land had remained under the old authority of your fathers there would have been no Crown grants, and your lands would not have been wasted.

Tuhaere moved quickly after the 1869 decision to prevent the individualisation of the Orakei title and the disintegration of the tribe as had happened elsewhere. The Orakei decision was promulgated in February. In March it was arranged that Te Kawau make a will and in it, Tuhaere became his trustee and sole beneficiary. Te Kawau died in November. From then, Tuhaere took charge of the Orakei land preventing its dismemberment by reminding his people to avoid the Court.

It was soon apparent however that no-one could prevent individuals from applying to the Court and eventually Tuhaere and six others filed Petition 153 to the House of Representatives for a Bill to hold the Orakei Estate intact and turn it into a tribal endowment. With the assistance of Dr Pollen, Legislative Councillor from Auckland, a private bill was drafted and eventually became law.

The Orakei Native Reserve Act 1882 enabled Paora, with the consent of the thirteen others, to lease any part of the Orakei block for terms up to 42 years. In the claimant's submissions to us there was criticism of this Act because it was a first inroad into the principle of inalienability. Given the politics of the time, we think it rather showed a shrewd and informed move by an astute Maori leader. For Tuhaere knew only too well the restriction on alienation was not inviolate. It was only a matter of time before it would go. By removing it now, but for leasing not sales and by securing not a deed but a statute to govern Orakei, Paora was setting in place a system for the allocation of the land through the collective decisions of the owner group as a whole, ousting at the same time the alternative control of the Native Land Court, the vagaries of legislative amendments to the main Act, and the facility of Orders in Council to remove restrictions on alienation entirely. Given the conflict between Maori aspirations and the politics of the day, the Orakei Act was a brilliant plan, conceived of great cunning and born of a need to change.

The Act was limited in the authority that it gave but was pregnant with potential. Had Tuhaere sought more at that time, a tribal trust, he would have made no progress for other tribes seeking that had been turned away. It was called the Orakei Native Reserve Act but, as Edwards J was to note in *Solicitor-General v Tokerau District Maori Land Board* (referred to later), it was not a Native Reserve. Likely it was described that way because that is how Tuhaere saw it and hoped it would in law become. The Act refers to thirteen owners but effectively made them only managers. The Act, intro-

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duced on the basis that it was necessary to enable the land to be leased, and rationalised on a claim (well merited) that it took too long to achieve results through Native Land Court proceedings, was really intent on securing the structure of a Native Reserve but under Maori management.

Tuhaere was intent on going much further. With the income from short term grazing leases he embarked on an ambitious plan for residential development on long term leases to capitalise on Auckland's growth, highlighted by a spectacular land boom between 1878 and 1886, and to provide an endowment for the tribe. At that time local authorities and the Anglican Church had similar schemes on nearby lands to endow their own enterprises. Tuhaere surveyed one acre building sections on the perimeter of the block at what is now Bastion Point, capitalising on magnificent harbour views. Access was to be by water with roads leading from a new wharf near Bastion rock. At the same time he arranged with the Hon Dr Pollen to promote a new Orakei Native Reserves Bill. This Bill as introduced to the House in 1887, proposed a permanent trusteeship, new trustees to be appointed on Tuhaere's death, and authority for the trustees to subdivide land (after reserving sufficient areas for tribal dwellings and cultivations), to lease house sections to Europeans for up to sixty years, to raise loans (on the security of rents) and to develop roads, wharfs and approaches. None of the land, however, could be sold.

During this initial period of his planning no-one made application to the Court, by way of succession, partition or otherwise but through the action of the Crown, Tuhaere's plans began to fall apart. The first application for succession came in 1882, then five in 1883 at which point Paora himself succeeded to Te Kawau's interest. (The latter succession had the unfortunate effect of excluding Te Kawau's own children but, in 1896, after Tuhaere's death, the succession was overturned by the Native Appellate Court, restoring Te Kawau's issue to the ownership list on the ground that the block was inalienable and could not therefore have been alienated by Will). But the major attack came in 1886 when, as seen at para 4.4, the Crown took the Bastion Point area for defence purposes, destroying the subdivisional plans.

Tuhaere quickly applied for compensation, exposing his proposals to view. The Crown responded by seeking an amendment to Tuhaere's Bill, to block compensation by claiming the land as an exchange for the gift at Takaparawha. In counter reaction Tuhaere withdrew his Bill altogether and required that compensation be paid. Compensation awarded in 1890 was eventually applied to survey and other costs incurred. Tuhaere died in 1892, his plans unfulfilled.

Had Tuhaere lived longer he may have achieved what seems to have been the ultimate objective, the management of the Orakei block through a representative committee for the benefit of the people as a whole, and under a separate and special statutory authority. The 1882 Act was a good attempt. There was not another like it until 1978.

Tuhaere had adhered to the tribal principle. Income was applied not to individuals but to the benefit of the people as a whole. Reflecting back on this time, while giving evidence before the Native Affairs Committee of the House

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of Representatives in 1912, Otene Paora described how the people cultivated communally and how profits were applied to general purposes and tribal gatherings. There was at that time no cause for anxiety. But sixteen succession orders had been made by 1892, a new generation was coming onto the titles, and even before Tuhaere died, the first application by owners to partition 'their' shares had been filed, in 1891. The people were returning to the Native Land Court, following the precedence of nearly all other 'owners' in Maoridom, while those adhering to the tribal principle were increasingly concerned that Crown Grants, the 'ten only rule' and even special statutes gave the tribes no protection at all.

#### 5.4 Renata Uruamo and Equitable Owners

With Tuhaere ailing, and the people returning to the Native Land Court, Renata Uruamo came onto the scene in another attempt to block the individualisation of the Orakei title and maintain the tribal principle that Tuhaere had sought to uphold. He relied not on the 1882 Orakei Act, but other legislation the origin of which is now explained.

Many throughout the country who attended the early Native Land Court expected the ten or fewer persons appointed to titles took in a representative capacity only. They learnt later to their chagrin and surprise, that that was not so. Sometimes those who attended knew the position very well. Some Chiefs favoured the ten owner system as they were "downright extravagant, living in flashy imitation of the settler gentry" or needing "cash to provide traditional feasting and hospitality for the large and frequent political meetings which developed through the 19th century" (Ward 1974:213). Te Kooti named such chiefs "the money rangatira." They were significant phenomena from 1865 to 1910.

There were numerous complaints of chiefs taking the tribal lands for themselves. Matters came to a head in Hawkes Bay when a chief persuaded his people not to submit their claims to the Court but to allow only his own name to go onto the title. He would, he said, hold the land unsold, as an inheritance for the tribe. The chief duly obtained sole ownership of thousands of acres but then dealt with the land as his own. Then others of the tribe sought declarations in the Supreme Court that the chief held as a trustee only, but without success. The matter went to the Court of Appeal. It was held the certificate was conclusive and the chief must be taken to be the absolute owner (*Ani Kanara v Mair* (1886) NZLR 216).

It is of passing interest to note the opinion of P G McHugh that *Ani Kanara v Mair*, heard by Chief Justice Prendergast, was a direct application of the Chief Justice's earlier position, in *Wi Parata v Bishop of Wellington* (referred to in para 4.6) where the Treaty was declared "a simple nullity". McHugh (1987:39) refers to a line of decisions of the Privy Council from 1921, on cases arising from Africa, which, though subsequent to *Ani Kanara*, held clearly that a Crown grant of land did not extinguish the native title at all. Indeed the presumption was the other way. A native holding land under grant from the Crown was presumed to hold on behalf of his family according to customary

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law. In New Zealand it was not until 1982 that a High Court felt able to apply customary understandings to a case involving the disposition of native lands, albeit in family protection (*Rogers v Rogers and Tatana*, 18.11.82 High Court, Whangarei, A34/81, Barker J).

What next happened is explained by Sir John Salmond (Salmond, 1909,1931: Vol 6,87).

In 1886 the Native Equitable Owners Act was passed, to enable the Native Land Court to make enquiry as to whether the persons named as owners in former certificates of title and memorials of ownership were entitled beneficially or were merely trustees for a larger number of native owners, and to include in the title the persons so found to be entitled. The limitation imposed by the earlier Acts on the number of names that could be inserted in a certificate of title had led to the practise of inserting a small number of nominal owners on behalf of the rest, instead of the full number beneficially entitled (Salmond 1931:87).

In 1891 Renata Uruamo of Orakei applied under the 1886 Act for an order that the Orakei land was intended for the original thirteen as trustees only. The matter did not proceed to a substantive hearing. Indeed, Renata was not even present or represented in Court when the then Chief Judge dismissed the case minuting

I see an order for a certificate of title was issued on 10 February 1869 to natives so that the case clearly does not come under the Act of 1886. Upon the certificate a Crown Grant was to issue to Apihai Te Kawau, on trust for several other natives dated 8 July 1873; this also shows that the case does not come under the Native Equitable Owners Act 1886—application dismissed (4 Auckland Minute Book 66).

It is difficult to know what to make of this. It may be the Chief Judge thought

- the 1886 Act was to enable the Court to review those cases where ten or fewer owners were on the title as absolute owners
- but in this case the title was held by one person *as trustee* (for thirteen absolutely beneficially entitled) and therefore the 1886 Act could not apply.

If the Chief Judge thought that, he must have presumed the ‘Fenton’ order was made under section 17. We consider it was not, for reasons given earlier. Either way

- (a) the question of whether section 17 was in fact used was important and needed to be argued, and
- (b) it was also open to argument that even if Te Kawau were named on the title as a trustee he and others were also named on that title as absolute owners when they too ought to have been only trustees so that the 1886 Act still applied.

Yet the matter was dismissed without anyone being heard.

The result is frankly amazing. The 1886 Act seems to have been specifically designed to remedy the mischief complained of. But dismissed it was, and those who have always maintained the original thirteen were or ought to have been representatives only were denied the legal avenue specifically provided to put the matter to a proper test. It was dismissed so the matter could not be raised again, at least in the Native Land Court.

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Since then the claim that the original thirteen were trustees only, or were meant to be trustees only, has been raised at every opportunity but could be adverted to only as an adjunct to some other proceeding where it was not really in issue. Had the land been vested in all members of the three hapu entitled, then who knows, given the policies of the time the land may still have been lost, but at least Ngati Whatua would have been spared the costly, divisive and many proceedings that were to follow. The opinion that the land ought to have been held for all is the root cause of the debates and divisions spawned in a long list of legal inquiries that came later and of divisions amongst the people that facilitated eventual sales. The question arose, but was never conclusively determined, in three further applications in the Maori Land Court, three Supreme Court hearings and one in the Court of Appeal, at least six Parliamentary petitions, and before one Committee of Inquiry, one Commission of Inquiry, and one Royal Commission of Inquiry until eventually direct confrontation was sought when an Action Group occupied Crown land at Bastion Point in 1977. That unfortunate event and the long history of previous legal wrangles may not have been necessary had the question been directly confronted on Uruamo's application in 1891. But that application was dismissed—and without even a hearing!

To add salt to the wound, the 'principle' in *Ani Kanara* was soon codified into statutory law. The Native Land Act 1894 made it clear that thereafter the Court could not vest title in representatives only, a position which yet survives in Part XV in the current Maori Affairs Act 1953.

The Native Equitable Owners Act 1886 was not the only Act that the legislature found necessary to pass to sort out the muddled state of affairs then pertaining to Maori lands. It is helpful to pause here to consider them.

### 5.5 Legal Confusion and Validations

As has already been seen the basic legislation affecting Maori and their land was that contained in the Native Lands Act 1865.

By 1890 the legislature had passed a bewildering array of Acts in an endeavour to sort out particular problems as they arose or to introduce new lines of policy. They were in two classes—local acts designed for particular problems in particular places, like the Orakei Act, and general acts to sort out problems of general application, such as the Native Equitable Owners Act 1886, or to effectuate particular Government policies. For the 21 years 1865 to 1886, we have counted no fewer than thirty six general Acts affecting native lands, inclusive of lengthy amendments, and a brief survey revealed numerous local Acts too to give at least three Acts per annum on native land matters for nearly one generation! From this legislative profusion five main policies emerge. Maori lands were to be "individualised" by being vested in individuals. They could be divided (partitioned) amongst them. They could be freely alienated to anyone. Only land with particular significance could be made inalienable but any restrictions on alienation could also be removed. Finally, as first provided for in 1870, no alienation was to be valid if it was contrary to equity

and good conscience or if the alienor did not have sufficient other land for his support.

Though those principles may be gleaned from the Parliamentary harvest they were well hidden under piles of straw. Ordinary people, both Maori and European, made illegal transactions contrary to laws they could not, or would not understand. In those circumstances an extraordinary Act came to legalise past illegalities. The preamble to the Native Land (Validation of Titles) Act 1893 recited the confused circumstances, how Europeans held lands under arrangements that could not be perfected through the repeal of laws, because they lacked some statutory approval or were invalidated by “some unlawful act . . . by the Native Land Court or some other Court”, how some Europeans had gained title to lands despite prohibitions and irregularities, how native claimants considered there was “no Court with sufficient jurisdiction for the redress of their grievances”, how native land laws had become so cumbersome, conflicting and contradictory “that obedience to them has been always difficult and sometimes impossible” and how “it would be a scandal that such a state of things should be allowed to continue”.

For all those reasons a Validation Court was established to validate past transactions though ultimately Parliament itself was to legalise irregularities by special Acts. The Act, however, was primarily designed to assist Europeans to gain titles from unlawful transactions and did nothing to assist Maori grievances that, contrary to the Treaty of Waitangi the tribal principle was outside the law too, and that that was the source of their troubles.

The ‘Validation Act’ was therefore one sided but was not without support from some Maori quarters. Maori people at this time were consuming their energies in protracted litigation at distant towns incurring enormous legal and accommodation expenses in an endeavour to hold to their land. The war had simply shifted to the Courts. It was common that the land itself was sold, assuming the case was won, or other land sacrificed if it was not, simply to meet costs. Sir James Carroll, first Maori Minister of the Crown, supported the Act, not because it was right, but because in his view, his people lost even if they won and would do better to absent themselves from the debilitating procedures involved.

But neither the Act nor Sir James’ opinion could give Ngati Whatua any respite. They had no other lands to return to but that at Orakei, and they had either to capitulate to European demands for the use of that land, or secure to the land the traditional preference for customary tenure even if that meant recourse to the Courts must continue. Paora Tuhaere had maintained the Orakei block intact, as a home and resource for his people as a whole. But Tuhaere died in 1892. Renata Uruamo had sought the same thing, but Renata’s attempt was shortlived. Thereafter there was to be no clear leader to pull the people to order and prevent the divisions and sales that were to follow.

## 5.6 Successions and Partitions

When Tuhaere died, one might have expected the election of a replacement trustee to administer the Orakei estate in terms of the Orakei Act 1882,

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allocating lands for the people's use and other lands for leasing. But no replacement trustee was appointed and the Orakei Act fell into obscurity. The original owners were succeeded to, the land was partitioned (divided) amongst them, and owners dealt individually with their allotments, leasing them and using the rents themselves. There were still many who believed the land was meant to be held for the tribe as a whole but their beliefs did not match what was happening on the ground for it was now the turn of the individualists to hold sway.

It is not entirely clear why this happened. One scenario is that it was really the Court that held sway or influenced owners attitudes. In strict law there was not a trust, apart from the trust for the administration (only) of the land in terms of the Orakei Act 1882 (and then for the benefit of the owners, not the tribe), and everything the Court did stressed the owner group were absolutely entitled to the benefit of the land. In the first instance, Renata Uruamo's application to assert tribal ownership had been peremptorily dismissed. In the second, successions were completed, thirty from 1882 to 1910, each on the basis that the deceased was absolutely entitled. Strangely, not all entitled succeeded. An average of only 2.5 persons succeeded each deceased, which is evidence not of low fertility but the concern of the Court at that time to avoid fragmentation of ownership by putting in only some successors. To illustrate the point, only two next of kin were put in to replace Tarena Hengia deceased, in 1883. One of them died without issue so effectively the Court had to redo the succession for a half share, in 1910. By then Judges' opinions had changed and the Court was willing to put in more successors. Not one but eleven next of kin were then found entitled, as at 1883, and their issue resulted in an order to forty successors, despite the fact that representatives only were put in for some lines (9 Auckland MB 189, 191, 4 and 9 August 1910). How many were excluded from other successions is not known but it seems the disinheritance of the many was continued, even in respect of the successors to the original thirteen.

In any event a new generation came onto the title less convinced that they were merely representatives for the tribe and in 1891 the first application was filed to partition the shares of an owner to a separate block. By 1896 there were six applicants and they were by then seeking the apportionment of the whole block, save the village, or papakainga, amongst the various owners.

The several applications were not heard until 1896 because in those days the Chief Surveyor had to prepare an overall scheme for division before partitions could be made. That took time and very nearly resulted in the Crown gaining another foothold in the block (it already held the Battery Reserve). The Chief Surveyor wired the Surveyor-General to report "old Arama Te Matuku (an original owner) who owns a full share worth say 6000 had taken part in the Wars. His interest was liable to be confiscated and the Chief Surveyor wrote "it is worth while setting up the claim on behalf of the Crown". The Surveyor-General disagreed as a Crown Grant had issued in 1873. Any confiscation, in his view should have been done then and the matter was dropped. The partition however went ahead. In 1898 the farm lands were divided by



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the Court into several allotments ranging from 10 to 20 acres and owners were allotted different portions. The papakainga, said to contain 43 acres but later surveyed at 39, was awarded to the owner group as a whole.

Another scenario suggests the people were fighting amongst themselves and it was that which caused the partition. This comes from the Judge's notes of evidence and correspondence on the Court file. It was claimed there was a feud between Taou and Ngaoho factions. There were disputes over who could use what parts and the Court was asked to accept an arrangement to put the Taou cultivations in one place and Ngaoho in another with the papakainga to remain common to all.

The position was put this way in a letter from the lawyer to the Court.

They complain they can do nothing in the way of permanent improvements until they ascertain what portion will be allotted to them. The male owners are behaving very unfairly and are taking possession of the best portions and even parts that have been occupied on behalf of the female. Disputes are constantly arising and nothing satisfactory can be done until a subdivision is made.

In this scenario the Court acted merely to fulfil the wishes of the owners, but speaking later, in 1912 before the Native Affairs Committee of the House of Representatives, Otene Paora painted a different picture, effectively blaming the Court

I would just like to say this: the year before the partition of the land was made we held a large meeting at Christmas-time, and the Orakei rents were the moneys which paid for the expenses of that meeting. We had 40 acres in wheat and 20 acres in potatoes, and all together worked and planted those. This will show, I contend, the position of the land before the partition was made—that it was land held in common by the tribe . . .

It is apparent moreover that if there was an occupational dispute the alternative option was open under the Orakei Act 1882 to define allotments and award occupational licences to various individuals, without Court interference, thus still maintaining corrective ownership, at least amongst the owner group. A third scenario is that it was neither the owners nor the Court that initiated the move to partitions, but rather prospective European lessees. The documentation establishes the Court did not file the application—owners did and indeed, at that time, no one other than an owner could invoke the jurisdiction of the Court. The same documents disclose the apparent intention behind the applications, to divide the lands for the more orderly user by owners themselves. The most telling factor in the Court record however is that following partition, several blocks were promptly leased to Europeans, with a readiness suggestive of prior arrangements. Personal use was not the main objective at all. It transpires, from the subsequent record, that the lawyer who filed the partition applications on behalf of client owners, and who wrote to complain that the partitions were urgent to end disputes amongst the people (disputes that Otene Paora knew not of), acted also for those who eventually gained leases of partitioned areas, and was later to represent the lessees in their endeavours to buy the freehold.

It was well known to Judges of the Native Land Court that behind owner applications for the exercise of the Court's jurisdiction is often an intending

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alienee, a circumstance still prevalent in the Maori Land Court today. At para 4.7 we quoted Chief Judge Fenton's recognition of that practice—" . . . most frequently land was purchased by a European before (an application for title investigation) came into Court . . .". It was common that where prospective lessees felt unable to gain the consent of all owners of a large block, or rival lessees agreed to divide parts between them, owners disposed to alienate were persuaded to seek partitions to allow leases of at least 'their' parts. We think this third scenario the more likely.

The claimants have been most critical of the Court's action in partitioning the block. Even if owners had applied to partition, in their view the Court ought to have refused it. It is claimed the Court destroyed the concept of trusteeship that existed.

We are of the opinion that the Court did negate the effect of the Orakei Act 1882 for although that Act did not provide for a tribal trust, it did provide for overall administration of the whole block, without Court control, by a trustee acting with the consent of the owner group as a whole. The effect of partitioning was to negate that which Parliament had specifically provided for. The Court did know of that Act. In making partition orders it repeated the restriction in the Orakei Act that the farm blocks could not be alienated except by lease for a term not exceeding forty-two years. There was an important difference however. The consent of the owner group as a whole would not be required to any lease but only the consent of those owners of the affected block. (The papakainga remained inalienable for all purposes).

Yet the main problem was not the manner in which the Court effectively negated then varied a statute. The Court destroyed the limited trust in the Orakei Act but it did not destroy the concept of a trust in favour of the tribe as a whole because in law no such trust existed. The partition order was a problem but it was mainly symptomatic of a wider one—the failure of the legislature to provide for tribal ownership. The tribal principle was an essential part of Maori society, and when it was destroyed, Maori society crumbled too.

It was after the partitions that those who considered the original thirteen merely trustees had more cause to be concerned. The partitions involved extensive legal and survey costs. Mortgages were registered against the titles. The people were thrust into a new business economy from which they could not retreat. It was now necessary to lease, even if that were opposed, for costs had now to be paid and instalments met.

Some owners gave long term leases of their farm allotments. To those left out, and some of the 'owner' group too, this was unacceptable. In their view, not only was the land meant to belong to all, but the people as a whole had the right to decide such matters of tribal policy as to whether any part of the 'reserve' should be leased, and if so, who might be admitted to the tribe as lessees.

There was a dispute on this score. The adherents of the tribal principle argued the consent of everyone, or at least the owner group, was required to lease any block. Others denied that was so. They claimed the 1882 Act was

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effectively at an end. All that was needed was confirmation of the leases by the Native Land Court (as then provided for in section 117 of the Native Land Act 1894).

The dispute was put to the test when some owners applied for confirmation. The Court stated a case to the Supreme Court. But the issue stated to the Supreme Court was not whether the consent was needed of all owners to the leasing of each block, but only, whether confirmation was needed by the Native Land Court having regard to the specific provisions of the Orakei Act. The Supreme Court held (*In re Hawke's Leases* (1901) NZLR 34) that the Orakei Act 1882 was a specific Act designed to deal with leasing in the Orakei Reserve. Accordingly the Native Land Act did not apply and confirmation by the Native Land Court was not needed.

The unstated corollaries were that the consent of all owners was needed to each lease in terms of the Orakei Act, and that the partition orders were themselves invalid, for the Court had no business to apply the partition provisions of the Native Land Act while the specific provisions of the Orakei Act applied. That in turn would invalidate the leases. But those matters were not considered by either the owners or the lessees. The owners in various blocks in fact leased them without reference to other owners and neither—as a result of the Supreme Court decision—was confirmation obtained. Accordingly while the Supreme Court upheld the supremacy of the Orakei Act, it was at the same time put down, to fall into disuse. Still, for quite some time Tuhaere's Act had served to protect Orakei from the national demand for more land.

### 5.7 Orakei and the Need for More Land

During the period that Orakei was protected under the Orakei Act 1882 large areas of other Maori lands were sold in the wake of individualisation. As the pace of settlement rapidly increased, so did demands for more land and with equal rapidity policies were introduced to acquire it.

The Orakei block, as has been described, was comparatively insulated from demands to buy. But the protective cloak was removed when the Partition Orders were made, and ironically the initiative to buy the block came from the very Judge who thirty years earlier had declared the land inalienable.

Chief Judge Fenton retired from the Native Land Court in 1882, the year in which Paora's Orakei Act was passed, but he was engaged immediately in other work on behalf of the Crown. The Thermal Springs Districts Act 1881 had deemed it expedient that Rotorua "should be opened to colonisation and made available for settlement" and that a Crown agent should be appointed "to make arrangements for effecting that object".

It was Chief Judge Fenton who secured the job to negotiate with the Rotorua tribes for the establishment of what is now the City of Rotorua. He was responsible for much of the town's layout, design and reserves.

Rotorua was no isolated case. The legislature gave wide powers to the Executive to acquire Maori land for the establishment or extension of towns.

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The Native Townships Act 1895 for example, entitled “An Act to promote the settlement and opening up of the interior of the North Island” acknowledged the exigencies that “in many cases the native title cannot at present be extinguished in the ordinary way of purchase by the Crown, and other difficulties exist by reason whereof the progress of settlement is impeded” and provided for townships to be laid out on Maori land, even without owners’ consents.

It seemed only a matter of time before the Orakei block, bordering Auckland, would be considered for township extensions. That time came in 1898 when Chief Judge Fenton, now sixteen years retired, proposed an arrangement for the Orakei block (and perhaps hoped for further employment). He wrote to Premier Seddon as follows

I see by the papers that the block of land called Orakei has just been cut up by the Native Land Court and awarded to individual natives. This block contains about 600 acres, and is of great value. When I held the first Court upon it many years ago, it was valued at £50,000. I think I am warranted in saying that if let alone it would gradually fall into the hands of speculators, in the form of mortgagees and others (by the way, the power of mortgaging by Maoris ought to be prohibited). I feel strongly that this block in its entirety ought to go to the Government and should be laid out by them as a town, for it is in fact, by its position etc, part of Auckland. I do not profess to understand the Native Lands Acts, as they are at present, but surely there must be some power for the Government to intervene in a case like this.

I take the liberty of calling your attention to the matter and think the chief surveyor, Mr. Muller, would concur in the views I express. I hope you will pardon me for interfering in a matter in which I am not concerned more than any other citizen is.

We would be less inclined to give that pardon. So much for the opinion of some that Fenton intended Orakei to be inalienable for all time! That option was never seriously regarded. Te Kawau’s plea had carried no weight. It was clearly open to the former Native Land Court Chief Judge, in 1898, to recognise a greater need to make Orakei “safe”, for if there has been a danger that the land would fall into the hands of speculators in 1869, then how much greater was the need, in 1898, to secure it as an inalienable endowment for Ngati Whatua? That however would have required a concern for the maintenance of Maori tribes and the principles of the Treaty of Waitangi. The Chief Judge, with hindsight, had no real regard for either.

Fenton’s letter was referred to the Surveyor-General who in February 1898 wrote for a report on the condition of the title, the intentions of the owners and a plan of the partition. It was reported to the Minister of Lands, and then to Cabinet “it is unquestionable that were this land in the hands of the Government it could be dealt with to great advantage.” It was added however the owners intended to lease the divisions for 42 years under the Orakei Act 1882 and “as the land has now to be disposed of under a special Act of Parliament all the Government can do in the matter is to see that there are no obnoxious clauses introduced into the leases when the lands are let”. Cabinet considered the position on 18 March and directed that Government be kept informed of the position and of any lease terms.

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Meanwhile the tribe was divided between those of the 'trustees only' view and those who maintained they were absolute owners. The division was exacerbated by intra-tribal differences. The Te Hira line from Te Kawau was paramount at Okahu while others had greater eminence at Hurinui, Reweti, or at Kaipara and clear leadership could not emerge.

Many still living at Orakei were not legal owners. Many legal owners had moved elsewhere, leasing their interests outside the tribal group for personal advantage and though some residents were without lands for even subsistence cropping. Some owners stayed on and adhered to the tribal principle that Renata Uruamo had sought to re-establish. It was still the belief of many, at Orakei as elsewhere, that only the restoration of tribal ownership and authority could bring to order the recalcitrant members of the tribe.

But Orakei was merely a microcosm of the country. It is necessary to understand what was happening nationally in order to understand what happened at Orakei. Everywhere Maori society was crumbling as anguish and despair followed the New Zealand Wars. The Maori population dropped significantly from an estimated 56,049 in 1857 to its lowest recorded level of 42,113 in 1896. The European population was then 701,094. The popular opinion was the Maori was a dying race. It was symbolic for Ngati Whatua that on their former fighting pa of Maungakiekie or One Tree Hill a pine was planted to replace the single totara, the Maori symbol of chiefly authority. (The totara, called Te Totara-i-ahua, was reputedly planted by Tupaha about 1640.)

The authority of the chiefs had indeed been broken. It was not only at Orakei that a leader failed to emerge after Tuhaere's time. Throughout the country chiefly authority waned as lands were broken down to allotments and allocated to individuals, often a privileged minority. Owners were willing to sell the patrimony of their tribe, sometimes anxious to do so in case the tribal claims succeeded. Selfish individualism on the one hand, drunkenness and despair on the other became the main threats to the Maori.

Maori society, thus divided, could not withstand the settlers insatiable demands for more land. The Liberal Government that took office in 1891 was committed to expanding the rural sector through the cheap acquisition of Maori land (see Williams 1969:17) but at the same time another awareness was developing. Pakeha politicians were ceasing to be British migrants. Maori politicians were becoming prominent in the House. At this critical period in Maori history the race was represented by some of the finest politicians it has ever seen. Not only in Parliament but through Maori schools, church committees, councils and village Komiti, a new form of leadership was filling the gap left vacant as chiefly authority passed.

The period has recently been illuminated by G V Butterworth in an address to the Stout Research Centre Conference, Wellington, 1985 (and see Butterworth 1985:242). Much of what follows is summarised from his work. A new generation of leaders spearheaded a resurgent Maori personality. They appealed to the native born Pakeha as Governments swung wildly between hard and soft policies on land acquisition. Carroll, Wi Pere, Heke, Ngata, Parata, Pomare and Buck ventilated a Maori view in the House of Representatives but,

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Butterworth reflects, what a weight of prejudice they had to overcome and how little formal political power they had to deploy! Their strength lay in their ability to stand astride both worlds as polished performers in the arts of each. Carroll's charm and humour, Ngata's literary articulateness, and the outstanding oratory of each gave them an influence they lacked in numbers. If their numerical weakness forced compromises at a point lower than some of their Maori contemporaries could accept it was still much higher than any the House had previously known.

The Maori political advocates fought valiantly for the retention of Maori lands and the resurrection of the tribal principle, against considerable odds, but Carroll, and later Ngata, who led the field, were each from eastern regions of the North Island, less affected by war and settlement and where large acreages were still Maori owned. In their determination to retain the bulk of the large tracts of land to which they were accustomed, they were not averse to sacrificing the smaller and scattered allotments of other tribes. To make matters worse for those holding lands near towns, they adhered to the popular view that the Maori was better off in the country. The Maori members were not united and no less than on this question. Orakei, as it turned out, was sacrificed to Carroll's wider cause but not without protest from Hone Heke of Northern Maori and opposition, as it turned out later, from Ngata himself. Heke, however, lacked Carroll's astuteness for Carroll rarely advanced a proposal without first lobbying his colleagues and ensuring there was a reasonable prospect of success.

Sir James Carroll, of Maori-Irish descent elected for Eastern Maori in 1887, represented a European constituency in Wairoa from 1893 and was Native Minister from 1899. He was a senior member of both the Seddon and Ward Governments. He advocated tribal control but his view on 'city Maoris' was less enlightened (unless it was intended to bolster his stand for the retention of Maori land). He stated in the House in 1894

Maoris must always remain what might be termed an agricultural and pastoral people . . . we cannot expect them to come into our industrial life. They are not capable of entering into our manufactories . . . (1894 NZPD 557)

His views on tribal control of land were first expressed while a member of the 1891 Royal Commission on Native Land Laws. The Commission identified as the key problem the failure of the Legislature and Native Land Court to recognise the tribal principle. For the Maori there was nothing new in that finding but the recommendations for the administration of Maori lands through tribal councils were expressed in a form more acceptable to Parliament than the Kotahitanga movement had proposed, as later articulated in the House by Hone Heke between 1893 and 1896. The Commission's recommendations were very much due to the philosophies of Carroll and W L Rees, a Pakeha parliamentarian and lawyer who had a long association with the East Coast tribes, and a great respect for them.

The Liberals as a whole were more interested in speeding up the purchase of Maori land. They established the Validation Court and gave liberal funding to the Native Land Purchase officers; but when the extent of the Crown pur-

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chases became apparent (over 3,000,000 acres of fertile land was acquired from 1892 to 1900) Pakeha politicians, increasingly sympathetic to the Maori view, also voiced the fear that the rate of buying would render the Maori landless and bequeath an even greater problem to the nation. Maori discontent erupted in a welter of tribal protests and petitions. In the wake of threatened rebellion in Urewera (1895) and Hokianga (1898) Carroll, and the four Maori MP's led by Heke were able to push through the Native Lands Administration Act 1900 for the administration of Maori lands through Tribal Councils.

The Act did not survive beyond 1905. The concept of tribal administration was acceptable to Government only if it still produced land for settlers. It failed to do that. As a compromise Carroll had agreed the tribal councils would delineate areas excess to tribal needs, but he was intent on reserving 7.5 million acres as a permanent Maori heritage and proposed that surplus lands would merely be leased. His colleagues strenuously objected to what they labelled 'Maori Landlords' but still, in the exigencies of the time, the 1900 Act was passed. The Government confidently awaited hundreds and thousands of acres for lease but despite Carroll's urgings the Tribal Councils offered a mere 170,000 acres. The Act was repealed in 1905 (and £200,000 was voted to the Land Purchase Board) but Carroll continued to urge his people to lease, not sell.

For the people of Orakei the problem was different. They had not the large tracts of land that Carroll was concerned to retain for other tribes and it was apparent that the pressure for more land was not limited to that which might be farmed.

To those of Orakei opposed to any loss of the land the position was desperate. Though Carroll stopped State buying between 1900 and 1905 a tremendous opposition to his policy was continually being applied and it seemed only a matter of time before Carroll's embargo would crumble. And it did. The Maori Land Settlement Act 1905 authorised the resumption of Crown purchases. Carroll and Heke were left to fight a rearguard action to protect their own tribal areas. Carroll with Wi Pere succeeded in obtaining an exemption from the 1905 Act for the Tairāwhiti District, which held until 1908. At the cost of agreeing to compulsory leasing Heke obtained a similar exemption for the northern Tokerau district which extended to Orakei. That held until February 1909 when Heke, a doughty fighter for Maori land rights, came to a premature death. Still it appeared to others their Parliamentary leaders were merely trying to stand against the tide. At Orakei it seemed clear, early in the 1900s, that the only hope was to pursue Uruamo's attempt to restore the entitlement of the whole tribe.

To this end Otene Paora of Orakei took up the cudgels in 1904. He continued the fight for thirty years. He was one of Maoridom's most persistent advocates for the tribal principle.

Otene applied first to the Native Land Court to repartition the land so as to include others on the title. At that time he asked that at least 40 acres be held as a general reserve "so that other descendants of Tuperiri, who are not in the

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title, might have a place to live on.” He was unsuccessful. His application was dismissed after a brief hearing.

Then Ngata was appointed Member of the Executive Council Representing the Native Race on 7 January 1909 and for the first time, though not without criticism, there were two Maori in cabinet. From 1905 Carroll and Ngata promoted, in addition to ‘lease don’t sell’ the policy of ‘use don’t lose’. If the problem was, as was alleged, that the Maori was not developing his land, then, Ngata argued, give him the money and training to do just that. Ngata went much further than merely proposing that concept to his party. He went out to his people, urging them with or without money, to work their lands. It was a huge task that faced him. It was to tax his enormous energy over the next twenty years. He had to convert a people who were traditionally horticulturalists to pastoral farming and from the apathy and dejection that prevailed. It seemed unreal to Ngata that there could be any reliance on Government to maintain statutory restrictions on the alienation of Maori land and his message to his people was clear—use it or lose it.

Ngata’s proposals had an effect. It was agreed to set up a Commission to investigate what Maori lands might be leased or sold and what might be kept and developed by the Maori themselves. The Native Land Settlement Act 1907 provided that the Commission investigate the areas of native land which are unoccupied or not profitably occupied and the mode in which such lands can best be utilised and settled in the interests of the native owners and the public good.

That may have seemed innocuous but by the Act the Commission was to determine what Native Land might be retained for native use and occupation, and what parts ought to be given over to settlers to either buy or lease. It is extraordinary, as we reflect now on the Treaty of Waitangi, that subject to the report of the Commission the Governor-General could, by Order in Council, vest native land in a District Native Land Board for sale to settlers, with or without the consent of the native owners, simply on the ground that the land was considered excess to their requirements. But that was only one aspect of the Act. By Order in Council the Governor could declare land that ought to be retained for Maori occupation as subject to the restrictions on alienation in Part II of the Act. It was stated, in the debate during the Bill stages the Government intended that of the available land, half would be leased and half sold.

The Maori people were fortunate in the two persons appointed to the Commission, the former Premier and then Chief Justice, Sir Robert Stout and Mr A T Ngata, later Sir Apirana Ngata. Ngata considered Stout a great success.

He put matters plainly and simply before them and they were impressed with his dignity and kindness (1911:15 NZPD 731).

This was fortunate for the protection of Maori land now depended largely on their discretion.

The Commission made recommendations in respect of 1.3 million acres. It recommended that about half be reserved for Maori people and that of the



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balance, 400,000 acres be leased and only 200,000 acres sold. It was considerably less than the Government had hoped for.

Of more interest for this inquiry is the Commission's consideration of Orakei. It was considered the whole should be kept. Not one bit of it should be sold.

### 5.8 The Stout–Ngata Inquiry

In 1908 the Commission on Native Lands and Native Land Tenure (the Stout–Ngata Commission), came to review the position at Orakei. In doing so it extended its brief to consider the events of the Orakei past.

The Commission began its report on Orakei with an over-view that the block was communal land meant to be preserved in trust for the tribe. It must be taken to have presumed rather than determined that was so or that it should have been the case, for the Commission could not settle points of law. It said

It is the only land on the peninsula owned by the remnants of the once-powerful tribes who occupied the territory between the Manukau Harbour and the Hauraki Gulf.

It is plain that at the time of the investigation of the title it was thought only fitting and proper that this small remnant of land should be preserved for the ancient Tribes of Ngaoho, Te Taou and Te Uringutu, more generally known as Ngatiwhatua. By the certificate and order issued by the Native Land Court it was made inalienable . . .

. . . the grant was not issued directly to the people entitled, but to Apihai Te Kawau, the Chief of the Taou, Ngaoho and Uringutu Tribes, and his heirs, upon trust for [and the thirteen names are then recited] It must be remembered that this is Native land and communal land and was meant to be preserved as a dwelling-place for the remnant of a tribe.

The Commission then queried whether the Native Land Court had authority to partition the land.

It may be a question whether the Native Land Court had any jurisdiction to destroy the trusteeship that existed, but the Court did do so, and partitioned the land amongst the owners, specifying them.

The Commission considered that in partitioning the land the Court (wrongly) varied the restrictions on alienability. Previously, all owners had to consent to a lease. Now, only those in the particular block had to consent to the lease of that block. (In addition, although the Commission did not take the point, it appears that an individual might have leased his undivided individual share).

It was one way of breaking down the control of the group as a whole. The Commission commented, with reference to the Orakei Act,

it may well be that the Legislature meant that no single owner should be permitted to bring a European into a Maori settlement without the consent of all the owners or residents. This would be in accordance with Maori law or custom, and it might be calamitous to the life and good order of a Maori pa that Europeans not approved of by the Maoris should be allowed to settle on such communal land. The fact that the land was given to the chief as trustee, and that he had to execute leases together with all the owners, shows that the land was not treated even as ordinary Native Land was treated.

The Commission considered that the partition orders were therefore “illegal and void.”

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The Commission noted that no leases, save grazing leases for one year terms, had been executed before the land was partitioned, but since it had been partitioned, 18 leases for 15, 21 and 42 year terms had been effected with Europeans. Although the Supreme Court had held that confirmation was not needed, the alternative requirement of the Orakei Act 1882 that all owners consent had not been complied with either.

Be that as it may the Commission then noted that section 16 of the Native Land Settlement Act 1905 had since been enacted to do away with “all restrictions, conditions, or limitations against the alienation by lease of any lands owned by Maoris, whether such restrictions, conditions, or limitations are contained in any Act or any instrument of title.”

Leases could now be effected in respect of all land, or of any share in it, with the approval of a District Native Land Board provided the Board was satisfied

- (a) That the rent was adequate
- (b) “That the Maori alienating had a papakainga, or sufficient other land for the purposes of a papakainga, or (with the rent payable under such proposed lease) an income sufficient for his support”
- (c) “That the proposed lease is for the benefit of the Maori lessor” and
- (d) “That such lease takes effect in possession and not in reversion.”

The Commission noted that three of the approved leases were contrary to (d). Another three had not been executed by all the owners in the block, and in all cases, sufficient reserves for Maori occupation had not been made.

But in all the circumstances the Commission considered the “illegal” leases should be validated, the Commission noting

the history of the legislation dealing with Maori land shows that the validating of illegal sales and leases of Maori land is continually going on.

The Commission proposed instead that an area of eighty-five acres be set aside for Maori occupation and that the balance be available for leasing. It concluded

There have been no doubt thousands of transactions between Europeans that have not been enforceable by law, but Europeans have not asked for the aid of legislation to validate or carry out their illegal contracts. It is only when the transactions are between Europeans and Maoris that the aid of Parliament has been sought. A precedent has been set in many past Native Land Acts, and as we believe the lessees in this settlement have been acting bona fide and the lessors are anxious that the leases should be given effect to, we have, though we generally disapprove of validations, made the recommendations above set out.

In particular the Commission recommended

- that the papakainga and nearby lands extending across the ridge above it be reserved for Maori occupation, that area to comprise some 85 acres
- that certain existing leases be affirmed or validated where need be in respect of some 496 acres
- that allotments be surveyed and leased for general settlement by public auction through the Maori Land Board in respect of some 63 acres; a total of 644 acres.

### 5.9 Proposals to Buy, Attempts to Retain

The recommendations for the extension and protection of the papakainga and the alienation of the balance by lease only were never followed—although there was the facility to provide for them in a new Act passed in 1909.

The Native Land Act 1909 was a consolidating and amending Act designed to rationalise a plethora of confusing and conflicting laws, and, in a sense, to start again. It removed all existing restrictions on alienation imposed by any previous enactment, Court order or Crown Grant but made provision for restrictions on alienation to be re-imposed. Accordingly while the Orakei lands were now exposed to sales for the first time, there was provision to reformulate restrictions in terms of the Stout–Ngata recommendations.

More particularly the provisions in the Native Land Settlement Act 1907, under which the Stout–Ngata Commission had reported, were continued in force in Parts XIV and XVI of the 1909 Act. Read with the Act, the Commission's recommendations offered a solution to the Orakei problem. The papakainga could be vested in a Board able to give occupational licences to owners and non-owners alike (for licences could issue to any 'Maori'). Through the Board the balance could be leased.

There was still a compromise. The Maori Land Boards constituted in 1905 and 1909 were not tribal councils. They covered districts too large and included too few members to represent tribes, there being only three persons with one Maori representative and under the presidency of a Maori Land Court Judge. They were really in the nature of courts with parental powers. Maori land was open to purchase by anyone but the Boards had to approve each sale and could impose restrictions. With that, and a heavy emphasis on leasing, the Boards represented a compromise between the opposing political views of 'no sales' and 'free trade'.

The drafting of the 1909 Act was a monumental task. Carroll helped formulate the broad principles and Ngata assisted the drafting but the main work was undertaken by the Solicitor-General Sir John Salmond. It replaced 49 Public Acts, 18 Local Acts, 2 Private Acts and had to fit with a host of general laws. The current Maori Affairs Act 1953 is based upon it. It did not go as far as Carroll and Ngata wanted but they thought it the best compromise they could get. The Prime Minister Sir Joseph Ward thought it went too far and sought to delay its second reading as a Bill. On 15 December, in the dying stages of the session a deputation of six Members of Parliament waited on Ward to urge the second reading without further delay. They could gain no firm commitment. The Bill was on the Order Paper however and at 11.30 that night, with Ward absent from the House, Carroll moved its second reading. Massey was alarmed and tried to stop it by speaking for an hour and a half but it was too late. Carroll, emphasising the removal of restrictions on alienation in the context of "the undoubted advances made by the Maori people" was able to push through the Bill clause by clause before a minimum of members, and as arranged none of the Maori members spoke.

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Amongst the European members there appeared genuine concern that the Act should guard against defrauding the Maori, but there was rare sympathy for them as Maori, some impatience for them to be Europeanised, criticism that the Bill did not go far enough in speeding the destruction of communal ownership to divest (the Maori) of all his native trappings (per Herries, with a similar view from Ormond), and criticism of proposed leases making Maoris the landlords of whitemen (Pearce). Maoridom however was not convinced the Act went far enough. Land which formerly could be acquired only through Crown agents, could now be acquired by anyone. Maori land was on the open market and even individual interests could be acquired. Wi Pere opposed the Act when it was introduced to the Legislative Council by the Attorney-General, Sir John Findlay.

Kawharu (1977:25) says of the Act

for the majority of Maori people there appeared to be little to relieve the gloom, and what little there was, was illusory.

In fact the 1909 Act marked the commencement of even stronger Government initiatives to acquire Maori land. The Act established a Native Land Purchase Board within the Native Department, the latter having been established in 1906 with dual roles in servicing the Native Land Court and buying native land. Government authorised the Board to expend up to \$1,000,000 per annum on land buying. Between 1911 and 1920 Maori holdings were reduced from 7,137,205 to 4,787,686 acres and Carroll's hopes of retaining a patrimony of 7 million acres were shattered. Of that left, 750,000 acres were leased to Europeans and over 750,000 acres were unsuitable for any development. The tempo increased yet further under the Reform Government from 1912. William Herries became Native Minister, rationalising wholesale acquisitions by espousing the view

the Maoris would survive best if forced to be as resourceful and acquisitive as pakehas (King 1981:285).

Ngata was left to fight a rearguard action for the continued retention of Maori land but he was not to get any substantial development funding until 1928. For Orakei the developments meant only that the Stout–Ngata recommendations were not followed. Instead a race was on to buy the land. Orakei became the bride sought by many suitors.

The lessees moved first in February 1910, with a delegation to Prime Minister Ward for an arrangement to enable them to buy the land, pointing to the extensive improvements they had made. In turn the Prime Minister announced an intention to re-examine the purchase of the land by the Crown. The announcement appeared in the *Auckland Star* on 3 March 1910 under the heading "Orakei Estate—possible acquisition by the Government?" But when by August the lessees had had no firm reply, the local Member of Parliament raised the matter with the Prime Minister on their behalf. He in turn referred it to the then Native Minister, Sir James Carroll, suggesting revival of enquiries for acquisition by the Crown begun in 1898. Carroll, conscious of the demands on Maori land and still anxious to hold the larger tracts of central North Island and the East Coast was willing to compromise in other areas. Orakei was part

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of the price. Though the Minister was later to change his mind on 21 September 1910 he minuted

Rt Hon the Premier

I have always favoured the acquisition of the Orakei Estate by the Crown. Though there are leases over a portion of it and the price will be pretty big yet I would strongly recommend the purchase. The Crown must get a good return besides satisfying a strong and growing public demand.

J Carroll

Thus was the Crown confirmed as a rival contender for this last bastion of Ngati Whatua land. On 7 November Cabinet directed a report. The Under-Secretary for Lands directed the Commissioner of lands to make a personal inspection and “a thoroughly good and confidential report thereon”. He added

the matter is rather urgent. I may state, confidentially, that the Crown wishes to purchase the block. A full report followed. Only two impediments were seen—“the successors now number upwards of one hundred” and the validity of the partitions and leases was in doubt the Commissioner of Lands writing “Personally I am satisfied that none of the titles are valid”.

Updated valuations were obtained and on 13 February 1911 Cabinet directed an inquiry into the validity of the titles and leases. The Solicitor-General replied he saw no advantage in questioning them. Valid or not the purchase price would be the same. If the leases were invalid the Crown would have to pay full price to the owners and compensation to the lessees for improvements and if valid the price would simply be divided between owners and lessees according to lessor and lessee valuations. It did not even cause concern that the Crown should be satisfied that any seller would have proper title. That was thought to be the problem of the Maori.

Then the Auckland City Council became the third contender. Auckland had stretched to Orakei and building was going on all around. The adjoining Lucerne Estate at Pukapuka and the Kohimarama Estate which had earlier been built on, were in the process of being further subdivided. High prices were being paid for building sites on adjoining lands much inferior to the Orakei block with its commanding views on the ridges and prime location. It was the choice site for housing development as every developer involved with adjoining projects would have known. “Acquisition of Native Lands Orakei” was on the agenda of the Auckland City Council from at least March 1911 when the matter was referred to the Finance Committee. On 1 June the Council appointed an Orakei Estate Purchase Committee comprising representatives of the Council, Auckland Harbour Board, Chamber of Commerce and Mayor of Mount Eden to enquire and report on the advisability of the purchase of the Orakei Estate by the City of Auckland “with power to ascertain particulars of title and price and call for expert opinion as to the best method of subdividing and dealing with same.” The move was widely publicised. The Auckland Trades and Labour Council responded quickly (12 July) with a submission urging the acquisition, but, “for the erection of workers’ dwellings”. The Committee favoured the development of an experimental garden suburb. “If you can get Parliament to permit your City Council in

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proper circumstances to acquire that large area to provide for future expansion of the city you should wisely take that step” counselled Sir John Findlay in an address at his Parnell electorate (*New Zealand Herald* 10.10.1911 p7).

The City Council lobbied the House throughout 1911 and 1912.

The media publicity covered more than the proposed Bill to compulsorily acquire Orakei. Articles appeared on model garden suburbs established overseas (eg, *New Zealand Herald* 15.9.1911 p6), unsanitary living condition threatening Auckland with “the serious danger of plague” (*New Zealand Herald* 8.8.1911 pp4,6), and Native Land laws seen as stifling progress. The *Herald* (4.4.1911 p4) delivered a scathing commentary on figures released by A T Ngata on unoccupied native lands and those, over four million acres, assessed to be “under profitable occupation”—“. . . by which he means of course” read the *Herald* leader “that this land is occupied by European tenants or leaseholders who pay rent for the privilege of improving it for the Maori owners.” (Native land leased to Europeans was in fact given as 2.5 million acres.) The article continued

Mr Ngata and Sir James Carroll may preach the doctrine of education and monetary assistance for the Maori, but their actions speak louder than their words and all their actions are in the direction of building up a Maori landlord caste, which will grow rich on the exertions of the European. And the amazing thing is, the mystery of mysteries, that this attempt to establish a hereditary landlord caste is supported by those who profess to hold progressive ideas.

Edwards J, in a case on Maori lands then before the Court of Appeal was reported in the *Herald* (8.8.1911 p4) as advancing the theme, with a comment in the course of hearing

if the present system of restricting dealing with native land were continued long enough it would in the end create a Maori landed aristocracy.

The *Herald* agreed, adding

although the Chief Justice (Stout) expressed his disagreement with this, it will be generally agreed by all who do not hold preconceived ideas as to the desirability of preserving the Maori race from the necessity to work and the responsibilities of citizenship, that Mr Justice Edwards is unquestionably correct . . . this unpardonable establishment in our midst of an hereditary Maori aristocracy [would] be supported by the rack-renting of a land-hungry European tenantry, through whose toil the native wilderness is to be transformed into fertile and productive farms.

A deputation led by the Mayor of Auckland approached Sir Joseph Ward who in turn undertook the Government would facilitate the passage of a Bill enabling the compulsory acquisition of the block by the Council. Drafting of the Bill was not complete when in March 1912 the Ward ministry resigned. A new Liberal ministry formed under Hon T Mackenzie, to resign in July, and then a Reform ministry emerged the following month under Hon W F Massey. The Council found it necessary to lobby both the citizens of Auckland and the Members of the House and there was considerable newspaper publicity for the proposal during both 1911 and 1912.

Meanwhile during 1911 the lessees, seeing the Crown was not allowing them to buy, took steps of their own. Through the legal firm that had arranged the 1896 partitions and first leases, a syndicate was formed under Matthew

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Henderson, an entrepreneur who was negotiating land acquisitions from a northern hapu of Ngati Whatua at Reweti. It was at Reweti at the beginning of 1912 that the purchase of the Orakei lands was first discussed with owners. It was then also that the legal firm engaged a young Orakei man, Ngapipi Reweti, to translate the discussions and assist them. Some owners, envisaging the passage of the Bill and the compulsory acquisition of Orakei land and believing forced sales yielded the lowest prices, were anxious to treat. For even as these discussions continued huge sewage storage tanks and sewer pipelines were being built on the papakainga foreshore, despite the Orakei residents' protests, on Maori land already compulsorily acquired for those works. Many owners relied on Ngapipi to arrange things quickly. There was no point in testing the market more widely. There was a time constraint and who other than the syndicate would buy on the open market if their lands were subject to long term leases?

There had always been, of course, a fourth group of contenders—Ngati Whatua people opposed to sale although still considerably divided over the owner versus trustee question. Prominent amongst them was Otene Paora.

Otene was born at Orakei in 1870. He spent some time 'working in the bush'. Later he was ordained a priest in the Anglican Church. But it is as a preacher for the collective ownership of the Orakei land that he is best remembered for he was to urge recognition of the customary entitlement from at least 1904, at age 34 and relatively young to be involved in tribal affairs, until his death in 1930. Like Paora Tuhaere before him he had an unhappy beginning in the Native Land Court when, in 1904, he unsuccessfully sought a repartitioning of the land to admit more to the title. Like Tuhaere he sought in the alternative a political solution, for also in 1904, he filed a petition through Hone Heke, Member for Northern Maori, for an investigation into the Orakei situation. The Native Affairs Committee recommended an inquiry and that inquiry eventually came when the Stout-Ngata Commission, appointed in 1907, included the matter in its general land use survey. As we have seen the Commission concluded the land was intended for the tribe as a whole and should be preserved for them as such. When no steps were taken to implement the Commission's recommendations and the lessees moved to buy, Otene petitioned the House again, in 1911, claiming the sellers' title was defective. A majority of five to four in the Petitions Committee considered title questions should be settled in the Courts and the petition was put aside. In some desperation Otene returned to the Native Land Court, this time seeking leave to appeal against Chief Judge Fenton's original decision. The grounds were

1. That the thirteen owners were merely representative of the tribe.
2. That at the time the tribe then in occupation greatly exceeded thirteen.
3. That only men were included but women were entitled.
4. That some of the thirteen were not resident on the block while occupiers with greater rights were excluded.
5. That the shares of the thirteen were equal, which suggests they were merely trustees.

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6. That Renata Uruamo had not only a personal right to inclusion, but a special right under the mana of his grandfather Uruamo, but Renata had been excluded.

Leave to appeal was refused the Chief Judge stating

It is quite possible that names were omitted from the list of owners when the decision was given some 38 years ago, but if the matter is to be re-opened it must be done by Parliament, as I am not going to order a new trial of a decision given in 1873 (sic).

Otene, who lacked Tuhaere's knowledge of law and legal process and was without legal counsel, petitioned the Legislative Council. Once more it was recommended that Government hold an inquiry. Otene knew this would take time and when the City Council became a contender with the Crown, and the lessees began worrying people to sell, he petitioned the House once more, in 1912, seeking a stay on sales pending an inquiry. "They have received payments" Otene was to complain in evidence, when the petition was heard, "of £50 a piece, £10 a piece and so on; this man has signed, that man has signed and so on; and the lawyers approach me at every corner of Queen Street and drag me in to sign away my living."

Otene wrote to Prime Minister McKenzie on 29 April 1912 for himself, and he claimed, some 50 others. He stated

I earnestly assure you that there is great difficulty existing about this land. The difficulty is that many persons in the title have shares which are too large, some of them having no original rights thereto, while on the other hand many included in the title and having original rights have shares allotted to them which are altogether too small, whilst others again having original rights have been omitted from the title. I represent these, therefore our Petition is now prepared. I need not dwell on the details. You will find sufficient information as to these by referring to the [Stout-Ngata Commission Report] and the decision given at Auckland by Judge McCormack of the Native Land Court on 6 August 1910 [a decision to include all successors on a succession rather than selected representatives]. Therefore our Petition to Parliament and we earnestly entreat of you not to enter into even a provisional arrangement with [the Mayor of Auckland] until the difficulties referred to are adjusted . . .

Otene and his party were not the only ones to complain of the lessee's activities. Media controversy raged when the Council learnt too, following a complaint to the Mayor on 2 May 1912. "Everyone in Auckland knows the position" said the Mayor calling on the lessees to desist in favour of the Council (*Herald* 4.5.1912 p7). The action was seen as pre-empting the Council's initiatives but the lessee's lawyers responded "[the owners] resent the proposal to confer upon any person or corporation a pre-emptive right." Ngapipi Reweti led a deputation to the Mayor assuring him that if the price was satisfactory the owners would prefer to deal with the Council (*Herald* 6.5.1912). The Town Clerk meanwhile had already written to the Minister of Native Affairs on 3 May 1912. He pointed out the City Council had set up a Special Committee with the object of promoting the acquisition of Orakei and had been in communication with the Government before, "requesting that the Auckland City Council might be afforded necessary facilities to acquire the freehold of the property", and that the Council had received every encouragement in response. He advised of the syndicate's intervention "notwithstanding the fact that the Council's intentions with respect to Orakei



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were publicly notified on several occasions last year”, and requested that steps be taken to protect the interests of the City “as against mere speculators”. He recommended

that the Government should at once issue an Order-in-Council under Section 363 of The Native Lands Act 1909 operating for 12 months and prohibiting the alienation of any part of Orakei, thus affording time for the City Council to promote legislation at the next Session of Parliament dealing with this matter.

The Crown did respond, albeit to appease the Council, issuing on 9 May 1912 a prohibition on the sale of any part of the Orakei Block—to anyone other than the Crown. But it was already too late. Four transfers for the sale to lessees of 104 acres in all had already been lodged with the Maori Land Board for confirmation. One was dated April 1912, two 1 May 1912 and the fourth May 4 1912 (*New Zealand Herald* 6.5.1912, 7.5.1912, 8.6.1912). Soon after, at least according to the transfer dates, many more were signed bringing the total area to 387 acres. Although each lacked legal effect without prior confirmation by the Board, it was to transpire the owners had been paid substantial deposits, committing them, where the money was spent, to supporting the confirmation applications. Wiremu Watene, the largest owner and a seller contended later that year

when the Acts of the Council were issued I became frightened and I said, well, I would be willing to sell at a proper price.

The lessees filed the transfers for the confirmation of the Tokerau District Maori Land Board arguing that the Order in Council did not apply to those transfers predating it. The Council responded by letter to the Prime Minister of 10 June 1912 urging that the Crown Solicitor seek an adjournment of the proceedings before the Board “until a fair opportunity had been given to the public of Auckland to decide as to the acquisition of this property”, adding

the public feeling here is that at all costs this fine Reserve should not be allowed to get into the hands of private speculators.

The Crown did indeed move to stymie the lessee’s putt, by-passing the District Native Land Board and even the Supreme Court by an action moved direct to the Court of Appeal, but since the decision came later, in 1913, it will be dealt with later in this report. In the meantime Parliament was pre-occupied with Otene’s petition on the one hand and the Council’s Bill on the other. The latter was dealt with first. It reached the floor of the House in August 1912 under the sponsorship of Hon A M Myers, Member for Auckland East.

The Orakei Model Suburb Empowering Bill was an amazing proposal for the compulsory alienation of the Orakei people from all but the papakainga area of their land, (given as 31 acres not 43 as originally partitioned or 85 acres as the Stout–Ngata Commission proposed). It was presaged that even that area might pass to the City in the course of time. It was to be inalienable to anyone other than the City Council (although parts could be taken for roads). The *New Zealand Herald* thought the Bill offered

a magnificent field for an experiment which can hardly fail and which will result in a remarkable gain to Greater Auckland, a remarkable advance in the social life of the community.

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There was no unanimity amongst House members. Prime Minister Massey was generally supportive following a deputation from the City Council and the advice of the Town Clerk that the natives were willing to sell, but he questioned whether native land could be taken compulsorily except for public works (*Herald* 2.8.1912 p8). Hon A M Myers questioned whether a model suburb was not a public work. A second deputation reported however “amongst many members, Maoris in particular, there is a distinct undercurrent of feeling against the Bill” (*Herald* 5.8.1912 p6).

A heated debate followed in the House. Those supporting the Bill argued that special provisions had been made for the Maori and that a reserve, to be inalienable, was to be established. But the Maori members opposed the Bill vehemently. Dr Maui Pomare replied that there was other land available in Auckland without compulsorily taking Maori land. He claimed “Maori land was being filched gradually until the Maori had no security. They made the land inalienable one day, and the next they did away with it. What was the use of making a reserve inalienable if they were going to do that sort of thing”. Pomare believed the Bill to be a violation of the Treaty of Waitangi and the Constitution Act; the Maori would lose their heritage. The land under consideration was made inalienable—for what purpose? So that the Maori people in that district should have a heritage for all time. It was now proposed to take that heritage away from them. An exact parallel, he said, would be a proposal by the natives to establish a pa in Auckland Domain. Dr. Buck was equally opposed. Prime Minister Massey was eventually to conclude that Orakei “should remain inalienable in the hands of the Natives” (NZPD, Vol 161, 1912, p98).

Still the Bill passed a first reading and while it stood referred to the Local Bills Committee of the House, Otene Paora’s petition was before the Native Affairs Committee. The composition of the latter had undergone some change—there were now five Maori among the twelve members (Carroll, Ngata, Parata, Pomare and Buck). Amongst the Ngati Whatua witnesses there was division. Twelve appeared in favour of the petition, thirteen, led by twenty-three year old Ngapipi Reweti, were opposed.

Before the Native Affairs Committee Otene contended that all the descendants of Tuperiri should be included in the title, or if not that many, then at least the heads of all the families including in particular a descendant of Uruamo. It was said that Uruamo died shortly before the 1869 decision. A representative for his line had been omitted from the arrangement because his successor had not emerged. It was claimed the Uringutu Hapu had been left out and there were many others at Orakei without title or interest.

With regard to the sales he said

What I want to point out is that now certain of my co-owners in this land have sold. Now, under this representation it was found that this land was to be preserved for those ancient tribes and hapus. I contend that my friends who have taken this action have permitted the canoe of my ancestors and tribe to float about. I contend that I am right in maintaining that [the Stout–Ngata report] upholds my present claim. Now, Tuperiri was the ancestor under whom the Native Land Court heard this matter. I claim that all the descendants of Tuperiri should be included in this land. Some of

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them only have been put in, and some of them have been left outside to swim about in the sea, or where they like. I say that if this Government does not uphold this petition, then it would be better that this Government should build a canoe and put on board that canoe those descendants of Tuperiri who are not included in this land, and let them drift away into the ocean . . .

With regard to tribal ownership Otene referred to Carroll's Act of 1900 for the administration of Maori lands through Tribal Councils

The Council's Act was framed for that particular purpose—for providing for purposes such as this. What was the object of that Act—I mean the Maori Councils Act? The Acts have been passed by Parliament for the purpose of upholding and assisting and furthering the welfare of the Maori race. I say that if those Acts were passed with that intention on the part of the Government when they passed them—namely, the upholding and the furthering of the interests of the Maori people—then this is a particular case in which this should be done. Now, I hope and pray that this Government, seeing that I have been for a long time past contesting with the other Government—eight years now—without any means of support, will, and that the present Committee will, give due consideration to this petition. . .

The opposition, who had in fact filed a counter petition, and some of whom admitted they had already sold and had received cash, maintained they were absolute owners.

They claimed others had been left out of the 1869 arrangement because they had taken larger shares in the Kaipara lands of Ngati Whatua. The petitioners denied that was the case. (Nor have we found evidence of it and nor was an exchange provided for on an investigation of title).

Wiremu Watene, the sole survivor of the original thirteen gave evidence in opposition. The transcript records his answers to Doctor Pomare's questions:

Do you maintain that this land was for the thirteen owners absolutely? Yes.

Do you think it was an equitable arrangement? No it was not.

The same witness was to say on another inquiry in 1930

I admit that the original thirteen owners were only trustees for the three tribes—Taou, Uringutu, Ngaoho. Owing to some feeling between us, I objected at Wellington (before the Native Affairs Committee) to the inclusion of the three tribes (17 Auckland MB 181 of 18 July 1930).

The Native Affairs Committee voted 7 to 5 in favour of the Petition on a motion, in October 1912, that the evidence be tabled in the House with a recommendation that the Petition be referred for an inquiry. Sir James Carroll, it should be noted had now changed his view, voting in support of the motion. In the following month the Committee voted against the Orakei Model Suburbs Bill, though it had the prior approval of the Local Bills Committee, and that put an end to the Auckland City bid. The second reading was moved on 4 November but the Bill was dropped.

The Mayor's regret was conveyed in a telegram to the Prime Minister and published in the Auckland Star on 4 November 1912

Deeply disappointed over Orakei. Nothing can now prevent (name of legal firm) securing block for syndicate. Already fourteen transfers, signed by Maoris during last few months to pakehas at low prices. Maori opposition instigated by interested Europeans. I presume the Government accept the responsibility for the Native Minister's action, which means the triumph of private speculators and utilisation of

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Orakei in the worst interests of Auckland and the Maori owners. I regret I cannot allow any party predilections to prevent me protesting against great wrong to Auckland.

In the *Herald* (6.11.1912 p10) the Mayor also expressed regret for the natives, for the Bill also “reserved 40 acres for their own use forever” though he had previously given no prominence to that point. In fact, as earlier mentioned, the Crown had taken action in respect of the lessee’s transfers, and the proceedings in the Court of Appeal will shortly be considered. But although, at long last, Otene had won a battle, he was about to lose the war. A Commission was never constituted to inquire further into the Petition, and while the lessee’s bid was about to be thwarted by the Crown, it was not in order to protect Ngati Whatua, to place a caveat on sales until true ownership could be established, but in order that the Crown could acquire the land from those whose title was in dispute. Indeed, when the Model Suburb Bill finally lapsed on 7 November and the Hon A M Myers requested that the restriction on alienation be maintained “meantime”, the Native Minister Hon W H Herries had no difficulty in agreeing, for, as he said, it was his intention to see if the Crown would buy the whole block!

*5.10 Solicitor-General v Tokerau Land Board*

Although it was held in *In re Hawke’s Leases* (supra) that dealings in Orakei were governed by the Orakei Act 1882, and not the Native Land Act that required confirmation of dealings by the Board, by 1912 the general opinion was that the Orakei Act had been impliedly repealed by the Native Land Settlement Act 1905, so that confirmation under the 1909 Act was required. In any event it was inconvenient for the Crown to argue the 1882 Act still applied for while it would have prevented sales to the lessees, it would also have stopped a sale to the Crown. Neither would it have assisted the Crown’s objective to argue the sellers’ title was void as it was unlikely the tribe as a whole would sell.

The Crown developed instead the opinion of the Stout–Ngata Commission that the partitions were void for if they were, the private sales would be out of order, but the Crown could still buy. A writ of Prohibition was taken out by the Solicitor-General to prevent the Board from dealing with the applications until the question of the Commission’s view had been determined by a Court of Law. The proceedings, instituted in the Supreme Court were moved direct to a hearing in the Court of Appeal. Judgment was given on 17 April 1913. The case was heard by the full bench of that Court comprising five Judges and is reported as *The Solicitor-General v Tokerau District Maori Land Board and Others* (1913) NZLR 866.

Two of these Judges, Chief Justice Stout and Mr Justice Edwards, had already expressed conflicting opinions. We quoted earlier (5.9) the view of the latter, in 1911, that restrictions on native land sales would lead to ‘a Maori landed aristocracy’ and the disagreement of the former, but surprisingly, the Chief Justice heard the appeal too, though he had reported on the Orakei issue as

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Chairman of the Stout–Ngata Commission. Not surprisingly they made conflicting judgments in the case on appeal.

The Court of Appeal did not address the wider issue of whether the thirteen owners were, or were meant to be trustees only for the tribe as a whole. It did not need to dispose of the matter before it. At law, Tuhaere alone (although deceased) held the legal estate when the land was partitioned. The other owners had what lawyers call a beneficial and equitable estate. That means, in this case, the others were entitled to the land though Tuhaere held the title. The question, for the Court of Appeal, was whether the Native Land Court could partition equitable interests to give legal estates to those whose interests had till then been merely beneficial.

By a majority of four to one the Court of Appeal held that the Native Land Court did have the power to partition equitable interests in the way that it had and that the partitions were therefore valid. Chief Justice Stout, of course, was the dissident.

The Court of Appeal gave brief attention to the validity of the Crown Grant of 1873. There were doubts about its validity because the land was vested in one person on trust for thirteen when the law said no more than ten could be recorded on a title and nor could the title record a trust. Four Judges considered this point. Three held it was irrelevant (neither counsel had raised the point anyway) for even if it were invalid, the Orakei Act 1882 validated it by giving the grant legislative recognition. The fourth judge, Edwards J, was also of the view that any invalidity was cured by the 1882 Act but went on to express the view that the grant was invalid when it was made, and that it was made under section 17 of the Native Land Act 1867.

It appears Edwards J presumed rather than determined that the grant was made under section 17 because, as he said, it was the only section that ever authorised or recognised anything in the nature of a trust affecting Native Lands. He added

In order to put the matter beyond controversy the original of the orders of the Native Land Court have, however, since been produced from the official records through the Registrar of this Court. These show, as the grant itself shows, that the order of the Native Land Court, which was treated as the basis of the grant, was an order under the 17th section of the Act of 1867.

In fact the sealed order is expressed to issue pursuant to the Native Lands Act 1865 and the Grant refers simply to ‘the Native Lands Act.’ As noted at para 4.7 the prerequisite for a valid order under section 17 was that the section had to be expressly cited in the order and grant for the law did not allow the disclosure of a trust on a title. It allowed no more than the hint of a trust by reference to the empowering statutory provision in the order effecting conveyance.

In any event the Judge’s opinion was not central to the Court’s finding. The decision, as we read it, is authority for no greater proposition than that the Native Land Court can partition beneficial interests and equitable estates. That finding was important for the Native Land Court, for since then, and to this day, the Court has partitioned such estates, and in fact most Maori Land Court

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partitions are now in this category. But the decision is not authority for the proposition that the 1869 order was made under section 17 of the Native Land Act 1867 and nor did it determine that Chief Judge Fenton was correct in awarding the title so as to exclude the greater number of the tribe. That needs emphasis because later Chief Judge Jones, the Lee Committee and the Supreme Court in 1978 were all critical of Judge Acheson's opinion in 1928 that Chief Judge Fenton was wrong. Chief Judge Fenton's order, it was thought, had been upheld in the Court of Appeal. In our view, it was not.

In any event the Court of Appeal upheld the 1898 partitions, enabling confirmation of the lessee's transfers to be considered. Leave to appeal to the Privy Council was granted but as it turned out, was not needed and that for the simple reason that the Maori Land Board declined confirmation of the lessees transfers!

Without abandoning its right of appeal to the Privy Council the Crown decided to let the matter run before the District Maori Land Board for in the Board's opinion, there was no order to further stay the confirmation hearings after the Court of Appeal had ruled. Although it was not a party to the proceedings before the Board, the Crown was in fact represented, arguing against confirmation of the sales on the ground that the Crown was a willing buyer. The Board did not consider this a proper ground but nonetheless declined confirmation of each of the seventeen transfers, for the reason, in each case, that the sale price was inadequate. The Board noted "the value of the lands as building sites, the opening up of the adjoining estates and the contemplated increase in value in the near future" and considered these "sufficient reasons to amply justify the Board in refusing confirmation". No chance was given the lessees to raise the purchase prices.

That put an end to the lessees' bid, but not to their interest. Money already handed over had to be repaid.

From the available information three other factors need stress. The Crown contended in 1978 that it moved to buy the land only because the owners were going to sell. In fact the Crown investigated buying the land as early as 1898 and had favoured compulsory acquisition before anyone sold.

The Crown has also pointed out it paid more than the lessees offered. It could hardly have paid less when confirmation of the lessees' transfers was refused because the price was too low!

The third factor is obvious. Two months after the Board's decision of June 1913 Cabinet approved the purchase of Orakei by the Crown. That decision was made five years after a statutory Commission comprising a former Premier and the then Chief Justice, and one of Maoridom's greatest politicians, had specifically recommended the reservation of the land for Ngati Whatua. It was also made ten months after a Petition challenging the title of the sellers had been favourably recommended by the Native Affairs Committee for inquiry.

There was never that inquiry. In November 1913, after the Crown's decision to buy had been made, the Legislative Council referred the Petition back to the Native Affairs Committee for further consideration. In 1914, after most of

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the Orakei block had been sold to the Crown, the Committee resolved against further action. That put an end to the tribal bid. And the question of who should really have owned the land, the original grantees, a greater number of persons, or the tribe as a whole, was never settled.





## Chapter 6

# The Inundation of Orakei 1913–1930

### 6.1 Sewers and Swamps

Okahu Bay today is a sweeping carpet of green park peppered with exotic trees—a pleasant stage for the gallery of homes on encircling hills. Only an old cemetery hints of the former Maori presence—of the people who sought the alliance that led to Auckland, of the first Maori Parliament where 200 chiefs affirmed loyalty to the Crown and faith in the Treaty when war threatened the country, or of the village that once bent along a pristine beach.

The park is prone to flooding. The cemetery was flooded when the Tribunal was first there. It started when the city intruded on this former Maori enclave, once distanced from it by a circumference of hills and waters.

Before 1912 the Orakei block was intact. Such intrusions as existed posed no threat to the security of the village, the farms at its backdoor or the harbour at its front. Access was still by water. The Orakei bridge built in 1862 serviced only the southern perimeter of the block and was mainly a through route to other places. By 1900 the bridge was in disrepair. There was no practical road access to Okahu Bay before 1926 and the papakainga was serviced by a wharf and steamer. Four acres had been given for a church in 1858 but in the Maori mind the Church had no further interest once the buildings were gone. The same could be said of thirteen acres taken for defence in 1886 for although it was taken and paid for, the villagers thought it was part of the original gift and in accordance with customary thinking, understood it was returned when no longer used. Thirteen acres was taken for roads in 1858 under an old law enabling the Crown to take 5% of Native Lands for that purpose but that was a mere paper thing for no roads were formed on the ground.

It was not until 1911 that the first physical intrusion warned of the inundation to follow. Work began on the Auckland and Suburbs Drainage Scheme in October 1909. Auckland's sewerage was to be discharged at Orakei, the only sizeable Maori land block in the district, and only one year after the Stout–Ngata Commission had recommended that the block be permanently retained in Maori hands. A sewer pipe was to pass across Hobson Bay and the full length of the papakainga foreshore to an outfall at the head of Okahu Bay. Work started at the latter end in 1910 and by January 1911 a concrete sewer arose out of the sand 8 ft 6 in high by 5 ft 8 in wide (inside measurement). A reinforced concrete retaining wall rose above it on the seaward side in contemplation of a raised road one day skirting the bay above the level of the papakainga flats. Photographs evidence the unsightly view from the papakainga. The harbour aspect was lost along with ready access to craft. The drainage

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was insufficient and in heavy rain the papakainga turned to a swampy quagmire.

The Orakei works began, with Public Works Act reinforcement, the same year the press carried news of Government's intention to consider acquisition of the whole Orakei block. Soon after the flooding started.

That was Auckland's introduction to the turangawaewae (standing place) of Ngati Whatua. The people were opposed to the sewer outlet from the moment it was first mooted (by civil engineer R L Mestayer) in 1905. Hone Heke notified the Council and Government of the people's opposition as early as 1907. He was advised the work was a public work and the Maoris could only dispute the taking if they could prove it was not a public work. In any event, the works were secured by special legislation—the Auckland and Suburban Drainage Act 1908—the Crown approving the Okahu Bay discharge without requiring Auckland Harbour Board consent, and constituting the Auckland Drainage Board to include Auckland's Mayor and Councillors.

In 1914, when the works were operational, Auckland's crude sewage was discharged to the shellfish beds of Ngati Whatua, opposite their ancestral village. There could have been no greater insult to a Maori tribe even if one were intended. The disposal of human waste to water, especially in such great volumes offends all sensibilities of Maori people, particularly in proximity to the main habitation place, profaning that which is sacred. It would have indicated to Ngati Whatua what Auckland thought of them even without the spiritual connotations of Maoridom. It may also have indicated that Auckland expected they would soon no longer be there.

Neither the loss of the shellfish beds, nor the insult was compensated, and nor was the consequential flooding. On 9 December 1912 when £125 compensation was awarded for land loss, land severed, lost access and depreciation it was stated in the Compensation Court's Award

With respect to that portion of the claim wherein a sum of £125 is claimed for depreciation for building sites through the sewer backing up and collecting stagnant water on land and in creek the Drainage Board have undertaken through its Counsel that it will in completing the construction of the sewer across the seaward end of the said Block leave and keep a sufficient opening under the said sewer where it crosses the said creek at the North East end of the said Block to allow the waters of the said creek to pass thereunder and will keep open the storm water syphon overflow channel now provided in and under the said sewer for storm or flood water to pass through the same provided that the owners or occupiers of the said land do not throw or deposit in the said creek any debris or articles of any kind which block up or impede the free flow of the water through either of the said exits.

And said it was but the flooding continued. As a further irony, the compensation award actually returned to the Crown. When later the Crown bought from the Maori the adjoining papakainga, £125 was deducted from the Government valuation—a keen Purchase Officer noting that the value would have dropped by the compensation paid (transcript of proceedings of the Kennedy Commission p 35).

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All this was but a beginning. The sewer pipe was merely herald to the tempest that was to inundate and desecrate the whole of Ngati Whatua's last ancestral land. In the space of one year the Crown bought the bulk of the Orakei block.

## 6.2 The Pot of Gold—the Farm Lands

Cabinet approved negotiations for the purchase of Orakei in August 1913. The Crown's position was secured by an Order in Council in May 1912 preventing sales to other than the Crown and was maintained by almost annual Orders in Council thereafter.

The Native Land Purchase Board was constituted by section 361 of the Native Land Act 1909 to undertake, control, and carry out all negotiations for the purchase of Native land by the Crown and ensure the performance and completion of all contracts. It consisted of the Native Minister, the Under-Secretary of Crowns Lands, the Under-Secretary of the Native Department, and the Valuer-General. On 25 October 1913 the Native Land Purchase Board resolved that

purchase [of Orakei] as authorised by Cabinet resolution be completed subject to certificate of Crown Law Office as to interests proposed to be acquired being in order.

The proviso to the resolution effected a delegation of purchase responsibilities to the Crown Law office or in effect the Crown Solicitor at Auckland. Under his supervision the work of purchase was carried out by Mr S Mays, Chief Clerk in the Crown Solicitor's office. He in turn consulted with the Auckland lawyers who had acted for the lessees and were familiar with the Orakei situation. The lawyers had in turn engaged Ngapipi Reweti to assist them in the original proposed purchases. Mr Reweti was in turn to concern himself with the sales to the Crown, introducing to Mr Mays those who wished to sell.

Ngapipi Reweti, or Hawke (for he was the son of Tuhi Reweti and Tame Hawke), was only twenty-two when negotiations to buy began. He was a person on whom some relied because of his education. He was born at Orakei and educated at West Tamaki Primary School and St Stephen's College, a secondary boarding school for Maoris. At 18 he was an engineering apprentice in Auckland. He was engaged by the legal firm in 1911 to translate the Maori discussions at Reweti and Orakei to consider the sale of the land, and expressing a desire to learn more of the law and become a Maori agent, was retained to act in that capacity. Ngapipi assisted the syndicate's purchases and it was he who filed and led the counter-petition in opposition to Otene Paora in 1911.

Much later he regretted his actions, protesting the syndicate paid him double value for his own shares. In the end he stood in support of Otene Paora in an inquiry in 1930, claiming the people sold the farm lands on a promise the papakainga would be protected. After Otene's death, he was one of those who led a petition challenging the purchases. He was a principal witness at the inquiry that resulted when he was aged 54.

All seemed set for the purchase operations to begin but for one thing. It was a matter of record that several Orakei owners were opposed to sales. At that

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time where any partition was owned by more than ten the Crown could not buy it except by calling a meeting of the owners and securing a resolution to sell by the majority vote of those attending. The next development was the enactment of section 109 of the Native Land Amendment Act 1913 enabling the Crown (alone) to buy the individual interests of owners in any blocks, no matter how many on the title, and without the necessity for a meeting. Ngata, opposed to the buying of individual interests, fought Herries bitterly over the 1913 amendment but to no avail. Most of Orakei was purchased by this method. Still, the meeting of owners procedure was occasionally used. If sellers held most of the shares in a partition the shares of non-sellers were acquired by this alternative.

The Crown Solicitor received instructions in October 1913. The lawyers and Ngapipi visited Orakei before buying began but Ngapipi kept contact between the owners and Mr Mays thereafter.

The sales began with the farm blocks. For the Crown it was an enormous success. Some 460 acres, or most of the farm area was acquired by December 1914.

Those who had 'sold' to the lessees had now to sell to the Crown or refund the money paid. A close contact between the Crown office and syndicate lawyers ensured the syndicate was repaid in full. Separate cheques issued, one for the syndicate another for the owner. But obviously many others joined the sellers for the original transfers had aggregated only 387 acres. That is not surprising. The effect of individual buying amongst Maori owners is that once some sell, and the buyer's interest increases, others lose heart and sell too, especially once the buyer has a preponderant or controlling share. What is surprising is there were not more. Throughout the country there was a rash of land selling following individualisation of titles and the right to sell individual shares.

It was a far cry from the customary preference for collective decision making. The Maori Land Court experience is that Maori group decisions are a far cry from the private decisions of individual members of the group. Even private European companies impose restrictions on the sale of shares.

Later there were many complaints about the propriety of the farm sales by people of Orakei, and many inquiries were held, but since by then most of the papakainga had been sold too, the complaints and inquiries were directed to the papakainga alone and there was never an investigation of the farm sales. Complaints that transfers were not executed as prescribed by law were never tested. In a Maori Land Court inquiry in 1930 there was an attempt to have the transfers and associated records examined but the Crown refused to produce them, and withdrew from the inquiry on the ground that the Court was stepping outside its terms of reference. They have not been seen since for there was no need for the Crown to register them. It merely announced by proclamation what it claimed to have acquired and that was enough to convey title. It is possible however that allegations of irregularities in execution were merely symptomatic of an overall grievance.

*Orakei 1987*

Another complaint related to the meeting of owners procedure, earlier described. By this system the shares of non sellers are acquired if a majority in shareholding agree to a sale. When Orakei No 5 partition was sold eleven owners favoured a sale and fourteen were opposed but the vote to sell was carried because the sellers held bigger shares. This explains how some of the interests of two leading non sellers became sold—Otene Paora and Te Hira Pateoro. They did not sell but were outvoted. Otene had fewer shares than he would have held had Uruamo not been excluded in 1869. He had shares from his father (Paora Kawharu) but none from the Uruamo line of his mother. Had Uruamo not been excluded the vote would have been different and the sale would not have happened.

Others claimed they did not know what was happening. Merea Kingi applied to partition her shares in 1913. Her application was dismissed in 1915 because in the interim the Crown had acquired the block. Otene Paora also sought a partition in 1915 in respect of another block in which he had shares. His application was not considered for even before it was filed the Crown had bought the block by the meeting of owners procedure. He did not even know he had been bought out. It is possible he was not given notice of the meeting. Rotena Reihana claimed he had executed his transfer in escrow pending an arrangement to give him some land in some more convenient location on the block. In the 1930 inquiry the Court attempted to see the document but it was not produced because this complaint the Crown considered outside the Court's terms of reference.

Wiremu Watene had a similar concern, one specifically referred to in the 1930 terms of reference and accordingly it was considered by the Court; but since the Crown had withdrawn from the proceedings by then the documentation was not produced. Wiremu said owners sold on a promise that the Crown would allocate them a block when everything had been sorted out. He claimed that immediately after one sale he insisted on and obtained a document signed by Mr Mays promising to reserve him six acres. Ngapipi Reweti recalled the event saying

It was arranged that an extra six acres in addition to the flat, was to be reserved for Wiremu Watene Tautari. Wiremu asked for it at Mr Blomfield's office. He told Mr Mays he wanted this six acres reserved for his sons before he would sell his interest in the land on the hill. Mr Mays agreed on behalf of the Crown to reserve this 6 acres, and an agreement was drawn up and signed by Mr Selwyn Mays. Then Wiremu Watene Tautari signed the transfer. He would not sign the transfer until the agreement to reserve the 6 acres was signed by Mr Mays.

Without the documentation the Court could do little but the issue was put to another inquiry in 1938. By then Wiremu Watene was dead and the document could not be found. Mr Mays contended that the document was an option to buy up to six acres within two or three years and since the option was not taken up, it lapsed. In the absence of any contrary evidence Mr Mays' contention was accepted.

Counsel for various Maori in the 1938 inquiry drew attention to another anomaly. Mr Mays stated Wiremu was counselled to retain part of the purchase price so that he would be able to buy back the six acres and so exercise the

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option, but still he failed to do anything. Counsel pointed out (and the Crown admitted) Wiremu was paid by instalments, as it lacked sufficient funds to pay him a lump sum, and the Crown still held the greater part of the purchase price when the option would have been due.

In fact there was provision in law to reserve land from sales or return land in fact sold. Section 19 of the Native Land Amendment Act 1912 enabled the Governor to reserve land purchased from natives for the exclusive use of any or all of the former owners instead of vesting the land in the Crown by proclamation.

And land was in fact reserved—but for lessees, not the natives. In the settlement with T Coates, a major lessee, on 22 October 1914, it was arranged that he would be awarded the section where his house stood. When by July 1917 he had still not received it, he wrote to his local Member of Parliament complaining

. . . On 22 October 1914 I had a final settlement with Mr Mays, and since that time my solicitor and I have done all possible to induce Mr Mays to give us the necessary Title to this small section of land, but so far with no result, except promises, with a request to call again next week and so on, and as such treatment is most unfair to me and most unbusinesslike, I must again appeal to you as my representative to once again take the matter in hand and make a strong appeal to Mr Herries (the Minister of Native Affairs) and ask that the Title be completed and handed over without further delay . . .

The Government called for a response. Mr Mays produced the agreement in August, showing the undertaking to transfer ten acres to Mr Coates when the whole partition for that area had been bought but Mays warned against achieving that end by special legislation, citing three reasons—

- (1) It will probably awaken the Auckland City Council's desire to control Orakei.
- (2) It will certainly revive Otene Paul's (Paora) worthless petition for redistribution of Orakei interests and
- (3) It will . . . encourage non sellers to hold out.

The matter was complicated by the discovery that the agreement did not comply with section 110 of the Native Land Amendment Act 1913 but Mr Coates obtained title by a Governor's Warrant, authorised on 6 December 1917.

By the same device, another lessee, Mr Biddick, was awarded 2.5 acres in two separate sections on Bastion Point in 1920 (see area No 7 on the map at Appendix III).

We think the main reason why lands were not reserved for the Maori vendors was that given by Mr Mays in evidence in 1938 with reference to Watene's claim

I told him very clearly that I would not purchase 2B with [provision to reserve a part of the land] in the transfer. Of course there was a reason for that. Once I did that with one piece each vendor would want a similar concession and it would be useless for subdivision.

He did not want a patchwork quilt but a clean sheet.

*Orakei 1987*

The main Maori complaint was that the farm lands were sold on a promise that if the Crown took the bulk of the land it would be satisfied and the people would be allowed to keep the papakainga. The Government in public statements had made clear its desire to acquire the farm lands, and had entertained use of the Public Works Act (in its support of the Council's proposals). There seemed little hope to the Maori that they could keep the farm lands. They were in any event subject to long term leases on which the lessees had put substantial improvements that would need to be compensated at the expiry of the lease. The right of actual occupation had already gone, and although the right to the reversion was still held, it was tenuous for the lessees were urging the Government to protect their improvements with the right to buy the freehold. (In fact, it later transpired, while not one Maori was able to keep the land on which his house stood the lessees lands were leased back to them until the Crown was ready to subdivide. Later, as we have earlier said, they were then given the freehold of their house sites).

But the papakainga was in a different position. It had always been separately regarded both by the people and official bodies. The Native Land Court in partitioning the land in 1898, and the Stout–Ngata Commission in 1908 had drawn a distinction between the farm and papakainga lands regarding the latter as a particular reserve. The Crown respected the distinction too, when it first started buying for it is a fact that it bought first in the farms.

In December 1914 the Crown began buying into the papakainga.

In the 1930 inquiry Ngapipi Reweti said his instructions were to advise the people

that the papakainga flat was not to be sold but was to be retained by the natives for all time.

In the 1938 inquiry Mr Mays disputed this saying

several of the small owners wanted to sell their papakainga land. I would not buy them and told them so. I said 'I am not buying the papakainga just now'.

The finding, in 1938, was that if Mr Reweti did say what he purported to have said, which was doubted, he had no authority to say it.

From all this Ngati Whatua inherited the label of 'willing sellers'. The accusation has diverted attention from the propriety of the Crown's buying in the face of the Stout–Ngata report on Orakei and the Native Affairs Committee recommendations for an inquiry into the vexed question of title. It served also to denigrate later petitions for the return of land and to restrict later claimants in negotiations, for the label 'willing sellers' has stuck and has affected the people's perception of themselves. Given the circumstances they should have borne no other label than that of a loyal tribe that sought to keep its main ancestral home as a place to stand.

The Crown has promoted the view that it moved to buy only when some moved to sell. The facts militate against that opinion too. Orakei was courted before the turn of the century and the intention of the Crown was not to buy the interests of just the willing sellers but to buy the block. That became even more obvious as time progressed but that will be considered later.

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While the farm lands on the ridges were being bought, the Auckland and Suburban Drainage Board was completing the Okahu Bay sewage storage tanks on the flats. On 17 June 1914 the Board wrote to Government seeking an acre for working men's cottages. Native Minister Herries' reply of 19 June "that nothing can be done until the whole block is purchased" discloses the ultimate intent.

On 27 July 1914 the City Council requested some 200 acres in "the back portion" of the block for "some hundreds of worker's homes". Cabinet directed a report but according to the *Auckland Star* (22.8.1914), the City Council resolved instead to negotiate to buy the whole block from the Government by paying what the Government paid the Maori plus 5% to cover expenses.

Otene Paora, presumably believing the Crown did not intend to buy everyone's interest, or the papakainga, responded with a letter of 26 August to the Prime Minister, warning off the City Council "because of the title in dispute and still now in dispute". He added that the Council and Government were well aware that "the vendors were outclassed in all shapes of form as to the right to the land" and that his position had been "adopted by the House for inquiry in 1912 [with] four recommendations of the Upper House Committee for favourable consideration. I am pointing out these facts" he said "so as to save the Government, Country, and the City Council some embarrassment. "

The Government considered the Council's plea, the Commissioner of Lands, Auckland, reporting favourably to Cabinet, on 30 September, on the creation of a model suburb with provision for such amenities as a University. A hotchpotch of popular opinion did nothing to ensure protection for the Ngati Whatua interest. The 'dying race' syndrome was still prevalent in 1913, despite evidence that the Maori population was increasing, but the belief was sustained by the continuance of drunkenness, disorder and disarray in many small Maori communities and the constant barbs delivered at the state of their affairs. Auckland's District Health Officer was particularly hostile, feeding opinion that Orakei was a source of typhoid and other infectious diseases, abetted by a smallpox scare in 1913 when Maori were forbidden to travel. The opinion that Maori were better off in the country 'to live the free life they prefer' did not help in the Orakei case either. But the popular demand that Maori land should be available for European needs and the antagonism to 'Maori landlordism' were the motivating causes for the acquisition of Maori lands at that time, and the official policy for the assimilation of the Maori people was the rationale—in order they might live the life the Europeans prefer.

### 6.3 Pieces of Silver—the Papakainga

The Crown began buying in the papakainga in December 1914.

It is convenient to summarise what happened before events are more closely examined in historical sequence. The papakainga was about 40 acres, the exact area being fixed at 38 acres, 3 roods, 16 perches in 1904, after parts of



*Orakei 1987*

the papakainga were taken for road. Progress was slow for it was hindered by considerable owner opposition.

In the first year of purchasing the Crown acquired interests representing 14.5 acres. Things moved more slowly after that and in 1916 the responsibility for buying passed back to the Native Land Purchase Board.

The Crown was buying not defined parcels but undivided interests or shares in one papakainga block and it did so over 14 years. Each interest represented a certain acreage. On an area basis the land acquired in each year was

1914	0	0	25.34	
1915	14	1	00.17	
1916	5	3	02.17	
1917	2	1	19.62	
1918	1	0	20.80	
1919	0	1	06.17	
1920	0	0	11.32	
1921		nil		
1922	0	1	39.06	
1923	8	0	39.83	
1924	0	1	14.31	
1925	1	2	13.33	
1926	0	2	36.61	
1927	0	1	18.73	
1928	0	1	26.55	by exchange
	36	0	34.01	
less	0	13	00	returned for church cemetery
	35a	3r	21.01p	

Mr Mays dropped from the scene after 1916 as Government Land Purchase Officers took over. Though it took a long time, eventually most owners gave in. In addition to buying in the papakainga the Crown Officers maintained pressure to gradually buy into those farm blocks not sold in the original farm sales with result that the Crown had acquired by 1927, all but some 12.5 acres of the Orakei block.

The agents by then were dealing with a hard core of non sellers but successfully split them in 1928, when one group agreed to combine their shares with other Maori land held on the side aspect of Bastion Point ridge, leaving the balance owners in the papakainga with only 2.5 acres and a ten acre 'exchange' block on the ridge. With the exception of the 2.5 acres, the Crown had acquired the papakainga for a total of about £12,500 and with 120 Maori then living in cramped conditions on 2.5 acres around the marae, without sewerage or adequate water supply, and some only in tents, it seemed merely a matter of time before they would give in. They in fact held on until 1950 when the Crown used the Public Works Act to take it, taking with it the 10 acre exchange block, and so it was not until then that the objective was achieved—and Ngati Whatua of Orakei was landless.

When the buying began in the papakainga Otene Paora and others had more petitions with the House of Representatives and Legislative Council. Petitions were filed from 1913 to 1916 but they were not considered. Substantially the same petition had had a full hearing in 1912 and the Native Affairs Committee had allowed that to lapse when its recommendation was disregarded. But

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Otene himself does not appear to have realised that the Crown was buying papakainga interests until well after the buying began, for individuals dealt behind the doors of Mr Mays' office. It was not until 3 February 1915 that he wrote to the Minister of Lands. He complained

The officers of the Crown are now urging the natives to sell their interests in (the papakainga) . . . this action of the Crown must not proceed further.

He promised another petition and added

Although a caveat has been entered forbidding the sequestration of the above land the negotiations with the natives still continue.

Judges of the Maori Land Court, and later historians, have recorded their views of the operations of the Native Land Purchase officers. In 1936 Judge Acheson described a time, in 1914 when he was Secretary to the Board, saying:

I felt ashamed at purchase happenings but was helpless to intervene.

G V Butterworth (1985:242) has written, with reference to acquisitions on the East Coast

The Native Land Purchase Officers, using the power of ready Government money, bought their way into numerous blocks including even those in which the kainga (villages) stood. The money so gained was used to slake the owners' thirst and provide stakes for gambling. The outbursts of drunkenness in particular shocked Ngata.

The Land Purchase Officers knew well enough that the restoration of tribal authority was the only bulwark to their schemes, one officer writing in 1896

. . . they must be dealt with individually, as the majority of them, if assembled in public meeting, would be filled with righteous indignation of the thought of parting with their birth right for a mess of pottage; but within 24 hours the same persons would gladly sell if they could do so unobserved by their fellows. (Wheeler to Sheridan 1896 Letterbook 19, NLP, NA).

From that time individual dealing became the standard tool of trade for the Purchase Officers, and remained so well into the 1960's. Their operations in Orakei were referred to in the submissions of J P Hawke and others in proceedings before the Supreme Court in 1978 (*Attorney-General v Hawke and Others*)

First, the officers of the Crown made regular and detailed reports on their progress in purchasing the land, and named the main 'oppositionists'. Then these same officers exchanged information which they thought might be of use in their dealings with these people. This information included who was in debt, who owed rates, and in one case even referred to the fact that Te Hira was 'failing physically'. Mr Phillips (a witness for the Crown) endeavoured to place no importance on the inclusion of this information in official correspondence, but the Crown's representatives thought it important enough to include it in letters which dealt with how to approach the various non-sellers. In fact there is every reason to believe, on the balance of evidence, that the Crown's officers used this information in their discussions with non-sellers. Indeed, as the evidence of Mrs Tumanako Reweti indicated this morning even the willing sellers—so-called—were pestered and pressured by Officers of the Crown.

Before this Tribunal J P Hawke claimed people were stopped by Native Land Purchase Officers' with cheque books in one hand and sale agreements in the

*Orakei 1987*

other in city streets, or in hotels or other public places. Tumanako Reweti, he alleged, was approached while still a pupil at Queen Victoria School.

Confusion was compounded by the fact that the Crown was buying not defined parcels of land but undivided interests in a single block, peppered with homes without separate titles, and by extraordinarily complicated conveyancing techniques. The overall scheme was that the Crown continued buying until it had enough shares to partition a block, partitions being effected in 1918, 1920, 1927 and 1928. The overall hope of the occupants was that the Crown would do for them what it in fact did for the lessees, namely that on the division of the land it would furnish a secure title to those parts on which they had their houses, in a proper and orderly manner.

To that end the conveyancing techniques took various forms, similar to those alleged to have been employed in the purchase of the farm lands. One was to execute a transfer of all an owner's interests with collateral agreements to pass back a title for his or her home in due course. Under this system only part of the purchase price was paid. Later, if it appeared too much was to be kept back, the Crown would renegotiate the agreement and pay out a bit more. A collateral agreement might be renegotiated three or four times and monies paid out, a bit at a time, on each occasion, until in all but one case, nothing or too little for a house site was left.

An alternative was to buy land interests on an agreement to pay more to cover the house, when the Crown through its other acquisitions had enough to partition an area that included that house. On this system part payment was made first and another payment later.

Yet another technique involved the acquisition of shares actually held, and those to which the owner had a right to succeed, although a succession had not been done.

Of course, non-owners who were mere occupants were relieved from understanding these procedures for they had nothing to sell.

Now although it was the obvious intention of some to secure their homes, somehow the whole of their interests came to be acquired so that there was later nothing left to secure them with. Collateral agreements were modified, a bit at a time, until the inchoate right to a later share of the land was totally extinguished. Many claimed not to have understood what was happening, and that is not surprising for the circumstances were even more confused.

Part of the difficulty was that owners held or were entitled to shares from several sources. We illustrate the point by reference once more to the position of Otene Paora. He held shares of varying sizes from separate successions to each Paora Kawharu, Paora Reweti and Rahera Paora alias Rahera Uruamo who in turn held separate shares under both those names. (He would have had many more shares again had his grandfather Uruamo not been excluded from the original list). It is common, even today, that Maori owners do not know the extent of their total shareholding in a block. They relate not to figures but to genealogical lines and hold, not a total shareholding, but as part holders of their fathers' share or grandmothers' share for example. To per-

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petuate the lines they may hold different shares under different names, those from the mother being held under her maiden name or first name, for example. It also happened that where an owner occupied a house built by his father, and therefore under his father's mana, the owner may be disposed to alienate the shares from the mother without considering whether the shares of the father provided a sufficient curtilage for partition.

From later evidence it seems some owners thought they were selling some only of their shares, those inherited from their father or uncle for example, not realising that the shares given in the agreement had been combined and represented all they had. Some thought collateral agreements to pay for their homes, later, were agreements to secure their homes on a later division of the land. Some appear to have thought that if the Crown took all their interests and combined them, then at the end of the day they would have enough for a home with a lot left over. The Crown could keep the part left over if they got a house site.

Complicating matters was the compulsory acquisition of the water-front land for a roadway that included lands on which houses stood. Otene Paora endeavoured to partition 0.75 acres surrounding his house to learn that that land had been taken for the works. Again Otene seemed to have had no idea that that had happened and did not know that he had lost his shares.

Others were confused by rate demands not knowing that rate demands issue to occupiers, not owners. Merea Kingi received a summons for arrears in 1916 after being earlier informed by the Court, when she sought a partition, that her shares had been sold. In 1922 the people, believing rate demands evidenced their continuing ownership, collected and paid £301 towards arrears.

Added to all this were the usual difficulties that go with fragmentation of shares of varying sizes. To accommodate everyone there were some 3,564,000 shares spread over some 70 owners (numbers vary through intervening successions). There were 36 sales in the papakainga, eleven by persons owning less than 0.12 acres and another thirteen by persons owning less than half an acre. Smaller shareholders were not afforded an opportunity to pool their shares in the name of one, or owing to the Crown's exclusive right of purchase, to buy out others to increase their holdings and so acquire house sites by that system.

Whatever may have been the understanding of the vendors it is clear that understanding was not reflected in the documentation. In 1938 a Commission examined the papakainga documents thoroughly. They had, for the most part, been properly executed, attested and translated to Maori. There were some irregularities of a non substantive nature and some owners had not been fully paid but these defects were comparatively minor, given the extensive documentation required, the complicated circumstances, and the piecemeal payments over a long period. Underpayments could be readily rectified. On that basis it was considered the purchases were in order. What the Commission had no need to consider, in other than a peripheral way was whether the purchases were proper, for the question before it was whether the interests

had been acquired, “freed and discharged from all right title and interest of the native vendors” and not whether they ought to have been acquired and then in the way that they were. Yet the method of conveyancing was decidedly unusual. For the far greater part the method was that earlier described that an owner would execute a transfer of his whole interest even if he did not wish to sell his whole interest, the transfer being held in escrow with a collateral agreement to pass back part and only part payment being made. The technique also envisaged that sellers would eventually relent and agree to relinquish the collateral agreement, which they invariably did, whereupon the balance purchase price was paid and the original transfer was released as operative. It added greatly to confusion however, the more so since sellers were being paid on a drip feed system anyhow. It must have been difficult for owners to know whether what they were receiving was for a payment overdue or for a new sale of more shares. In the 1938 inquiry Mr Mays justified the technique on the ground it was necessary to acquire all interests before the Crown could divide the land and return parts, thereby avoiding a patchy development. In fact the more usual system is that an owner wishing to sell part only of his shares, executes a transfer of those shares only and receives the stated purchase price in full. At the end of the day the Maori Land Court would partition the land between the Crown and non-sellers awarding to the non-sellers the parts on which their houses stood in satisfaction of their shares unsold in accordance with an overall scheme. Counsel for the Maoris, in 1938, challenged the propriety of the transfers and described the more usual alternative. “Such a system might have been adopted” the Commission decided “but it would have interposed delays”. Just what delays might have interposed are difficult to determine unless the Commission assumed total acquisition the proper goal.

Also unusual, as a matter of conveyancing and settlement, was that sellers were not always promptly paid for that which they sold and for which they had executed transfers, but were paid by instalments. Mr Mays explained, with reference to the instalments paid to Wiremu Watene, “there was not enough money at that time to pay anybody any large sum”.

The Commission considered “the case for the natives rested very largely on documents and papers in the possession of the Crown” and it was on the basis of that documentation, rather than the owners understanding of the Crown’s intentions, that the issues were determined. The clearest evidence of a misunderstanding was not the documentation, but the later applications to the Maori Land Court to partition house sites by persons whose shares had in fact been sold, to succeed to interests when succession rights had also been sold, or to transfer interests that were no longer held. Indeed there may have been more partition applications but the understanding was that the Crown would attend to the partitions at a later stage. In other cases the Court itself appears confused. Successions were done and shares awarded to persons who had sold them before they inherited them, in at least six instances.

In fact the Crown never did partition land for house sites. There was never one partition to cut out a house site despite the clear wish for that to happen,

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and despite the award of house sites to lessees in the subsequent subdivision of the farm lands.

Because of the extraordinary complexities surrounding the ownership of Maori land, it is still necessary to have a Maori Land Court monitor transactions and assist and advise applicants. The Court knows well the difficulties facing applicants seeking merely a house site on their land, even without the hassles of a 'willing buyer' in their midst. What needs to be borne in mind is that none of the Orakei purchases was subject to the scrutiny of the Native Land Court for Crown purchases were exempt from all restrictions, prohibitions and requirements on the alienation of Native land—s360 of the Native Land Act 1909. But nor were there applications to the Court to determine the ownership of improvements before buying began, to complete successions instead of buying interests in expectancy, or to use the facilities of the Court to consolidate interests or the interests of family groups and provide house sites the moment owners expressed a wish for that.

This Tribunal need not determine the validity or otherwise of the numerous claims made concerning the sales. It need only note that according to the documentation the shares of most owners had been acquired and where there were agreements to return a house site, or some shares were held back, eventually the agreements were extinguished or the shares held back were gradually bought up. Nor is it implied that no one wished to sell. Mr Mays deposed in 1938 that many owners came willingly to his office, or were brought there by Ngapipi Reweti. He said "They had had a taste of money before and they wanted some more."

Contemporaneous with the papakainga purchase were efforts to acquire the last of the farm lands. Interest focused on the interests of Te Hira Pateoro, great grandson of Apihai Te Kawau. Like Otene, he was opposed to sales but unlike Otene he was a major shareholder. In 1917 he was advanced in years. Te Hira had held back land in the farm sales. He was the major owner of 9 acres at Pokanoa Point on Orakei ridge and was sole owner of another block of 14 acres. Both blocks were subject to long term leases.

Land Purchase Officer Mr Bowler reported to the Native Department on 19 December 1917

(Hira Pateoro) has held out for a long time, but now seems inclined to deal. If the Crown could transfer to him the lease of the 14a 1r 19p I think it likely that he would sell his reversionary interest in the 9 acres (generally known as "The Point", and, to my mind, the pick of the Orakei Block).

He sought approval to such an arrangement. The opinion of the Commissioner of Lands, Auckland was rather that nothing should be offered to effect a deal. He reported, 20 April 1918, that the Crown "appears" to have acquired interests equating to 22ac 3r 33p in the papakainga (leaving a balance Maori owned of 15ac 3r 00p) and most of the interests in the farm lands but

I would bring before you the undesirability of the Natives retaining any of these lands. . From my point of view, it is absolutely necessary that the Crown should acquire this entire Block, and therefore suggest that in the event of the Land Purchase Officer being unsuccessful in his negotiations, that special legislation should be introduced to enable the Crown to compulsorily acquire the balance of the Block.

*Orakei 1987*

On 8 May 1918 the Department of Lands reported on arrangements to secure titles for the lessees but warned against similar arrangements for the native owners.

It is obvious that if some of the Native owners retain their interests in the reserve, any subdivisional scheme will be seriously affected. The Commissioner of Crown Lands, Auckland, has suggested that in the event of the Native Land Purchase Officer being unsuccessful in his negotiations, special legislation should be introduced to enable the Crown to compulsorily acquire the balance of the block. In this connection it appears that Mr Selwyn Mays of the Crown Solicitor's office, Auckland, has entered into some sort of verbal arrangement with the Native owners that they are to be allowed to re-purchase from the Crown an area in the vicinity of the Okahu Bay frontage. Such an arrangement appears highly undesirable.

Meanwhile Te Hira Pateoro was still holding out, as at the end of 1918, the Lands Department reporting to the Under-Secretary of Lands on 24 September "so far the sole owner (Hira Pateoro) has shown little disposition to sell" and recommended an increased offer, or failing acceptance "to see whether Hira will accept a suitable piece of Crown land elsewhere in exchange."

Te Hira did not cooperate. Eventually on 2 August 1920 the Commissioner of Crown Lands Auckland telegraphed the Under-Secretary of Lands as follows

Your wire today re proposal exchange Orakei 1A2. Recommend that exchange be gone on with as suggested unless Hira will agree to sell his interest in 1A2. Better to get rid of native altogether if possible.

Te Hira sold. Was he threatened with compulsory acquisition? He did not live to give evidence before later inquiries but others claimed to have been told that the land would be compulsorily acquired if they did not sell.

The position at the end of 1920, was that non sellers held undivided interests in the papakainga equating to roughly twelve acres. In the farm lands buying had slowly continued and the area held by non sellers equated about 24 acres. It was also a fact that by 1920 many had left Orakei and a loyal tribe seemed about to disintegrate. At least amongst those remaining there was, by then, total resistance to further sales.

#### 6.4 Rainbow visions

The flooding of the papakainga worsened in 1921 when a raised roadway was built over the sewer pipeline along the beachfront. It added to the villager's discomfort turning the papakainga to a swamp in heavy rain. It was only 30 years later, after the people had left that more adequate drainage was installed. It was only after the last remaining Maori land had been acquired that Auckland took its sewerage elsewhere (to the Manukau Harbour where by an unhappy coincidence the outfall again adjoined an isolated pocket of Maori land near Makaurau marae).

Plans for Orakei as a model suburb, with a university, or to provide for workers dwellings were urged by the Auckland Members of Parliament throughout the 1920's, Government insisting however that the whole of the block had first

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to be acquired. Then in 1923 the Minister of Lands stated in the House, in response to a question

It has not yet been possible to open the Orakei block, as the Crown has not acquired all the Native interests therein, whilst arrangements have also to be made to acquire the property of the Church Trust Board in the block. So soon as a sufficient area is acquired it is proposed to invite competitive designs for the laying out of the land on the most suitable and modern town-planning lines . . . (1923) Vol 200 NZPD 641.

In addition to acquiring the Church and native interests it was necessary to settle arrangements with the Auckland City Council which had been strongly protesting the delays. The Crown and Council reached an agreement in 1924 on the construction of the Tamaki waterfront drive and the Tamaki rail deviation which would provide easy access to the proposed new suburb. Meanwhile negotiations continued between the Government, Council and Orakei Roads Board as to the future administration of the area.

In the interim the papakainga was a model of abjection. By 1924 the majority had left the village but some remained and continued to occupy the houses on the land, for although the Crown had acquired most of the papakainga interests, and had partitioned out some of its holdings, the Crown was still buying only undivided interests in the land, with alleged promises to return parts and there was still the feeling that existing occupancies would be respected. Still there was no real security of tenure. No one was more than a mere part owner in the land, if one was an owner at all, and disintegrating homes were occupied by the remnants of a disintegrating tribe.

Then in 1924 there was some resurgence of hope. G P Newton, a clerk of the Maori Land Court, assessed the total of the remaining Maori interests in Orakei and proposed they be consolidated into one block of twelve acres on the marae site. The people's attempts to obtain title to the twelve acres, and add to it the area taken for roads never formed, were to take them to the Supreme Court in 1929. They were unsuccessful, as it turned out, but in about 1924 there were some hopes and a large number returned to occupy the twelve acre area that was sought.

The hope continued although other action by the Crown indicated that its enthusiasm for the total acquisition of the block had not waned. In 1925 the Lands Department promoted a public design competition to plan 'the Orakei garden suburb'. The 42 entries reached a high standard and were displayed not just in Auckland, but in Wellington, Christchurch, and in the Dunedin exhibition. The winner, announced on 26 June 1925 was R B Hammond, an Auckland town planner, surveyor and architect soon to become the City's inaugural Director of Town Planning. Large playgrounds would service numerous projected homes. There was no provision for Ngati Whatua. The plan depicted tennis courts and playing fields on the area still occupied by Ngati Whatua residents taking in even their marae.

The villagers directed their energies to espousing the alternative 'Walnut plan' which proposed a model Maori village on the papakainga. Ngata thought the plan degrading, intended for tourists to see Maoris being Maori in a model Maori village. The Orakei villagers were not impressed either but of all the



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plans submitted that was the only one that envisaged their continued occupation. They would sing if need be to keep a place in the land of their birth.

The Hammond plan prevailed and development for residential purposes started in 1926. Although the Maori still owned the land proposed for tennis courts, sections came to be sold on the basis that the park would soon exist at Okahu Bay.

Others of Ngati Whatua were unimpressed with either plan and placed their faith in the Church, the traditional provider of sanctuary to the oppressed.

## 6.5 The Vision of the Church

Te Kawau's gift to the Church, the four acres, was not owned by the Crown at the start of the 1920 decade but still by the Church. In Maori opinion, as described at 4.3, the land was no longer used for the purpose for which it was given and was 'returned'. Several people had moved to build homes and live in the sanctuary of the Church grounds. Some families had lived there from the time the land was first granted to the Church. The occupiers had paid the rates from when rates were first levied by the Orakei Town Board. It is not known how many were there in 1926, when this too was bought by the Crown, but it is known that much later, in 1935 when some had refused to vacate, there were 12 adults, ten children and five modest homes. It was reported in May 1939, when eviction notices were served, there were 14 adult occupiers with their families.

The Church sold the land to the Crown in 1926. There was nothing illegal in that. In law the Church owned it. Although in Te Kawau's Deed it was held in trust for the support of the chapel and the school that was there in his time, the Crown Grant changed this so that it was also held ". . . as an endowment for schools for the benefit of the aboriginal inhabitants of the Colony of New Zealand." Te Kawau had not agreed to that but as Bishop Gilbert said "the particular had become the general" and it was obvious not only had the Church and school ceased to exist, but the people whom they were meant to serve would soon cease to exist too. J E Towle, Chancellor of the Diocese, Auckland explained to us the Church had the option of keeping the land for what would have become "a Pakeha Church site" or selling it to advantage Maori schools generally and thus Maori education. The latter seemed the more important trust but there were doubts whether the Church had the legal power to dispose of the land to the Crown. The Crown overcame that doubt by enacting s7 of the Reserves And Other Lands Disposal and Public Bodies Empowering Act 1925 to enable a sale. Accordingly with proper and necessary regard for the law the land was sold and the 1000 purchase monies applied to the Native Schools Trust now represented in St Stephen's and Queen Victoria Schools Trust Board.

All that was done was done according to law. Later a Royal Commission had no difficulty in answering the questions Government put to it with regard to this matter—should the Crown have abstained from buying?—No—was the purchase money applied as the law required?—Yes.

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At least the burial ground was not developed (though it is claimed bulldozers tore away part of it). The people had to move to live but had still a place to die and there was another Church at Okahu Bay where they could still give thanks.

One of the people was minded to do none of those things. She petitioned the Supreme Court claiming to have acquired a title by prescription or long term occupation. The details of that case are not important for this inquiry. It is reported as *Whaitiri v The King* [1938] GLR 379. It is of more interest to note that in the course of her losing the case the Court accepted evidence that the Church grounds had been home to large numbers of the people for a long time.

The Tribunal cannot question the actions of the Church for its jurisdiction is restricted to actions of the Crown. But the Crown was very much involved. Te Kawau ceded the land to the Crown, not the Church, to entrust the land to the Church. The Crown grant was not correct in its delineation of the trust. In addition, for reasons given in chapter 11, the Reserves And Other Lands Disposal Act 1925 was contrary to the principles of the Treaty, for in 1925 the land should have formally returned to Ngati Whatua.

The inundation meanwhile continued. Negotiations with the Auckland City Council for the future administration of Orakei were settled in August 1927, Government agreeing to construct internal roads, to continue the Waterfront Drive to Mission Bay and to share the cost of the Orakei Bridge. The Council accepted a £200,000 liability on Government expenditure in developing the suburb and would exempt Orakei from all special rates until half the saleable land had been sold. In 1928 the Orakei Road District was dissolved and the City Council became the local body entrusted with Orakei's administration. It was the last step in the Council's territorial expansion. The Waterfront Drive to Orakei and the Westfield railway deviation were completed in 1929, and Orakei, and Okahu Bay, lost the geographic isolation of former years.

It was now clear that Orakei was to be developed as a Crown subdivision within Auckland city. Subdivisional works began on the Orakei ridge in 1926. The first Orakei sections along Paritai Drive were auctioned in February 1928 introducing a new concern for Aucklanders for they were acquired not for low cost housing, but by prominent business persons including a Councillor and the son of one former Councillor who was later Mayor. Another Councillor acquired a section as agent for a bank manager. But the rest of Orakei was to pass for state housing, that policy being helped by a national collapse in land values.

It was inevitable and necessary that there was some co-operation between Crown and Council and some discussion and disclosure of plans between them. In 1939 the Auckland City Council was gazetted as the Orakei Domain Board. In the same year the first piece of Crown land was vested in the Board and the Orakei Domain was begun, with an area of cliff face and bush between Paritai Drive on Orakei Point, and Ngapipi Road and Tamaki Drive on the foreshore.

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Meanwhile with Newton's support, owners were still endeavouring to consolidate their papakainga interests into one block of about twelve acres. Further interests had been sold in the farm lands but some still held shares in blocks on the eastern hillside. The Crown partially relented. Owners would be allowed to consolidate their shares if they took them to the eastern slopes. Some agreed. Others would not give up the papakainga and particularly those who were direct descendants of Te Kawau. For them no other place could do for Okahu symbolised the mana of Te Kawau's family.

Those who did agree were located on the eastern hill by an order of the Court of 1928. Those who did not agree were put in two separate blocks on the papakainga by partition orders also of 1928. One block of one acre was awarded to Maki Waata solely and included her two homes. The balance owners were put into a block of 1.5 acres taking in some homes and the marae. In addition, in 1928 the Court set aside about one acre as a Maori reservation taking in the Okahu Church and cemetery. It was vested in three of the Orakei people as trustees for the tribe. (Strange to say, the marae was not similarly protected).

Unity was impaired for the non-sellers were partitioned in more ways than one. A lasting division grew between those who thought the 'exchange owners' had compromised the papakainga, and the exchange owners who thought the move necessary if Ngati Whatua were to keep any ancestral land at all. (As it turned out they were both wrong anyhow. Though each held fast to their separate parts, in 1950 they were both taken under the Public Works Act and the Crown's true objective was publicly manifest).

Nonetheless Te Hira Pateoro and fifteen others now followed Otene with fresh petitions to save the papakainga. In 1928 they brought two petitions to the House of Representatives to stop sales and review the purchases and proposals.



## Chapter 7

# Cleaning Up 1930–1952

### 7.1 The Acheson Inquiry 1930

Despite all that was happening around them, life carried on at the papakainga much as it had before. People continued to live and die there and ‘the dying race’ produced another generation more numerous than the last. (Indeed the Maori population as a whole was on the increase, nearly doubling from some 42,113 in 1896 when it reached its lowest recorded point, to 82,326 in 1936). Photographs of the 1930’s depict a large number of homes still existing and numbers of people still gathering there. The Council’s Chief Sanitary Inspector reported in 1935

The settlement as now constituted consists of one main village with two adjuncts in Korari Crescent and on the Church Reserve, Coates Avenue, respectively. Altogether there are 32 buildings composed of 24 dwellings, 5 tents, 2 halls and a Church, and of these, 17 dwellings, 4 tents, 2 halls and the Church are in the main village.

Some homes were not as good as they might have been but people could not get renovation permits and there were of course doubts about security of tenure. Certainly no one would lend on such tenuous titles. The author Iris Wilkinson (pen name Robyn Hyde), visited the area in 1937. She wrote (*New Zealand Observer* 8.7.37)

Most of what is said against the Maori dwelling places, at present constituted, is true enough—except that they are the dwelling places of very decent people, who, given a chance, would probably keep their premises as creditably as anyone could expect, and who have hung on to their long threatened shacks at Orakei with the courage of despair.

Nia Hira, one of the Orakei leaders expressed himself with quiet dignity in saying that one could not expect the Maori people to put much heart into their homes until they knew that those shacks were their homes . . . it is impossible for them (their titles to land or dwellings having been under dispute for years) to obtain facilities for proper sanitation, drainage or lighting. They also point out that the old Maori system of drainage wasn’t bad of its kind. But every winter, loose metal washed down from the motor-road around their flat blocks up their drainage, such as it is, with results that can be imagined. It is awkward, but the road is not their road, and the motor cars are most certainly not their motor cars.

Pateoro’s first petition (No 156) was

That the Orakei papakainga be returned to the Natives as a home for themselves and their descendants as this was the understanding at the time the solicitor representing the Crown went to see the Native owners.

His second (No 165) was for the return of the Church site.

The Native Affairs Act 1909 provided (as the current Act still provides) that such questions may be referred to the Chief Judge of the Maori Land Court

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for inquiry and report by the Court. That was done. Chief Judge Jones referred the inquiry to the District Judge for the area. It so happened that the District Judge, Judge Acheson, had a good knowledge of the procedures adopted by Government Land Purchase Officers for he was a former Secretary of the Native Land Purchase Board.

At the hearing of the Petition Otene Paora insisted that the claim was merely symptomatic of the wider topic he had raised before. If the trusteeship issue was settled, the Crown purchases would be invalid. As he put it

If the roots of a tree are cut, the fruit on it will soon die. So it will be with the Crown claim if the basis of the Crown's purchase of Trust land is destroyed.

But it was Otene Paora who was to die. He passed away in 1930 before the Court of Inquiry had completed its report. He was not to know that the Court would uphold his view that the land ought to have been held as a perpetual trust for the whole tribe. But he was not to know either that that finding would not make a jot of difference.

Te Hira Pateoro also died in 1933, before the report was made known.

Judge Acheson saw the first petition as posing two questions

- (a) Should the papakainga have been reserved as a home for 'the Natives' and
- (b) Had the Crown bought the farm land on an understanding that the papakainga would not be bought.

To answer the first he embarked on a wide ranging review of events, beginning, as one might expect, in 1869, with the issue that started it all, of whether the first owners should have been trustees. To answer the second, he sought to consider the farm purchases.

At first V R S Meredith for the Crown accepted that course agreeing "this contention that the whole or part of Orakei was trust land should be dealt with at the same time as other issues". He changed his mind when Judge Acheson sought to examine the farm sales and when J T Sullivan for certain owners contended the farm transfer documents were incomplete or executed in escrow, that some had not had full payment and that the Crown had refused to allow him to inspect documents.

Meredith submitted the Court was ranging beyond the prayer of the petition. The Court decided to proceed on the basis of an interim decision that Counsel was entitled to inspect all records if only to ascertain whether there was an implied promise in them not to buy the papakainga. The Crown chose not to seek a direction from a higher Court authority but withdrew from the inquiry altogether withdrawing as well its witnesses and the records and documents of the Native Land Purchase Board whereby the second question might have been determined. In the result the Court dealt at length with the first question and very little with the second, admitting in that regard, the important evidence was not before it.

Judge Acheson, angered by Meredith's action was moved to remark

This is the most regrettable incident that has come to the notice of this Court during the ten years experience of Judge Acheson on the Bench. A most unfortunate

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impression will be left on the minds of the natives interested. They will feel that the Crown has placed a blanket over the matters at issue. The natives are not likely to be put off in this manner. The Maoris are most persistent if they feel that they have not been fairly treated.

The sale of the farm lands was never subsequently investigated.

In broad terms Judge Acheson made findings on just about all that he could find on the first question, and only an inconclusive statement on the second for the vital evidence was missing.

On the question of trusteeship, Judge Acheson concluded the Orakei block should have been a tribal reserve protected from sales. The papakainga purchases were particularly inappropriate in his view and several owners were made landless as a result. In the absence of contrary evidence from the Crown he accepted the testimony of Ngapipi Reweti of an undertaking, in securing the purchase of the farm lands, that the papakainga would not be touched. To set matters right he recommended a conference between the Orakei people and Ministers of the Crown, excluding, he was at pains to stress, "officials, Departmental or Judicial."

On the second petition Judge Acheson considered that instead of passing legislation to enable the sale of the Church site, Parliament should have enacted its return to the donors.

It was for Chief Judge Jones, not Judge Acheson to report to Parliament. The Chief Judge considered, on the first petition, that Judge Acheson had wrongly extended the inquiry. That would have disposed of 'the trustee only' question for in his view, that was outside the Court's purview. Chief Judge Jones nonetheless went on to consider that which he thought Judge Acheson should not have. He thought Judge Acheson was wrong in considering there was, or should have been a trust in favour of the tribe because the Court of Appeal had settled the issue, deciding there was no tribal trust. We consider the Court of Appeal had not (see 5.10), and indeed, the legal technicality decided there was not relevant to the Acheson inquiry. On the question of the purchases the Chief Judge noted Judge Acheson had only one side before him and the Chief Judge could make no recommendation. As to the Church site the Chief Judge could "hardly recommend that it be returned to them as a free gift" having regard to the Crown's purchase. Presumably to consider that the site had been 'a free gift' to the Church could not be considered because that would be to extend the inquiry.

The Chief Judge nonetheless annexed to his findings (of December 1932) the report of Judge Acheson. Needless to say, the Government took no action as in terms of the Chief Judge's report, which was the official report, none was needed. But nor did the Government make the reports public, until many years later.

We are indebted to P M Barnett's research essay (Barnett 1976) for a great deal of resource material on this inquiry. She describes the subsequent efforts of members of Ngati Whatua, aided by the lawyer who represented them at the Acheson inquiry, to obtain approval for improvements to the papakainga and for the conference that Acheson had recommended. They supported the

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Walnut plan. The City Council rejected it but agreed to promote a conference of interested parties, the Mayor writing to the Minister of Native Affairs and Prime Minister Forbes for that purpose in March and April 1934. Forbes replied in October that as the matter directly concerned the Lands Department he had conferred with E A Ransom, Minister of Lands, who advised “that if a representative of his department were appointed (to attend the conference) . . . such representative could only oppose the suggestion that the lands or any portion of them be returned to the Natives. In view of the position, therefore it does not appear that any good purpose would be served by arranging such a conference.”

Thereafter, the prospect of Ngati Whatua obtaining support from the Council was once again blighted by health concerns as set out in a sanitary report made to the Council in 1935. Once again the swampy conditions and inadequate drainage were referred to, and yet again the Maori occupiers complained the insanitary conditions were not of their making—there was also no adequate water supply and permits to improve living conditions had been repeatedly refused.

Judge Acheson came back to the scene to assess compensation for these buildings on Crown land. In response to criticism that the place was just a slum, he minuted the other point of view

These buildings at Orakei have a special value to the Maori owners and occupiers. It is true they are not palatial. They are not painted. They are not modern in design. They lack many of the things that please a pakeha but make modern residences so expensive. Nevertheless these Maori homes are comfortable. Inside they are remarkably clean. In these homes the Orakei people reared their children. The homes are close to the beach where their forefathers welcomed . . . Captain Hobson. The people are close to their customary fishing grounds. By netting fish and gathering pipis they keep down the cost of living, a most important consideration for Maoris with big families. They are close to the City where many of the people work. The houses certainly look poor, but at any rate they are free from debt, unlike the palatial residences frowning down upon them from the hill (22 Kaitaia MB 64).

Barnett continues (Part III p6)

European public opinion had divided into two opposing camps. There were those led by Graham, Acheson and Sullivan who believed that the drainage difficulties could be overcome and a model marae should be established on the site of the ancestral marae and there were those who believed resettlement on another site was the solution . . .

. . . the Auckland Chamber of Commerce wrote to Government indicating that in their view the only solution was resettlement as ‘there were serious objections to the establishment of a native village in any other part of the block’.

The Council had recommended demolition of the papakainga as early as 1932 and relocation of the people on Brown’s island but there were hopes of a change of direction when the first Labour Government was elected at the end of 1935 with an alliance with the Ratana Church. Many of Orakei had joined the Ratana movement and on his election the new Prime Minister Michael Joseph Savage, received a traditional Maori welcome at Orakei (Metge, 1972) The people placed great faith in Savage, and fittingly, on his death in March



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1940, he was interred at Bastion Point, some 200,000 Aucklanders lining the route to Orakei (Gustafson, 1986:271).

On 24 August 1936 Savage received a deputation of Orakei Maori complaining that Acheson's report had not been made public and seeking the restoration of the papakainga and church site. The Commissioner of Crown Lands referred to the extent of the Crown's purchases saying

the return of the land would, in effect, be a gift of about £30,000 to the Maoris.

The Lands Department argued

. . . with all the best heart for the Natives in the world was that the place for a Native settlement at the front door of what must become a thickly populated European settlement? Was it in their interests?

The stenographic minutes of the meeting show the Prime Minister as saying

. . . frankly, he was rather fogged—the Native question had a happy knack of coming back at one. He wished the government could get two or three men who know the Native question from beginning to end—who would settle the issue. (Nash Papers, National Archives file 1158).

## 7.2 The Lee Committee 1936

Savage established a Committee of Government and Council representatives to report on the Church site, unsold interests and other concerns to do with roads, the defence reserves, the Maori preference for a 'model pa', health concerns and the Government Housing Scheme. (the Committee was not to report until after Savage had sailed for England early in 1937). The Committee comprised

Mr J A Lee Parliamentary Under-Secretary for Finance

Judge F O V Acheson Native Land Court

Mr J S Brigham Town Clerk, City of Auckland

Mr W D Armit Commissioner of Crown Lands, Auckland

Mr A Tyndall Director of Housing Construction

Dr T J Hughes District Public Health Officer

Acheson failed to move the Committee from issues of housing and hygiene to the broader issues of trusteeship and the rights of tangata whenua.

The majority view of five to one was briefly

- That the Church site was necessary for the scheme, had been properly sold and purchased, and the natives on it ought to get off.
- That interests unsold ought to be purchased as all were necessary for the scheme; alternatively the non-sellers should be offered an exchange.
- The natives had no legal or moral claim to land taken for roads not formed as new roads had been formed and more were needed.
- The natives had no legal or moral claim to the defence reserve—it could still be needed for defence.
- The natives' proposal for a 40 acre native village was impracticable.

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- The model pa proposal was unrealistic and not in the villagers’ best interest.
- The papakainga was a health hazard ‘a disease centre’ in the City Council’s submissions.
- Housing was not the best use of the papakainga because of drainage problems, and
- The Government Housing Scheme was necessary for Auckland’s expansion

Judge Acheson’s minority opinion contested each conclusion. He reckoned as well that 42.5 acres had been taken for roads and not paid for. Acheson ended by saying

The story of the purchases will remain an inglorious page in New Zealand history.

Judge Acheson considered also the Treaty of Waitangi

The rights of the Maoris, their land rights under the Treaty of Waitangi, their moral and legal rights as set out in the Court’s Report of 1930, their right to equality of treatment as promised by the Government, their pathetic clinging to the remnant of tribal lands, their right as fellow citizens to be treated with respect and consideration, their law-abiding habits, their past willingness to share in the defence of the Empire, their ability to retain dignity and cleanliness under conditions of direst poverty, their right to have one small portion of Auckland which they can call their own and where they can re-build their ancient culture and maintain their tribal existence and honour the memory of their ancestors.

With Savage overseas the Government accepted the majority recommendations and in June 1937 resolved ‘the Maoris must go’ especially those living on land partitioned to the Crown. The decision was taken to evict them—79 native adults and 48 children occupying twenty buildings and four tents—and to transport them to other parts of Auckland or to more distant places like Helensville. (One witness claimed Bulls was one place proposed!)

Ironically in the same year, 218 state homes were completed on the Orakei block and the first non-Maori dwellers moved in. A new mood then settled on many of Auckland’s citizens. Meetings of the Auckland Clergy Association headed by Archbishop Avert and the Association of Friends of Orakei (formed on 10 August 1937), urged Government “to grant a full inquiry before moving the Maoris from their homes”. Social workers, writers and ordinary citizens joined with the clergy and the Communist Party in protest meetings or prayer campaigns. Ngati Whatua, true to its preference for the settlement of disputes through ‘the necessary laws and institutions’ met separately. ‘Let iron clash only with iron’, they resolved ‘Let the Pakeha settle with the Pakeha’.

Author Iris Wilkinson (pseudonym Robin Hyde) took up that challenge writing with obvious emotion in the *New Zealand Observer* (19.8.37).

Now, though apparently in the interests of a garden suburb and a view, the white residents of Orakei are perfectly willing to hunt the living natives from lands which have been their ancestral right and property for so many years, surely the Maori dead will be allowed to lie in peace. Or will tombstones also clash with the rainbow visions and the town-planning schemes? . . . (for there were suggestions that the cemeteries be removed too). This proposal of bulk transportation of a community of people, numbering over a hundred, without any regard to their will, is the most dictatorial

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suggestion, and would be the most dangerous precedent any Government could adopt . . . No other 40 acres would be the same as the papakainga at Orakei . . . their heart is with their land and they believe that if the Prime Minister and his Government know all the facts it will be proved the 40 acres was reserved to them.

She pleaded for

. . . a little security and a chance to exercise the racial pride and self-respect which is never dead in the Maori . . . As for disease . . . putting garden suburb and other Pakeha considerations out of the way . . . there is probably not a competent engineer or doctor in Auckland who wouldn't laugh at the idea that the difficulties are insuperable.

Surely it is better to remedy those conditions and to give the Orakei people a chance to establish themselves on the land they have fought for so hard as a community (not as a showcase or tourist pa) than to transport them to parts unknown . . .

She also wrote to J A Lee, in an open letter

"I thought that in 'Children of the Poor' you showed a better understanding of lollipop methods, and a better contempt for them than any other writer who has yet appeared in our bright little New Zealand . . . When a little brightness is offered to the restricted, the poor and the handicapped, of course they are going to fall for it, even if in the end they get the worst of the bargain . . .

But the really interesting thing is not whether a hundred or so Maoris, hard up and living under conditions disgraceful to us and not to them, would take more lollipops if they were offered; it is whether it is a part of our advanced modern technique to offer them."

The Auckland City Council protested the public was not aware of its position

Our only concern has been to ensure that the settlement conforms to the hygienic requirements of the community. There has been no attempt to dictate or dogmatise on issues which are far removed from the interests of health and sanitation, and which are confined exclusively to legal and Governmental interpretation. (*New Zealand Herald* 26.8.37 p14).

Sir Ernest Davis, then Mayor of Auckland, called for an immediate solution

If the Maoris are to remain, then let the necessary steps to re-house, drain and clean up the area be taken at once . . . If, on the other hand, they are to be removed to another site, then let the transfer take place without further delay." (*New Zealand Herald* 25.8.39).

Prime Minister Savage had meanwhile returned from abroad. He was met by representatives of the incensed Orakei Maori.

In what was certainly a rebuke to his colleagues and a move not popular with many non-Maori residents of Auckland, who saw the Orakei Maori settlement as a disgrace to the district, Savage immediately reversed the decision made by Lee and Langstone. The Maoris remained at Orakei and 'what might well have been a major political crisis had it not been for Savage's good sense and sensitivity' was averted" (Gustafson, 1986:191 with quote from Olssen *John A Lee* p106).

The Government immediately arranged a further inquiry into the purchase of the papakainga, but the terms of reference related to just that—the papakainga. They did not relate to the initial purchases of the 'farm blocks' or the issue of whether the legal owners should have been trustees only.

### 7.3 The Kennedy Commission 1938–1939

The Government appointed Supreme Court Judge Justice Kennedy a Royal Commission of one to consider specific questions.

Mr V S Meredith opened for the Crown. The sales he said were voluntary, without pressure brought to bear as evidenced by the fact that “the sellers went into the negotiating office in Auckland and did not want to be visited themselves.” They knew what they were doing he claimed, and received hard cash. They sold the papakainga voluntarily, for a total of nearly £12,000 and now wanted it back. It had been sold for an average 30 per acre but some £232,000 state money had been spent on the Orakei block (as a whole and which included State housing) and the Council had spent £2,000,000 in providing a bridge and waterfront drive to Orakei, internal roading and sewage, an embellishment cost equal to £980 per acre. Although the Stout–Ngata Commission had recommended the retention of the land by the natives, the land was then rural land, it was argued, but with new roading it had become suburban. J T Sullivan in reply pointed to the Stout–Ngata Commission’s specific reference to the suburban development around Orakei at that time including the more distant St Heliers. The real problem he said was the unease over a ‘Maori Island’ within a European city. He expressed the native’s disappointment the farm blocks were not included in the inquiry and added there had already been two inquiries in 1908 and 1928 and the reports of each were satisfactory to his clients. He contended the natives did not understand the unusual and complicated conveyancing and settlement methods employed which presumed that eventually all their interests would pass to the Crown. They clearly wanted reserves but no one ended up with a reserve even for their own homes. This was particularly so in the case of Wiremu Watene, in his 90’s at the time of the sales but deceased at the time of the inquiry. The Crown’s purchases were not subject to the scrutiny of the Native Land Court and there were no revaluations from 1911 to 1918. There had been a land boom in Auckland in 1914 and the Court normally required fresh valuations. Other properties sold on the open market were well above Government valuation. But most of all the natives were induced to sell with promises that parts would be reserved for them, promises that were gradually whittled away, he claimed.

In evidence Mr Mays contended he made no arrangement to reserve land for Wiremu Watene “because other natives would have asked for the same concession”. He thought, and Mr Meredith strongly argued, no one was left landless in the papakainga because everyone’s shares were so trifling they were already landless in terms of the Native Affairs Act.

The latter point compelled an enquiry of the farm sales, Mr Sullivan contended. If the Maori owners were technically landless after the farms sales, the farm sales must have been contrary to the Act by making them landless.

The latter point was not considered for the inquiry was limited to the papakainga. In any event, Mr Mays contended, the papakainga was unfit for dwellings.

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The Commission's jurisdiction was limited to specific questions. The questions put and the answers given were, in paraphrase, these

1. Had the Crown acquired a good title to the lands it had purchased in the papakainga? The Commission's answer was 'yes'.
2. Was there anything in law to prevent the Native Land Purchase Board buying the land or any interests therein or to make any purchases invalid?

This was an important question. The Native Land Amendment Act 1913, section 109(10) provided

It shall be the duty of the Native Land Purchase Board, before completing a purchase of the interest of any Native owner in any land, to ascertain that such purchase will not render the selling Native landless within the meaning of the principal Act. The Native Land Purchase Board shall in each case obtain from the Registrar of the Native land district or districts in which any lands owned by the selling Native are situated particulars of all land in which such native is beneficially interested.

According to the Act the term 'landless Native' meant

a Native whose total beneficial interests in Native freehold land . . . are insufficient for his adequate maintenance.

It was also provided that even if the duty was not discharged and the prohibition ignored, a purchase was not invalidated thereby.

Ngapipi Reweti in the 1930 review claimed enquiries had not been made and added

I know all the Natives who were interested in the 40 acres. About 15 owners did not sell their interest in the flats. Those who sold had insufficient other lands for their support—all except Hariata Whareiti who has over 100 acres of unimproved land in the Makarau district.

I know Rotena Ropiha Reihana—he was a seller but has not a bit of land left.

My uncle Hira Pateoro also sold, and has only one acre left. It is at Orakei. He is an Old Age Pensioner. I myself only have interests in Tauranga—and I only get 34/- a year rent from them. I have no other land.

No enquiries were made by the Government Officers as to what other lands I have left.

Wiremu Watene Tautari is an old age pensioner and has only a couple of acres of land left—in the Kaipara District. He is the sole survivor of the original 13 trustees.

The Commission considered that in many cases the duty to inquire had not been discharged, and in many cases people were certainly left landless, but also in many cases the owners had other land interests (in distant places like Kaipara, Rewiti, or in Ngapipi's case Tauranga). In 24 of the 36 sales the sellers held less than half an acre in shares. They were not rendered landless as technically they were already landless. It answered formally

The Native Land Purchase Board, by the Native Land Purchase Officer, did not in certain cases fully discharge the duty imposed by section 109(10) of the Native Land Amendment Act 1913, and purchased when, pursuant to section 373, a purchase should not have been made. No purchase was, however, rendered invalid thereby (for it was said in the Act that sales were not invalidated through any failure to discharge the statutory obligations).

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3. Were there any valid reasons why the Crown should have abstained from purchasing the interests of such of the owners as were willing to sell, and did sell to the Crown?

The Commission considered the papakainga, if not purchased, would soon become an isolated Native settlement adjacent to a closely settled residential area.

Most of the papakainga land is only four feet above the high-water mark. The Native occupiers must, in the interests of health, have been subject to the pressure of the requirements of the city in sanitation and in housing, and they could no longer, in such a locality, live the free life which they prefer.

Its formal answer was that in certain instances the purchase would render the Native landless and that was the reason why, in individual cases, as the law stood, the Crown should have abstained from purchasing the interests of certain Native sellers. There were, in its view, no other valid reasons. (The Stout–Ngata recommendations made before buying began, were not considered.)

4. Were fair and reasonable prices paid to the Native vendors?

The Commission replied that no answer without qualification was possible. Of 36 Natives who sold interests in the land, 13, in its view, did not receive fair and reasonable prices, considering the value of the land at the time of purchase. In one case the underpayment was mainly due to an omission or error to pay for all that had been acquired. In each of the remaining 12 cases the deficiency did not exceed £30. In one instance where a building was separately purchased the price paid was not fair and reasonable. In six cases structures on land awarded to the Crown had not been paid for.

5. Was the purchase-money paid to the Native vendors?

The Commission answered “Yes”.

6. Have the Natives occupying purchased land any right or justification for their continued occupation?

The Commission observed that the practice of buying the land but not always the houses on them, had resulted in Natives owning houses on Crown land. Except those persons, no Native had any right or justification for continuing to occupy the papakainga, and the others were entitled to remain only until they were paid for the homes.

7. Were promises made that the papakainga would not be purchased?

This raised a major contention. The evidence was somewhat confused and conflicting but on balance the Commission concluded in the negative. It stated

The broad conclusions, then, to which I have come are as follows

- (a) Mr Mays did not give any instructions for a promise to be held out to the Natives that the papakainga land would not be purchased by the Crown.
- (b) He made a statement, and it might properly have been passed on, that the Crown was not just then purchasing the papakainga. This was a mere statement of intention and in no way a promise.

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- (c) It is not proved that any promise was made by Ngapipi Reweti to any Native other than Wiremu Watene Tautari. The probabilities and other circumstances negative a promise to any other Native.
  - (d) If a promise was made to Wiremu Watene Tautari, then it was unauthorised. Ngapipi Reweti had no authority to give a promise pledging the Crown not to purchase the papakainga land.
  - (e) In my view, if such a promise was made to Wiremu Watene Tautari, or to others, which is not proved, the Crown was not in the circumstances legally or morally bound thereby.
8. The next question concerned a particular claim that one person had been given the right to repurchase six or seven acres. The Commission concluded that an option had been given but no attempt was made to exercise the option until well after the stipulated time.

There followed a series of questions about the Church site. The questions and answers are paraphrased as follows

- (a) Should the Crown have abstained from buying? No, because the land had not been needed for a church or school for some time and was not needed for that purpose when the Crown bought it. (Whether it should have returned to the tribe was not considered).
- (b) Was the price paid fair and reasonable? Yes.
- (c) Was the purchase money applied as by law required? Yes, it was applied as required by the special Act.
- (d) Have the Natives occupying the church site any valid reason for refusing to vacate?

The answer is, subject to alternative accommodation being available, 'No justification at all.' If alternative accommodation is not available, then their justification is necessity. That justification will cease as soon as accommodation can be found.

By then there had been more sales of farm land interests. The then remaining shares had been added to the exchange area and at 1940 the people held

- one acre in the papakainga with one owner
- 1.5 acres in the papakainga in multiple ownership (which included the marae)
- the one acre church cemetery, a Maori reservation for all, and
- a ten acre block on the eastern hills, in multiple ownership.

The Report gave the Crown a clean slate for its past operations and justification for continuing its eviction proposals, provided some more money was paid out (as it was) and other accommodation was found, but a war intervened to shift the battle elsewhere and the eviction proposals were dropped.

#### 7.4 The War Years 1940–1945

If Ngati Whatua adherence to the Treaty was not apparent in their continual recourse to the necessary laws and institutions and their loyalty in the New

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Zealand Wars, it ought to have been apparent when the next war came. Although there was no compulsory conscription for Maori, twelve of the Orakei able bodied enlisted with A Company of the 28th Maori Battalion to fight the tyranny and oppression of an invader who threatened the turangawaewae of the Europeans. (The names were supplied by Ned Netana). Five were killed in action.

Those at home did not relinquish claims to a part of the home land. P M Barnett continues the story

. . . the Maoris at Orakei tried during the 1940s to consolidate their position by laying claim to all land of questionable ownership. Fearing that there was no hope of the Crown returning any land, they applied to the Maori Land Court for decisions on the ownership of land taken for roading and on which no roads had been formed; for the title to land acquired by foreshore accretion; for orders to make the remaining land an inalienable reserve . . . The Court appeared sympathetic and the Government from 1943 to 1949 seemed genuinely concerned with finding a satisfactory compromise but the Maoris would not accept any solution other than the retention of the ancestral marae (Barnett, 1976: Pt IV p1).

On 30 September 1941 Judge Acheson awarded them an accretion at Okahu Bay on the basis that it had accrued before the sale.

What follows is largely a summary from P M Barnett's thesis. At first, following the Kennedy Report the Crown showed little sympathy Native Minister Langstone saying

The trouble is that the natives are adamant and will not shift and it seems that possibly forcible action will have to be taken to remove them (*New Zealand Herald* 31.5.43 p4).

There was, he is reported to have added, a duty and responsibility resting upon the Maoris to so live and conduct themselves that they would not cause any offence in the neighbourhood and the community in general.

The village was, in the opinion of Auckland's mayor

a dreadful eyesore and potential disease centre (*The Observer* 31.7.40 p5).

The Auckland City Council resolved in November 1940, though not unanimously, that Government should relocate the natives this time to West Tamaki.

Meanwhile from 1939 the State was proceeding with its low cost housing scheme on Takaparawha ridge along the current Kupe Street. Reserves beside the harbour front were a definite part of that project, including the reserve proposed for the papakainga (see letter, Council to Commissioner of Crown Lands 7.8.41). The Council was pleased to receive the reserves subject to a requirement, in the case of the papakainga, that all houses be demolished and the occupants removed before the Council as the Orakei Domain Board took over.

Still, greater interest focused at that time on the Crown's intention to reserve the hills that overlooked the harbour. An impressive memorial to Prime Minister Savage was being built with a proposed 18 acre garden surround. It was intended to add that to the Orakei Domain along with an area of about 12 acres at Takaparawha Point. The exigencies of war, and the presence of



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gun emplacements prevented the immediate handover of the latter but the M J Savage Memorial Park was added to the Orakei Domain by s 11 Reserves and Other Lands Disposal Act 1941.

No reserves were proposed for the protection of Ngati Whatua but attitudinal changes came when Princess Te Puea of Waikato took up the Orakei case on behalf of the people. Waikato and Ngati Whatua had frequently undertaken joint ventures as kinsmen. Ngati Whatua had also supported Te Puea's work and attended her hui at Mangatawhiri and Turangawaewae, and some of them had joined her community (King 1977:217).

Te Puea visited Orakei in 1940 and with local approval, approached the Mayor to inspect the area, and then to see what she had achieved at her own marae, Turangawaewae at Ngaruawahia. The Ngaruawahia marae had been confiscated after the New Zealand Wars. Te Puea had bought back the ancestral site from its former owners through money raised from concerts. She re-established her people there and had built an astounding village and marae complex from nothing. The Mayor was impressed "If Orakei could be made into something like Turangawaewae" he said "I would be pleased to help you".

With European support Te Puea formed the Orakei Petition Committee in 1942, solicited the help of the General Labourers' Union and Auckland Trades Council and presented to Government (in February 1943) four petitions with a total of 5039 signatures for the restoration of 25 acres of the papakainga (Petition Nos 6, 32, 33 and 39 of 1943. The Native Affairs Committee recommended that they be referred to Government for consideration). To establish the people's capabilities on 5 April 1943 Te Puea went to Orakei to organise working bees. Members of the Auckland Trades Council were moved to assist. In June the Orakei inhabitants and 200 unionists erected a 300 foot pallisade around the pa of manuka stakes with totara posts at eight foot intervals embedded in a two foot concrete base. A carved gateway completed the surround.

Te Puea had a close and friendly relationship with Prime Minister Fraser but it was about to be put to the test. The latter warned her that if she became involved with the Auckland Trades Council and tried to protect the pa, the police would be sent in and she could end up in prison. Te Puea advised, the day the pallisades went up she had put on two sets of underwear to keep her warm in jail (King 1977:129). Nor could Prime Minister Fraser ignore the political wing of the Trade Union. He announced in Parliament, in 1943, a proposal to build houses for the Maori on the eastern plateau, to retain the marae area on the flat, and, with help promised by the Auckland City Council, to build a new meeting house on the site of the old one.

The proposed resettlement could not be justified in Te Puea's eyes.

She saw it only as a further example of European rapaciousness. Pakehas had systematically deprived Ngati Whatua of everything that gave the tribe security and identity. They then abused these Maoris for poverty and lack of spirit and used their handicaps as an excuse to plunder them still further. It was also incomprehensible to her that all this should have taken place after the tribe had virtually given away 3000 acres of what became the most valuable real estate in the country. Was there no end to Pakeha greed? she asked . . . (King 1977:218).

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### 7.5 The Last Years 1945–1952

The Prime Minister's relocation proposal was unacceptable to Ngati Whatua too. They welcomed the Government's offer to rebuild the marae and themselves proposed to contribute. Compensation monies for foreshore losses and money paid for houses on Crown land was still held by the Maori Trustee untouched. It was resolved to apply it to a marae building fund. But Ngati Whatua could not accept their relocation to the eastern plateau. A meeting with the Prime Minister was held at Orakei in 1946 in an attempt to resolve the differences but the Orakei people were unable to compromise. The papakainga was their anchor. They could not shift their homes from sacred land.

For the time being the Prime Minister had to deal rather quickly with five families who had returned to cling to the old Orakei Church site. In 1944 the European residents petitioned the City Council to take action over the unsanitary shacks. The Health Committee of the Council declared them unfit for human habitation and called on Government to remove the occupants within 14 days. They were shifted to five State rental homes nearby.

The main relocation remained unresolved when the Labour Government lost the 1949 election. The new Government moved swiftly. The Department of Maori Affairs was instructed to negotiate the acquisition of the remaining blocks. When the owners refused to sell and instead formally petitioned for legislation to protect them the Minister of Maori Affairs announced Government's intention to compulsorily acquire all but the church and cemetery (1950 NZPD pp3885–6). And so

the instrument wielded by the Crown to achieve its end was the razor-sharp Public Works Act which needed no other justification for its use than the public interest (Kawharu 1979:7).

The ten acre exchange block was taken first by a proclamation published in *New Zealand Gazette* No 15 7.9.50 p 166 "for housing purposes". Compensation was assessed at £8,065 on 30 April 1951. Maki Waata's one acre and the 1.5 acres that included the marae were taken together by proclamation in *New Zealand Gazette* No 19 15.3.51 p 315 for the purposes of "a recreation ground". Compensation was fixed at £5,600 for the former on 4 May 1951, and £5,911 for the latter on 29 May 1951. The meeting house was separately valued at £675 on 29 May 1951.

Apart from the Okahu cemetery (for Orakei cemetery was included in the sale to the Crown), Ngati Whatua of Orakei was now totally landless. Acquisition of the cemetery, a Maori Reservation since 1928, would have required prior cancellation of the Order in Council that reserved it. That would have needed the approval of the Maori Land Court and that approval was not likely to be given without prior re-interment of remains. That last step the Crown was not prepared to take.

The problem was to physically remove the living who also would not go. To aid that end thirty-five State rental units were built—twenty-seven together on

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Kitemoana Street above the former papakainga, three opposite the papakain-ga and five a mile or so away.

Certain formalities had also to be observed, the first to settle compensation. When the Maori Land Court sat in 1951 for that purpose, Te Puea appeared for the owners to protest. The Court explained it could not judge the Crown's action but only the monetary value of the land. The owners replied they would not touch the money (it was to remain with the Maori Trustee), and debated instead alternative courses of action.

Next day Te Puea and Dr Maharaia Winiata led a delegation to the Mayor of Auckland seeking Council's support for the restoration of the marae and its exclusion from the proposed public recreation ground. The Mayor replied

It might not be possible to reserve any portion of the land to the Maoris exclusively . . . I think it must be open to all, but I am sure that arrangements could be made for the Maoris to have the sole use of it at certain times of the year or on certain occasions.

The Parks Committee chairman referred again to drainage, a matter consistently frustrating development of the papakainga, but he was otherwise sympathetic.

Then, as houses were completed on the new sites, action was taken to relocate the remnants of Ngati Whatua as tenants of the State. Not everyone went unwillingly. Some of the younger ones were keen to have new homes with sewerage and taps with running water even inside the house. They pressured their parents and elders to leave but the older ones left with resentment and despair, which turned in time to apathy.

In her evidence to this tribunal Ani Pihema described how her grandmother, Maki Waata lost the one acre block.

To persuade her to leave the Crown built three state rental homes across the road from her property and when completed offered them to her, for herself and her three children and their families. Her married grandchildren would be accommodated at Kitemoana Street. Furthermore her house would be freehold. If she did not accept the offer, her property would still be taken under the Public Works Act 1928, but the Crown would not accept responsibility for further housing for her.

Two of her children and their families moved but she refused to do so as she was in ill health and deeply concerned about the fate of her relations as well as the Marae and Urupa. She also felt that her philosophy of 'Riro whenua atu, hoki whenua mai' was not being fulfilled. She needed a big house like her present villa to accommodate relatives from the country. There was a suitable home near the beach which her sister had sold to the Crown in the 1920's before she returned to Kaipara to live. Her lawyer advised her to make contingency plans despite her decision to stay on.

(By 'riro whenua atu, hoki whenua mai' I mean land given is land that returns. It is the way we think of land and gifts).

She passed away on 1 September 1950 and the Crown moved swiftly to carry out their own plans without any consultation with her family. The remaining member of her household was moved into the third state rental house and 35 years later they are still paying rent for the three old houses. Two years later in 1952, the family received compensation moneys to the value of £8,000 which was divided among her descendants—and that was that.

As relocation proceeded demolition went ahead. Buildings were pulled down, grounds levelled, timber stockpiled, and in the midst of it, the workers started

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demolishing the meeting-house, Te Puru-o-Tamaki. Still, some would not be moved. Technically they were trespassers against the Crown and since it had not been the Ngati Whatua way to step outside the law, they were trespassers against their own rule set in 1840.

Once more in 1952, Te Puea petitioned Parliament this time seeking three acres on the flat in exchange for the ten acres taken on the hillside. It was still her hope to build a model pa there pointing out “no other ground, without the necessary tribal and traditional background can substitute for the present sacred meeting house and marae site, no matter how large or how generously appointed.” The Maori, she said, would build the house but she asked that the State, and City Council share with them the cost of drainage. In return, she proposed marae trustees comprising representatives of the State, Council and Maori people.

The Minister of Maori Affairs refused to hear anything more about Orakei but Te Puea was received by Prime Minister Holland. An assurance was given that the matter would be considered but it was again to no avail. Of greater concern was the fact that many still refused to leave, despite eviction orders that had issued from the Magistrate’s Court and there was some vandalism. Someone had cut fences enclosing the Crown land, and someone, unknown, set fire to stocks of demolition timber and the meeting house.

The issue became one of law and order.

Some thought the Crown burnt the meeting house. Others suspected it was one of their own. The Crown proposed re-erection of the meeting house at Helensville but the people knew where the ancestral house belonged and there is a custom of burning such houses when threatened with desecration by a foe. It was not until 1977 that Prince Reweti announced his long deceased great grand-uncle did it so that the ashes would stay where the building was meant to be (*New Zealand Herald* 28.6.77).

Those left had to be burnt out and physically carried from their homes. It seemed necessary that that should not be delayed. Her Majesty Queen Elizabeth II was to visit Auckland in the coming summer 1952–1953. The procession route, it was first thought, would follow Tamaki Drive past the ‘unsightly Orakei shacks’ and since this was to be the first time a reigning Monarch would see Auckland, Auckland wished to be seen well. Ironically, the visit was almost 100 years to the day after Te Kawau had farewelled Governor Grey from Auckland, saying

Friend, when you arrive on the other side tell the Queen about the good arrangements you have made in regard to the formation of a township on our land and let this land (Orakei) be reserved for our own use forever . . .

One hundred years later it seemed important the Queen should not see any part of the arrangements made for her Treaty partners. Only months before she came the last of Te Kawau’s descendants at Okahu were to be torched from their homes.

The end was graphically described by John Broadbent, a European Aucklander whose forebears came to New Zealand in 1839 and who attended before the tribunal of his own volition. He was age 22 at the time, repairing his yacht in

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Okahu Bay, a bay he said “the yachties regarded as belonging to Ngati Whatua”. It so happened that in deciding to spend the night aboard he witnessed the final eviction.

It is 35 long years ago but it is still a wound in my side as I remember the smoke drifting across Tamaki Drive. The smoke was billowing and swirling and illuminated from all sides by the flames of collapsing buildings.

The burning, smouldering whares and the embers glowed through the night. (I would say the embers smoulder still.)

Reports of an old man being dragged from the fire are wrong. He actually cast himself into the holocaust of his home. I remember vividly the wading of the wahine and the confused shouts of the young. It could be clearly heard on the harbour.

I have never forgotten that infamy. It is time the injustices Ngati Whatua suffered were redressed.

Piupiu Rihi Hawke wept as she described how she forced her aunt to leave only to have her die two hours after she was placed in her new home. About two months later her mother died “and then all our old people started dying one after another and left us”.

Thus were Ngati Whatua relocated at Kitemoana Street. The street name was not an apt one. Like other street names nearby it said nothing of Ngati Whatua history or of their great forebears, Tuperiri, Te Kawau, Tuhaere, Pateoro, or Otene. Translated, Kitemoana meant only the street had a view of the sea, recaging to mind the words of Otene in 1908

. . . it would be better that this Government should build a canoe and put on board that canoe those descendants of Tuperiri who are not included in this land, and let them drift away into the ocean . . .

The children found another name for the block. They called it ‘Boot Hill’.

The houses were new but not entirely apt either. The new State homes had only two or three bedrooms and small lounges. With one nuclear family to a house the extended whanau (families) were divided. Homes became overcrowded and many left. The Government promised more. Thirty-two sections were actually marked out on the adjoining exchange block taken for housing but it was never used for that purpose and the extra homes were not built.

Ani Pihema’s evidence concluded a chapter in the history of Ngati Whatua

This was a traumatic period for the older people who had lived out most of their lives at Okahu and had fought desperately for years to continue living on their own piece of ancestral land, next to their beloved marae and urupa where their ancestors slept, no longer in peace. They knew that their kinswoman Princess Te Puea had done everything in her power to keep them on their papakainga and to strengthen their resolve never to give up hope for their marae at Okahu and not to accept any alternatives offered by the Government. The sense of defeat and the ultimate shock of eviction proved too much for the elderly kuias of Okahu and within a few months of each other Maki Waata, Te Mamae and Te Kareti Hira, the last three great great grand daughters of Apihai Te Kawau who welcomed the first Governor to Auckland, passed away.

Princess Te Puea was in poor health also and she too passed away in 1952 the following year, disappointed and disillusioned but still exhorting those who visited her to continue the fight for the marae and urupa at Okahu. (Te Puea remained resilient to the end. From hospital she sent a message to the Minister of Maori Affairs,

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through Hamilton MP Hilda Ross, advising she could still smell the smoke at Orakei. On the day before she died, she sent Te Heipounamu Utika to Orakei with a message urging another attempt to persuade the Government and the Council to reserve the old marae site).

By July 1952 the last remaining evidence of the papakainga had been cleared. The suburb of Orakei inherited a fine playground.

Ngati Whatua inherited a legacy of bitterness, division and defeat. In 1977 Auckland was to witness the result.

## Chapter 8

# The New Order—A New Marae 1952–1977

### 8.1 Portrait of Orakei

Orakei, by 1950, was firmly part of Auckland. The once secluded Ngati Whatua block severed from the city by the deep indentation of Hobson Bay was opened to Auckland by the Westfield Railway deviation (1927), the bridging of Hobson Bay (1928) and completion of Tamaki Waterfront Drive (1929), an 80 foot waterfront boulevard that enabled the development of the eastern suburbs. Orakei was brought within 2.5 miles and ten minutes drive of the inner city.

It was also firmly in non-Maori hands. The Orakei ridge was developed for superior residential properties, the southern plateau and Takaparawha ridge for State homes. The former lessees had been allocated a share, a total of 12.5 acres in freehold titles but the remnants of Ngati Whatua were State tenants in homes sandwiched in a gully of the Takaparawha hills. Held in public ownership was a broad swathe of open space along the north eastern harbour front from Okahu Bay to Kohimarama Point and south to Kitemoana Street. The subsequent history of Orakei focuses on these open spaces of the Orakei Domain.

As we have seen the Auckland City Council was constituted as the Orakei Domain Board in 1939 to administer the first area passed to it, some 10 acres of cliff face and bush at Pokanoa Point along Paritai Drive (No 10 on the map at appendix III). In 1941 major reserve proposals were agreed upon by the Crown and Council but in that year, mainly because of the war, there was added to the Domain only the M J Savage Memorial Park at Kohimarama Point comprising (then) 18 acres, and consisting, as it does today, of parking areas, the Garden of Remembrance and open space (No 19, appendix III).

In 1946 the Park was extended, according to the City Council because of an exchange arrangement. During the war, the Council told us, a military annexe was added to Auckland Hospital. The hospital, on Crown land, was surrounded by Auckland Domain which the Crown had vested in the City in 1893. It was not unusual during the war for parks to be used for military and transit housing purposes and the military hospital annexe encroached on some 4.25 acres of Domain land. It was agreed that this area should be permanently added to the hospital as Crown Land, and that the Council should take in exchange the administration of 20 acres at Orakei to add to the M J Savage Memorial Park (No 20, appendix III) and 76.5 acres adjoining at Takaparawha Point (No 21). It seemed to us the Crown had intended to settle this land on

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the Council, as a park, as early as 1941 but in any event s16 of the Reserves and Other Lands Disposal Act 1946 declared 20 acres of Crown land at Orakei as recreation reserve to be added to the Orakei Domain as an extension to M J Savage Memorial Park. The Takaparawha land could not be immediately handed over because of the gun placements there. That area, known as Takaparawha Park, was not added until it was gazetted in 1954 after the military apparatus had been cleared. It is grassed open space and only the concrete bases of the past works remain.

Cleared also, at about that time, were the gun placements on some 2 acres at Kohimarama Point (No 22, appendix III). That too was added to the Domain by *Gazette* notice in 1954 and is now in grass.

No sooner was the papakainga cleared than that was added to the Domain in two lots, by *Gazette* notices in 1953 and 1954 respectively. One area is passive reserve in trees and lawn which we call 'Okahu Park' (No 23, appendix III). Behind it is what we call 'the Orakei Sports Domain' (No 18). Comprising some 20 acres the southern half of the Sports Domain is occupied by the Orakei Bowling Club with two greens, clubhouse and associated parking, the northern half by a pavilion and playing fields, three rugby grounds in winter, and cricket pitches in summer.

The Crown added other smaller areas in 1953, mainly playgrounds within the housing subdivisions, and later some untidy and unstable areas requiring special treatment.

To complete the picture the City Council purchased the Biddick 'reserve' (No 7), the area awarded to one of the lessees in the 1920's and the only part of the Kohimarama headland in private ownership. There are two houses and a shed remaining on the property to this day.

The undulating plateaus of the headland are reminiscent of pastoral countryside with views seldom found close to the centre of a large city. At the seaward extremities the pastoral scenes open up to panoramic views of downtown Auckland, the Waitemata Harbour, the North Shore, Rangitoto Island and the Hauraki Gulf with its many islands.

But the Crown did not rid itself of all the land on the point.

Elevated behind the headland parks, also with commanding views of city and harbour, lay 60 acres of uncommitted Crown land (Nos 29-31, 103, 107-113, appendix III). The subsequent history of Orakei focuses on the uncommitted land in particular.

The whole area is most attractive. No sooner was the papakainga cleared than the land was drained, a park was established and the sewerage was taken elsewhere (the Manukau sewerage scheme was proposed in 1950, adopted in 1954 and operative in 1960).

But many of Ngati Whatua were still in the area too, occupying about thirty State homes. It may have caused fewer headaches for future Governments had they been taken elsewhere too, pepper potted throughout the city according to the Maori housing policy of that time. It may have been a greater mistake that they were grouped next to what was portentously termed



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“uncommitted”, for looming over the Bastion Point headland was a question of how those lands should be committed. Ngati Whatua had some thoughts on the matter.

At first their thoughts were only for the papakainga. The survivors would do nothing that might compromise the protection of the urupa where their ancestors were buried, or the ‘return’ of the old marae site. It was not until 1963 that they could even accept compensation for the old marae buildings and then only because it could be used for a new chapel being built in the cemetery grounds.

The Crown was to offer a new marae site but then that too was to be taken from them for Ngati Whatua were about to be submerged once more by yet further changes beyond their control borne on fresh winds of change.

## 8.2 The New Wave of Settlers

The Maori population had continued to grow. Having nearly doubled from its low ebb of 42,113 in 1896 to 82,326 in 1936, it had doubled again by 1961 when it was 167,086. (At 1981 it was 279,252).

It was also a population on the move. Those living in urban areas were, in 1936—11.2%, 1945—19%, 1966—55.8%, 1971—68.2% and by 1981—78.5%.

As early as 1940 the economist Horace Belshaw had predicted the trend

There is an unambiguous picture of a people whose land resources are inadequate so that a great and increasing majority must find other means of livelihood . . . large numbers must migrate to other districts, many of them to the towns. The prospect is disturbing both for Maori communities and individuals . . . The immigrants will be strangers in strange cities forced into adjustment while divorced from the moral and material support of their communities. Until the full implications of this are understood there is no solution to the Maori problem (Belshaw 1940:192).

It might not have been projected that the move to the cities would affect Ngati Whatua, for they were there already but they were dislocated nonetheless and a generation grew up without the training peculiar to a marae. They were seriously affected by the second great Maori migration which made up in numbers for what was lacking in distance.

Auckland received more of these settlers than any other city in New Zealand. With the influx of kindred Pacific Islanders it became the largest Polynesian city in the world.

At first it was thought Auckland would be a great melting pot of tribes. It developed, in fact, a tribal mosaic, much more in keeping with tradition, but the first Maori migrants sought a Maori identity only, not a tribal one, and through marae that would be pan-tribal, multi-cultural and regional. In similar vein the statutory voice of Maoridom, the New Zealand Maori Council, changed its tribal constitution to a regional one to admit to its meetings the many Maori living outside tribal areas. (Only recently has the Council reviewed its structure to re-admit of tribal representation).

Also at this time, European Aucklanders were attracted to things Maori. Several were willing helpers in Auckland’s Maori community projects and there were

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plenty of projects to link to. The urban Maoris sought to re-discover themselves in a plethora of special interest committees and a flurry of community activity. It was not until much later, with the resurrection of tribalism in the cities, that proper thought was given to the prior rights of Ngati Whatua as tangata whenua, the customary holders of local mana.

The early developments seriously affected Ngati Whatua. Notwithstanding the emerging groups and their new activities, there remained traditional obligations on Ngati Whatua as tangata whenua. These obligations they were in no position to meet. Not only were they struggling for their own survival, but they had no marae from which they could perform their duty to receive others or maintain their customary right to have others acknowledge them. It was a delicate and embarrassing situation, demeaning of their mana, and to extricate themselves from it they became compelled to accept proposals that would in other circumstances have been unacceptable. The sheer size of the Maori migration to Auckland accentuated the problem to the point that other Maori may well have asked, did Ngati Whatua exist or didn't they?

At a time when Ngati Whatua needed to regroup as a tribe, they were thwarted by the moves to multi-cultural development and pan-tribalism. They became diffused amongst a range of committees giving vent to whatever was in vogue. We do not decry the value and importance of the hardworking committees established at Orakei, but none of them depended upon the existence of Ngati Whatua for their own existence, and collectively they negated the resurrection of the tribal authority Ngati Whatua sorely needed.

It is convenient to introduce the new committees at this stage, bearing in mind they were not all formed at once, but emerged to take various roles at different times in the events to be reviewed.

### 8.3 The New Committees

*The Orakei Maori Committee* was formed in 1945 as one of several at the base line of the New Zealand Maori Council pyramid. Its statutory brief was to service the Maori of a district. That included but was not exclusive to Ngati Whatua of Orakei as the membership of the committee showed. It no longer functions. It had special significance however because when it did exist it had a statutory authority to represent those of Ngati Whatua living in the district of Orakei.

*The Waitemata Maori Executive* embraces several Maori Committees of the Waitemata area. It may support a Ngati Whatua view but of course cannot promulgate it. This same applies to *The Auckland District Maori Council* that spans the several Maori Executives of Auckland.

*The Orakei Maori Action Committee* led the Bastion Point protests in 1977. It was spawned by the Orakei Maori Committee in 1976 and spurned by most of that Committee in 1978. It was consistent with its birth that the Action Committee called in aid the Maori of the district, irrespective of tribal origin. As the Committee's name implies it was formed to promote change by direct

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action. As there are many disposed to that course, the committee enjoyed the support of many, Maori and European.

In 1981 the Action Committee authorised the establishment of another group to review the same concern through study and reflection—

*The Joint Working Group on Bastion Point*, formed in 1981 in conjunction with CARE, the Waitangi Action Committee, the Anti-racist Movement of the Auckland University Students' Association, the Church and Society Commission of the National Council of Churches, the Evangelical Justice and Development Committee of the Auckland Diocese and by various others.

Naturally when people cease to belong to a family that belongs to a hapu that belongs to a tribe, they like to belong to something else and the young like to belong together.

*The Tamaki Makaurau Work Trust* began as the Kia Toa Youth Group to create work for young people. In 1983 it was incorporated as a charitable trust under its current name. Ngati Whatua of Orakei youth are involved of course, but the rationale for the Trust's existence is youth employment, not tribal affiliation.

*The Orakei Marae Trustees* administer the new marae. They are usually but wrongly called the Orakei Marae Reserve Trust Board. The trust estate is at Orakei, and it is a marae, but the trustees administer neither a Reserve under the Reserves Act nor a Maori Reservation under the Maori Affairs Act. They administer a parcel of Maori freehold land. Nor are they a Board. They are not a statutory Board, a Board under the Reserves Act or an incorporated body. They are individual trustees appointed by the Maori Land Court. As such they are bound to act unanimously. If they cannot they may apply to the Maori Land Court for directions. Though unanimity is singularly lacking they have not sought directions. Nor have they acted for some time. Amongst the trustees are representatives of Ngati Whatua but the trustees as a whole do not represent Ngati Whatua. Amongst them there are, or have been, representatives from the Auckland District Maori Council, the Maori Members of Parliament, the Department of Maori Affairs, the Auckland City Council, Auckland Rotary, the Okahu Bay Progressive Association and Ngati Whatua. This is unusual for a marae. Although marae administration varies from place to place, commonly marae are vested only in tribal persons and then mainly, tribal elders. Usually the trustees meet only occasionally to determine major policy directions. Normally they entrust day to day administration to a marae committee composed of younger people. About all that the Orakei Marae Reserve Trustees have in common with the norm is that they too now meet rarely. The unusual composition arises because the trustee's administer a multi-cultural marae not a Ngati Whatua marae. By law it is a marae vested in trust "for Maoris". This could mean 'all Maori', 'any Maori', or 'specific Maori'. We have come to the view the land was intended for those specific Maori called Ngati Whatua of Orakei but it ended up being held and run not for specific Maori, any Maori or even all Maori but simply 'all people'.

The trustees first entrusted day to day administration to

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*The Orakei Marae Education and Cultural Exchange Centre Inc.* The 'Education Centre' has Ngati Whatua representation but stands outside any tribal structure. Its membership is both Maori and European. It includes Maori of different tribes. Ngati Whatua involvement arises because the Centre is based at Orakei and Ngati Whatua happens to be there too. The Centre is mainly concerned with promoting education and cultural exchange. From 1969 to 1982 it also administered the marae for the Orakei Marae Trustees and promoted fund raising activities. Today that responsibility has passed to another body and the Centre is able to concentrate on its main objectives of promoting better education and cultural understanding. In the former task it has done well.

*The Okahu Branch of the Maori Women's Welfare League* includes Ngati Whatua women but embraces other women of the district interested in its primary concern to promote educational, cultural and health programmes. Much of its work has been done in conjunction with the Education Centre.

*The Friends of the Marae* was an ad hoc body of mainly Europeans set up to support the marae project during fund raising. Its objective was to establish and show European support for the Orakei developments.

*The Orakei Marae Development Council* was formed by the Orakei Marae Education Centre. The Education Centre had been fund raising for the marae but in 1971, in consultation with the marae trustees a decision was taken to open the appeal to the wider community under the direction of a Development Council chaired by the Deputy Mayor of Auckland and comprised of business and civic leaders. The Development Council conducted a successful appeal until it ceased operations in 1977.

*The Orakei Marae Committee* established in 1982 and chaired by J P Hawke is the body that now attends to the daily administration of the marae.

*The Okahu Bay Progressive Association Inc* was established to provide local citizens support for the Orakei marae project. It no longer functions but because of the important work that it once did continues to have a representative with the Orakei Marae Trustees.

*The Orakei Maori Urupa Trustees* were appointed by the Maori Land Court in 1928 to administer the tribal cemetery and the Church now replaced by the undenominational chapel built there in 1964, at Okahu Bay. The cemetery is the only land at Okahu Bay that Ngati Whatua held onto. It is the spectre of Ngati Whatua's past rising from the graves of ancestors but because it is Ngati Whatua land, and the trustees are of Ngati Whatua, it might have provided a base for a new beginning. Instead in 1978 the Crown gave Ngati Whatua a broader base.

*The Ngati Whatua of Orakei Maori Trust Board* was constituted by statute in 1978 to receive and administer lands and houses vested for Ngati Whatua of Orakei as a whole. In law this body is established to hold and administer tribal property for the benefit of the tribe. It is not appointed to speak for the tribe on all issues but perhaps it ought to be for here all Ngati Whatua belong, and more significantly, only Ngati Whatua belong.

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It is not for us to say the Trust Board is or might become the embodiment of Ngati Whatua tribal authority. That can come only from the people. But we do note the potential bearing in mind the Board is founded on turangawaewae, the only turangawaewae Ngati Whatua now has. If the current wisdom is right and correctly replaces the opinion of the 1950's, turangawaewae and tribal mana is more essential for Maori health than was once realised.

For now, we return to the 1950's and the pan-tribalism of that time.

#### 8.4 The provision of a new Marae site

When the Okahu meeting house was demolished the Crown offered a new marae site behind what is now Kitemoana Street. Sir Ralph Love was secretary to the Hon. Sir Eruera Tirikatene at the time. He recalled, in written submissions, his visit to Orakei with Sir Eruera and the Prime Minister, the latter promising Ngati Whatua the new marae site to replace the old one. The offer, however, was refused. No one would give the Crown any reason to think they could be tempted from the papakainga or would abandon the old marae site. As Rev. Maori Marsden explained, it continued to be seen as the source of their status and mana.

The offer was repeated after relocation but was again refused for by then the people were ensconced as State tenants and their status was even worse. 'He tuporo teretere—they were but floating logs' said Marsden, hardly tangata whenua (the people of the land) for without the restoration of the old site they had no whenua (land) to belong to.

The Crown nonetheless proceeded to reserve the new site, assuming, no doubt that Ngati Whatua would soon come to terms with their position. In 1953 the recreation status then attaching to the site was removed (1953 *New Zealand Gazette* 1483) and one acre 19 perches was formally set aside in 1954, "as a reserve for the use and benefit of Maoris" (1954 *New Zealand Gazette* 1340) (No 105, appendix III).

For the use and benefit "of Maoris"? Ngati Whatua, of course, are not just Maori, they are Ngati Whatua, but the use of the general and not the particular was standard draftsmanship and should not have mattered at least if things were done by law. Where Crown Land is set aside "for the use or benefit of Maoris" the Maori Land Court is empowered, on application by the Minister of Lands, to vest the land in the particular Maori for whom the land was set aside, or, in the case of a group, in trustees on the group's behalf (s.437 Maori Affairs Act 1953). The Minister of Lands applied to the Court to have that done, in 1955.

In this case however, the use of the general words did come to matter. We have no doubt, from the surrounding circumstances of the time, that when the reserve was gazetted in 1954 the Crown intended the reserve for Ngati Whatua, or for those of Ngati Whatua found entitled by the Maori Land Court. (The question for the Court was whether the land should pass to the tribe, or to the owners of the old site at the time of taking).

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The trouble was however that at about this time, ‘Maoris’ generally, the new Maori migrants, were looking for an urban marae site in central Auckland, a home away from home. The trouble was also that while the Scots may have clans and the Indians bands—

to most Europeans, Maoris were simply Maoris; tribal differences and the protocol problems that went with them were regarded as unnecessary factionalism. Pakehas who were sympathetic to a marae in Auckland, therefore, felt that it should be centred on an existing one such as the Ngati Whatua pa at Orakei, and that it should be removed from any proximity to Europeans . . . . In one of his last letters to Whina Cooper (now Dame Whina), the outgoing Minister of Maori Affairs, Ernest Corbett wrote: ‘. . . I am opposed to the establishment of a fully fledged meeting house and marae in the heart of Auckland . . . If a meeting house were to be built at all it should be at Orakei where a reserve has been set aside for that purpose. I would support such a scheme because the site is already available, it is removed from the heart of the city, and it is on ancestral grounds with a Maori environment . . . .’ (King, 1983:191).

But who was the reserve intended for in 1954? That was the question asked of the Crown representative when the Minister of Lands application was before the Maori Land Court. When there was no reply, the case was adjourned the Court minuting “the terms of the reservation by the Crown must be made available to the Court.”

The terms of the reservation were never made available to the Court. The Crown was in fact entertaining a new proposition. It was seeking to meet Maori demands for an urban marae by offering the site at Orakei. Ngati Whatua did not seem to want it. They wanted the old site but that had been set apart for a park. The City Council backed the Crown’s option. It was happy with the new site provided it was for “all Maoris”.

Ngati Whatua however were opposed to that course. At meetings of the various parties in 1957, at Orakei and the Maori Community Centre in central Auckland, Ngati Whatua representatives remained adamant. The site could be used for a Youth Centre, Community Hall, or whatever, but

not as a place for ceremonial welcomes and discussions . . . not a marae. The Hira family, a leading family had given their word to Princess Te Puea they would abide by her decision to hold on forever to the flat in spite of what might be offered. They decided to send a deputation to Turangawaewae Pa to bring the matter to the notice of the Maori King and his Council . . . . On 13 July (1957) thirty people . . . went to Ngaruawahia and discussed . . . the matter with the Council; the latter decided the marae would always be down on the flat but they . . . would have no objections, provided the people were unanimous, to building a Youth Centre. (B P Puriri, evidence to Maori Land Court 16.7.57).

Many Maori understood the Ngati Whatua concerns and respected them. They considered anyway “outside people would always feel of a marae at Orakei that the local people owned it” (B P Puriri, evidence to Maori Land Court 16.7.57). Under the leadership of people like Dame Whina Cooper they raised funds to buy an alternative site at New Lynn, later abandoning that in favour of one centred on Mount Wellington.

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Others however, Maori, Polynesian and Europeans, were increasingly attracted to concepts of 'an Auckland Marae' or 'a national marae' and 'a marae that is multicultural'. They were also attracted to the Orakei site.

Ngati Whatua were in no position to build a marae even if the old site was returned, but with Auckland's help and the support of the numerous new migrants, a very fine pan-tribal and multi-cultural marae was possible. The Crown was willing to give the land. All that was needed was Ngati Whatua's acquiescence.

Ani Pihema picked up the story from there

I became a Maori Welfare Officer in 1956 and was very much aware of the attitude in the community towards the new marae that the Government was offering to compensate for the Okahu marae. The tangata whenua's refusal to accept it prompted the Government to offer the marae site to the Waitemata Executive for the use and benefit of the Maori of Auckland who were anxious to see an urban marae established in Auckland.

Then Ngati Whatua gave way. Kawharu considered in evidence that they succumbed to the weight of opinion and to the burden of their traditional responsibility as tangata whenua to provide hospitality and a place to meet to the newcomers. All that was asked of them was that they agree to extend the trustees to include others and to this compromise some of them finally acceded. Ani Pihema considered

I believe they were actually relieved that the pressure concerning the new marae was lifted off them

. . . I believe also the fact that they didn't have to accept the new marae as compensation for the old made them feel better because they still had the hope of getting the old one back.

Ironically Ngati Whatua, who had sold most of the land to establish Auckland, and lost their own block through Auckland's growth, were about to lose the prospect of getting a new marae because now 'Auckland' wanted one.

So it was that the application to the Maori Land Court, on its face exceedingly simple, took four years to determine. The case was adjourned several times, the Court insisting that upon knowing for whom the land was reserved in 1954, the Crown insisting that some matters had first to be sorted out. The case was finally resolved at a Court hearing in 1959 with the Minister of Lands, Department of Maori Affairs, Waitemata Maori Executive and the Orakei Maori Committee all represented. Two of Ngati Whatua were also there. Again the Court enquired for whom was the land intended? For the Minister of Lands it was glibly contended that the *Gazette* notice contained its own answer—"Maoris' presumably means 'all Maoris'". The question was not further pursued. The Department of Maori Affairs advised that a multi-cultural marae for Auckland was proposed, to be funded by joint Maori and European endeavour and from a call for help from all the tribes of New Zealand. The Court was informed that the people of Orakei had "resented the proposals at first" but had recently agreed to "other Maoris" coming into the trusteeship.

Only I H Kawharu of Ngati Whatua expressed reservations stating a proposed public appeal for funds through trustees other than those of Ngati Whatua

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“would involve social and moral obligations of an exacting kind so onerous that I doubt the tangata whenua could accept.” Others may have felt more comfortable with the opinion of the Department of Maori Affairs. It was considered

the natural courtesy of non-residents would prevent any strangers from other parts of New Zealand attempting to override the natural control of the reserve by resident trustees.

It was like 1869 all over again with I H Kawharu standing in for Paora Tuhaere. The Court was advised an arrangement had been settled and a list of names was handed in comprising representatives of the Waitemata Executive (now Auckland District Maori Council) (4), the Department of Maori Affairs (1), Auckland Rotary Club (1), Okahu Bay Progressive Association (1), Ngati Whatua (4) and the four Maori members of Parliament. Later a representative for the Auckland City Council was added. The problem of defining the beneficiaries was got around by following the *Gazette* notice. The Court vested the land in trustees in trust for the benefit ‘of Maoris’. But which Maoris?—and if the marae was to be multi-cultural why not ‘all people’?

Further minutes disclose the Crown’s patent confusion over the nature of its own application to the Court. It advised

all plans for the development of the area would as a matter of course be submitted to the Commissioner of Crown lands, Auckland

and it continued with that expectation for some years after the Court Order had been made. In fact by virtue of the order the land ceased to be Crown land and became Maori land and the Commissioners’ rights of supervision ceased too. The Crown also talked of the trustees as a Board. It used that term so often that the trustees came to see themselves as a Board too. In fact they were not, and never could be.

The Commissioner may appoint a Trust Board to manage a public reserve under (then) the Reserves and Domains Act 1953, but this was not a public reserve and this was not a proceeding under the Reserves and Domains Act. It was a proceeding under the Maori Affairs Act. By that proceeding the land became Maori land, and individual trustees, not a Board, were appointed for its administration. All that was lacking in the Court order was that it failed to determine who were the Maori beneficiaries.

The marae area was later extended and given access to Kitemoana Street. In 1974 an extra piece was set apart “as a reserve for the use and benefit of Maoris” under the Land Act (No 106, appendix III). Then by section 12 of the Orakei Block (Vesting and Use) Act 1978 other adjoining areas were “set apart as a reserve for the use and benefit of Maoris” but this time “subject to the Reserves Act 1977” (No 107, appendix III). It implies that the last additions were meant to remain as Crown reserves with trustees appointed by the Crown for their administration but no matter what the intention was, in 1979 the Minister of Lands again applied to the Maori Land Court for an order under s 437 vesting the additional lands in trustees. This time the application sought that the trustees be “the trustees of the Orakei Marae Reserve Trust *Board* to hold in trust for the benefit of *all* Maoris.” The italics are added to emphasise



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an important difference between this application and the Court Orders of 1959.

The Minister's representative produced written submissions to the Court to show that the intention was to vest the additional lands in the same trustees upon the same basis and upon the same terms of trust as applied to the original area.

There was no argument and the Court endeavoured to give effect to the request. The minutes show that the Court proposed to vest the land in "the trustees who hold office at present as trustees of (the original marae area)" and no mention was made of the beneficiaries. The sealed order, which prevails over the minute, changed the trustees and defined the beneficiaries. It vested the land "in the Orakei Marae Reserve Trust Board to hold upon trust for the benefit of *all* Maoris" (with emphasis added).

The order prevails over the minute and there are now anomalies.

- The original area is held "for Maoris" but the additional lands are held for "*all* Maoris".
- The original area is vested in individual trustees—the additional lands are vested in a Board that does not exist, in respect of a 'Reserve' that is not a Reserve.

At least, as the Crown has since admitted, all the land is Maori land by virtue of the Court Orders. It has admitted too that the land is *not* a reserve.

To lay people these things must be strange technicalities. They are decidedly strange to us! The Court orders, it seems to us, are wrong, made without jurisdiction and wanting in form. The Crown, it is clear, was in error, endeavouring to bend the law to fit its ends and all because, in our view, it no longer wished to honour its original proposal to provide a new marae for Ngati Whatua. There was no reality to the procedures the Crown adopted but at least reality lay in the building operations.

### 8.5 The Making of a New Marae

The question of the marae site was to remain a frustrating riddle. A new marae was built on the new site but not by Ngati Whatua. At first, it seemed, it was being built for them, but it was not, for it was never built on tribal terms or vested in their control. To their total humiliation it became known in Maori circles as 'the pakeha marae' where things are ordered on pakeha lines. It symbolised not only Ngati Whatua's loss of their land, but the takeover of even their culture—by Europeans and Maori from other places.

The belief, stated in Court in 1959, that the "natural control" would remain with the Orakei people was sadly misguided. Of the 16 trustees, only four were Ngati Whatua and according to Kawharu they did little more than sit quietly as token tangata whenua and they never, with one brief exception, included a kaumatua. This body met privately. Ngati Whatua of Orakei met separately. Despite the 1959 Court order the latter returned to the view that nothing should be done on the new site that might prejudice the 'return' of the old. They decided in 1961, for example, that compensation held for the

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old meeting house ought not to go to the new marae. It went instead, in 1964, to a new chapel by the old urupa.

Despite the Ngati Whatua resistance the trustees proceeded to authorise improvements. The impetus came from the Education Centre the origins of which are now considered.

Margaret Boyce is a former teacher, Training College lecturer and voluntary welfare officer in post-war Greece. She described the apathy and dejection amongst Ngati Whatua when she became chairperson of the Orakei Primary School Parent-Teachers Association in 1959. There was little interest in the Maori children's education and no Maori parents in her group. She canvassed the parents and was appalled. For many it was the first time a European had entered their homes. For Margaret Boyce it was the start of what is now 25 years of dedicated work amongst the Maori of Orakei. Quite rightly she enjoys the love and respect of many.

The Maori Education Foundation was also established at this time with a national appeal for funds. Margaret Boyce co-chaired fund raising in Auckland's eastern suburbs. The committee that was formed was the beginning of the Education Centre.

After the campaign the Committee began a homework-helping scheme with the Okahu branch of the Maori Womens Welfare League of which Margaret Boyce was also a member. The league sought to revive a beleaguered people through its young mothers, those who can least afford to give in to despair. From the campaign the committee had established links with the wider community, service clubs and local authorities which were canvassed for more support. In 1962, libraries were established and classes met in the homes of Maori parents. Maori and European worked together in programmes that brought new hope. 1964 was important for in that year the committee, now called the Education Centre began an association with the marae trustees, and with their approval put the first building on the marae site. It was a double garage converted to a play centre built from local fund raising efforts and help from Tamaki Lions. It is called Te Puawai, or the spring, and operates today as a Kohanga Reo (Maori language nest).

By 1965 Te Puawai was being used for both pre-primary and post-primary tutoring. Arts and crafts training started in 1966 again with both Maori and European involvement. Margaret Boyce was elected Treasurer for the Centre in 1965 and for the marae trustees in 1967. She has held both posts ever since. Fundraising continued through the years and in 1967 the Centre began annual grants to the marae trustees. It may not have seemed too significant at the time but in 1969 the marae trustees arranged that the Centre handle the routine management of the marae. As for the marae trustees themselves, they proposed to extend the marae grounds into the 'uncommitted' lands. It was soon apparent however that others had competing designs.

*Orakei 1987*

## 8.6 Development Proposals

By 1968 the marae trustees had major development plans and approached the Council and Government for more land and access to Kitemoana Street. Auckland's Mayor, Dr McElroy, was sympathetic, writing to the Commissioner of Crown Lands on 21 May 1968 referring to the Acheson and Kennedy inquiries and adding

No one can read these official documents without feeling it is time that amends were made to these people for the injustices they have suffered in the past in the hands of representatives of the Crown.

But others had other proposals for the uncommitted lands—a tourist hotel, highrise apartments, an airport, a university—and the Commissioner of Crown Lands proposed a high density housing subdivision.

The Auckland City Council recorded 'strong objection' to any development. Its view, which was said to represent the majority opinion of ratepayers was that the land should be kept as open space for Auckland. The Crown thought Auckland should pay for it—at \$12,000 per acre—as it should not be a gift from the national taxpayer. It was not a gift, in the Council's opinion. The Crown was exempt from meeting reserves or paying reserve fund contributions in its development of the 700 acre Orakei block. Private developers would not have been exempt. The Crown had a moral obligation to provide sufficient open spaces and the uncommitted land should be used for that purpose and for the provision of public amenities. To bolster that stance the Council wrote

It would be some help to the Maori people who live in this locality to know that their historic homeland had become a Park to serve both the white and Maori population in Auckland and to afford by its beauty of setting a fitting background to a marae worthy of the history and traditions which attach to this area (Mayor to Commissioner of Crown Lands, 22 May 1968).

Meanwhile the Education Centre was busy with its own programmes with many of the Orakei Maori now fully involved too. The second building erected on the marae (in 1970) was a double garage converted to a classroom for arts and crafts. In 1971 a building was opened next to it, for carving, and the two were linked by a verandah.

The general education programmes were also expanding. In 1972 a bursary fund was established to help pupils attend boarding schools. Numerous Orakei Maori have since been sponsored through local primary and secondary schools, boarding schools, technical institutes and university, or assisted to attend holiday ranches or overseas schools on exchange programmes. One witness now at University, by his demeanour and delivery alone was adequate testimony to the success of this programme.

Until 1971 the three buildings on the marae site had been paid for from local fundraising. Then the Centre added its support to the trustee's vision of a major marae complex and multi-cultural centre. That year saw the first public appeal for funds. A radio appeal was probably more successful for the interest generated than the \$4,000 raised. It was decided to launch a larger appeal. In June 1972 the marae trustees and the Centre formed the Orakei Marae Development Council to spearhead a public campaign. It comprised business

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and civic leaders and was co-chaired by the Deputy Mayor of Auckland and the Centre's Director. Ngati Whatua were not represented.

Local fundraising and initial construction work preceded the launching of the appeal. A toilet and ablution block was built, the actual construction being entrusted to J P Hawke. The foundation stone for the meeting house was laid. In 1972 Te Koha, an old carved wharepuni (sleeping house) was shifted to the site and renovated to serve as a reception and craft display centre.

Meanwhile the work-load was such that the Centre sought a permanent salaried staff. Pre-school primary and post-primary school programmes were still being run along with brownie, cub and scout groups. Another large prefabricated building was erected for their use (it has since been pulled down). Raffles, concerts and gala days accompanied the making and sale of craft-work, kits, poi, carvings, and tukutuku panelling. Hotels and business places, both home and abroad, were supplied with craft work under commission. The Centre hired a full-time Director and Administration Officer both of whom were Maori, (but neither of whom was of Ngati Whatua). Then the Centre itself was incorporated. All was ready for the appeal.

The appeal was opened by the Prime Minister in 1973. When it closed in 1977, \$ 173,671 had been raised. In a letter to the Tribunal Phillip Corvette explained it was a cooperative effort of the Development Council, Marae Trustees and Education Centre. He explained "the [marae trustees] directed the building programme. The daily responsibility for handling funds needed for day-to-day marae administration, repairs, maintenance, marae promotion, all insurances and care-taking was delegated by [the trustees] to [the Education Centre]. The [Development Council] handed over to [the marae trustees] during those five years, 1972-1977 a total of \$153,600 to pay for materials and labour in constructing those two buildings and also wages for carvers."

Though many of Ngati Whatua actively supported the programmes of the Education Centre and marae trustees, the appeal was not promoted by Ngati Whatua despite Kawharu's caution 14 years earlier that an appeal for funds through trustees other than those of Ngati Whatua "would involve social and moral obligations of an exacting kind so onerous that I doubt the tangata whenua could accept." The panui or public notice of the appeal was not announced by Ngati Whatua despite the promise fourteen years earlier, that "the natural courtesy of non-residents would prevent any strangers from other parts of New Zealand attempting to over-ride the natural control of the reserve by resident trustees."

Like all good appeals, it was well advertised. Brochures explained its purpose, to build

. . . an adequate marae where Ngati Whatua and associated groups can act fully in their host capacity . . .

. . . a large reception and community centre where (Maori) groups can come together on host territory . . .

. . . a meeting place for all people.

Its functions would be

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To provide a place where all who live in New Zealand can meet in a setting where racial harmony can be established on the best basis of all-working together.

To provide a setting where youth can share the Maori culture, where they can come as of right, the Marae thus providing a catalyst in community stability.

To provide a place where those things which are Maori can be conducted, taught and practised in a Maori way in a Maori setting with fitting dignity.

To provide a fitting location for welcoming distinguished visitors to this City.

In the messages from leading citizens printed with the publicity material there is nothing to suggest that the proper place of the tangata whenua might be threatened. The Hon Matiu Rata, then Minister of Maori Affairs, stressed that a marae “is one of the few places where matters are ordered on Maori terms”. That summarises Ngati Whatua’s current case for the control of the marae. Queen Te Ata-i-rangi-Kaahu stressed the significance of the site as “the focal point for Maori settlement of the Auckland isthmus and much of the North Island”. Ngati Whatua could not disagree with that. Mr Te Hau, Chairman of the marae trustees took a similar line referring to the area as the “Marae Matua”—or the parent marae, which of course it had to be, for in Maori custom it was the marae of the tangata whenua. And no-one, including Ngati Whatua, could take umbrage with the sentiments expressed by other leading citizens which included the Mayor and Deputy Mayor.

Such misdescriptions as were given were in other parts of the brochures. It was said the Orakei Marae Trust Board was created by statute when it was not a creature of statute but of Court Order, and nor were the trustees a Board. More significantly it was said that the marae was held “for the benefit of the entire Auckland community and for all Maoris in New Zealand (Maori Land Court 1959).” It was not held for the entire Auckland community but was Maori freehold land. The 1959 Court order did *not* refer to ‘the entire Auckland community, or ‘all Maoris’, despite the Crown’s representation that the word “all” was implied and should be added. But who could raise such technicalities to dampen the fervour and enthusiasm of the time?

The shell of the meeting house was completed as funds came in, in 1974. To accommodate Maori beliefs, the building was ritualistically opened, by another tribe, so that carving could begin. In accordance with ritual it was duly named—Tumutumuwhenua! Tumutumuwhenua is the founding ancestor of Ngati Whatua!

The naming of an ancestral house is no idle matter. It is always fraught with enormous implications, and in the Orakei case, the implications were considerably more than usual.

For the building then ceased to be a building and became the embodiment of the tribal forbear. Ngati Whatua had now to be committed, totally, to the new site, and the new house. The recovery of the old site was jeopardised for no other marae could stand in the shadow of this great ancestor!

Tumutumuwhenua! Ngati Whatua of Kaipara, Helensville and other places could lay equal or even greater claim to a house named for the great tribal forbear, but no-one had consulted with them. Though for several years the

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tribe had talked of establishing a house with that name, there had been no tribal meeting to agree that the Orakei subtribe could carry that honour.

We were told the name had been settled by a certain museum curator, not a person of Ngati Whatua nor even a member of “all Maoris”—but a person said to be an expert observer of Maori affairs. In any event, somehow the name surfaced, and though without tribal consultation or approval, with appropriate ritual *Tumutumuwhenua* was duly reborn.

Some considered the naming of the house an outright affront, others felt humiliated, while those who had fully supported the developments became increasingly uneasy. But in the euphoria of the time support was still there. Many of Ngati Whatua were amazed and humbled by Auckland’s generous response to the public appeal and by the hard work of persons outside the tribe. How could anyone be anything but grateful? It was not until two years later that the issue came to a head. In the meantime the protocol of business and being busy continued to predominate over Ngati Whatua ritual, custom and tradition. Ngati Whatua of Orakei had lost their land. The control of their culture had now been taken too. “As you suggest” said Margaret Boyce in responding to the Tribunal’s draft report, “a problem lies in the 1959 arrangements to set up the Orakei Marae Reserve Trust Board to build and administer a new Marae for all Maoris—arrangements about which I was certainly ignorant until long after I became involved in building the Marae at the urging of the Elders then here. As time went on, those of us who had agreed to be trustees, asked again and again about our responsibilities and status—our ability to tackle this formidable task. The only clear answer given to us was that we were there to build the Marae—no doubt we continued to be driven by the need and the increasing impetus of our Marae activities including education and cultural exchange.” She went on to point out that all this work was with the co-operation of Ngati Whatua people. In the period 1970–1973, she said, there were 84 working members in the Education Centre including many of Ngati Whatua.

In 1974 the marae trustees wrote twice to the Minister of Lands, first for more land for the marae (which was still without access) and secondly for more surrounding land for Maori housing. On the first they were successful, three acres being added in 1974 extending boundaries and giving access. On the second they had to wait while discussions continued with the Council.

The enormous task of carving, panelling and scroll painting began under the supervision of Ngati Whatua’s master carver under the patronage of the Education Centre. Fencing, planting, paving and landscaping was continued. Visitors flocked to the marae. They ranged from thousands of school children to overseas dignitaries, Prime Ministers and the Governor-General.

It did not always assist that the marae was now an ancestral marae and was therefore used also for tangi—the last rites for the dead are a most important proceeding on a marae. The tangi were conducted behind the main building in the old ‘prefabs’ under most trying conditions. The bereaved and their visitors had to be accommodated and fed. At first cooking was done in the open and later under a corrugated iron lean-to. There was only one tap for all

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washing—outside and with no drains. Ngati Whatua were ashamed of these conditions and of the goading they received from other tribes that ‘their’ marae was really a tourist show place and was founded on a vision that was all wrong. In 1975 the Tai Tokerau District Maori Council of North Auckland complained formally to the Minister of Maori Affairs that Orakei was receiving Government subsidies for a ‘tourist attraction’ while other more genuine marae of the north were missing out on the available money.

Things came to a head in 1975. Ngati Whatua desperately needed a cook-house and dining-room for their hui and tangi. The Education Centre needed a reception centre for their ‘official’ visitors and those whose support was necessary for the maintenance of the appeal. The Centre was not unmindful of the local people’s concern but a reception centre would separate the general public from things like tangi and maintain privacy for the local people. In any event, a full cookhouse and dining room was planned in the longer term.

Ngati Whatua saw things differently. Tangi take precedence and that meant proper catering for guests. In any event the new building was proposed for the marae forecourt and their custom did not permit of the forecourt being used that way.

But the die had been cast. \$25,000 from the Auckland City Council and \$25,000 from other sources had been given for the erection of the Reception Centre, nothing else, and could not be used for a dining hall.

The Centre decided that the Reception Centre would be built. The gradually widening split became an open chasm. Thirty-one Ngati Whatua residents met in one of the homes to record and pass on their unanimous opposition. For the first time they also labelled the development ‘a pakeha marae’.

For Ngati Whatua things went from bad to worse. Tangi were to be held away from the multi-cultural marae. Although when the reception centre was built it could cater for seventy people at one sitting it was in constant use by other groups. The use of the old building was eventually forbidden for health reasons. Thereafter tangi were conducted in adjoining homes, under tents on front lawns, or the dead were transported to Reweti, an old Ngati Whatua marae near Helensville where the living could fulfill their obligations and more fittingly honour their dead.

Symbolic of the new marae control was that the people had to seek the keys to the reception centre. Some claim to have experienced rebuffs but Phillip Corvette of the Education Centre considered there was either a misinterpretation or misunderstanding, stating, in a letter to the Tribunal

Ngati Whatua people have never been required to ask for permission to use Marae facilities for tangis, hui, family gatherings or any other meetings. Administration officers only required to be informed so that meetings or other activities already scheduled can be held elsewhere. We are aware that sometimes there has been conflict about the way such things are conducted but the conflict has always been between members of Ngatiwhatua families themselves.

The reception centre was opened in 1976. Its name ‘Te Pou o te Waitemata’ commemorates Titahi’s prophecy. A new post did indeed stand at Waitemata!

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Meanwhile, waiting in the wings to advance their cause were the Ngati Whatua residents. It suited their purpose to do so, at that time, through the official body then ascendant amongst them.

### 8.7 The Orakei Maori Committee

The Orakei Maori Committee was a body corporate with statutory authority to represent the Maori of Orakei district as part of the New Zealand Maori Council structure.

Since Ngati Whatua predominated in Orakei, they comprised a majority of the Committee, but technically it could not exclude others. In recognition of population changes the Maori Welfare Act 1962 did away with the old title of 'tribal committees' and substituted district representation. An indirect consequence was technically the Committee could not represent those of Ngati Whatua outside the district but such a technicality did not in practice constrain, or if it did, at least those residents who maintained their fires on the ancestral land had a statutory voice, and as residents, a good customary right to be heard as well. The statutory status deserves emphasis because later the Crown preferred not to deal with this body although it was the Crown's own creation.

It also included two prominent Ngati Whatua families in residence at Orakei, the Hawke and Rameka families. Michael Rameka described his family's concern to make the Maori Committee successful, after the 1962 restructuring, and the work undertaken to establish the first buildings on the marae for education. Eruini Hawke was both on the Committee and Chairman of the Education Centre at the time and his son Joseph, the main claimant in this case, was a willing worker for both. Joseph Hawke described how he arranged the supply of timber for the marae from Rotorua, and how he worked on the buildings.

Joseph Parata Hawke deserves special mention and not just because he is a fifth generation descendant of Te Kawau. He had not then the reputation he has today. He was a registered builder in business on his own account with good contracts from the City Council. He belonged to a Workingman's Club and enjoyed a game of bowls. Although at the time he was living in Mount Wellington, he was keen on furthering the work of the Maori Committee and was qualified to help in building projects.

But Hawke had inherited the legacy of his people. Underlying their activity was a brooding about the past. Hawke did not pretend to understand it all for he was but a child when his family was evicted from the papakainga. He knew only the rumours, the garbled version of legal technicalities. Much worse, he felt, more than understood, the anguish of his grandmother Mihiata Te Mamae, who had travelled to Wellington with Princess Te Puea, with great hope, only to suffer the despair of losing all. She died during the relocations. At first Hawke distanced himself from the anguish of Orakei, moving to Hawkes Bay in 1962 and remaining there six years to raise a family. He returned in response to the pleas of his mother, Piupiu. Hawke knew there must be a wrong and finally resolved to expose it.



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He began in the tradition of his forebears. In April and August 1974 he took the Orakei case to the Commission of Inquiry into Maori Reserved land. The Commission included a brief summary of the matter in its report (pp 127–129) but concluded that the land was not, and had not been a Maori reserve in law, and was therefore outside its terms of reference. The following year he hoped to take the matter to the Waitangi Tribunal, only just established, but the tribunal could not consider events occurring before 1975. He took to this tribunal instead (the first claim it ever had), a fisheries prosecution matter, but lost, for as he was convicted and discharged it was held he was not prejudicially affected. With ominous portent it seemed necessary that he be convicted and fined! He made submissions direct to Government in 1975 during the Land March but the Orakei case was only one of many referred to at that time and it was not examined.

Meanwhile the Orakei Maori Committee was having about as much success. It claimed it made many requests to the Housing Corporation for the right of residents to buy their State homes but that each request was declined.

Whether or not the Ngati Whatua state tenants were denied rights to purchase their homes in the same way as other Orakei residents had is examined in chapter 12. We need only record here that the matter loomed large in the residents thinking and had an influence on the inability of some to accept a later proposal to vest the homes in a Ngati Whatua Board. The issue was of sufficient importance to warrant meetings at Orakei with Housing Corporation representatives on 22 September 1974 and 26 September 1976. From the minutes of those meetings it is apparent that interwoven with the individual desire to buy, was a concern to keep the homes within the Ngati Whatua tribal group. The following is from the minutes of the 1976 meeting

It was pointed out that there were, under present policy, no “tags” as to a subsequent sale and it appeared that at the moment the houses could be sold eventually to any interested purchaser. This appeared to cause some concern and it appeared that some attempt will be made to formulate some suggestions for a policy of compulsory ‘buy back’ or possibly a leasehold tenure which can not be passed on to other than an approved purchaser.

Meanwhile unbeknown to the Orakei Maori Committee the Government was working on a plan to subdivide the uncommitted lands for general housing. Unbeknown to the Government the Committee was formulating another claim, for the return of all the uncommitted lands in the area to Ngati Whatua. Unexpectedly for both sides, a new Government swept to office in 1975 becoming heir to the inherent contradictions between the competing aspirations.

## 8.8 Government Proposals and Polarisation

The new Government neither hedged nor lost time, but reaction was equally swift and decisive. On 19 November 1976 the Minister of Lands announced the broad outline of proposals for the uncommitted lands, to sell 17 acres for private housing, keep one acre for a Youthline Hostel, and add 22.5 acres to the parks administered by the Council. The balance 19 acres around

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Kitemoana Street was 'subject to further investigation'. J P Hawke reacted the following day stating the Orakei Maori Committee had long claimed the whole sixty acres should return to Ngati Whatua (*New Zealand Herald* 20.11.76). The Prime Minister gave his view that the 19 acres should be used for Maori housing (same *Herald* report). The Commissioner of Crown Lands Auckland disclosed he had spoken with the marae trustees before the announcement and marae extensions and proposals for further housing were being discussed with them (*New Zealand Herald* 25.11.1976).

Many others then rallied to oppose the Government's moves, environmental groups, local residents, committees and others. The Auckland Trades Council placed 'a green ban' to prevent any site work and local residents circulated a petition. In all there was an uproar, many groups uniting in their common opposition to the Government's moves and yet for quite different reasons according to whether they favoured more open space, more development opportunities, more low cost housing or more Maori land.

### 8.9 Competing Claims

Though the Government scheme was based on a compromise of something for everyone it seemed to please no-one. Although the Crown was exempt from reserve requirements in developing the Orakei block, it had provided handsome reserves at the harbour end and now proposed to add to it, free to the Auckland rate payer. To recoup something for the national taxpayer who paid for it, part was to be sold, in an area intruding least on the open spaces, and used for more homes. For the Maori the prospect of a bigger marae and more Maori housing was at least under investigation.

Some objectors were not opposed to more public housing but were opposed to open sales likely to lead to high class residences on premium real estate. They contended the greatest need was for low cost housing in proximity to the inner city and that Government should provide for it.

The open space contenders wanted more open space, and as things turned out, they won the most. Environmental action groups had been herald to the protests of the 1960's and the national predilection for confrontation in the settlement of issues. Their protests were politicised with the formation of the Values Party. The latter saw most of their values espoused by the new Government in seeking election in 1975. The open space group had therefore a head start when they campaigned about Bastion Point, environmentalists finding common cause, in this instance, with local residents and Aucklanders generally.

Local residents stood to lose other values, if development went ahead, a loss of outlook, and a re-sale diminution as a result, magnified if either low cost or Maori housing won out. Aucklanders generally stood to lose too.

The Orakei parks are the largest near central Auckland with harbour frontage, providing a huge recreation area, sheltered places at Okahu Bay and commanding views at Bastion Point. The latter is a natural grandstand for the thousands who watch the Anniversary Day Regatta. Now although in law, long

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term use and occupation cannot disentitle the Crown, in practice it is different, at least in major cities. A leading factor favouring the open space contenders was that noted by a group of officials later established to reconcile the claims, that “the majority of Aucklanders have come to regard the whole of Bastion Point as public open space.”

The Maori land claim as formulated by the Orakei Maori Committee was founded on a similar premise (though with less public appeal) that the majority of Ngati Whatua had always regarded the whole of Bastion Point as their ancestral space, coupled with an additional claim that they were wrongly dispossessed of it. The first was seen publicly as less important than the actual use more recently enjoyed by Aucklanders, and the second, it was thought, ought properly to be determined elsewhere, although precisely where was in doubt for unless it could be narrowed to existing principles of law, there was then no Court or Tribunal that could resolve it.

Accordingly, as shall be seen, another section of Ngati Whatua was to narrow the Maori claim to an existing principle of law that Maori land taken under the Public Works Act, and not used for the purpose taken, should be returned. Sandwiched between the broad and narrow claims was another, also advocated by the Maori Committee, and based if not on principles of law, then on principles of general policy. It was a claim for the right to buy or recognition for having ‘bought’ the State homes that they occupied. Had Ngati Whatua tenants been given the right accorded other state tenants to buy their homes, it was said, and had rent been applied to mortgage instalments on standard Corporation terms, they would have more than paid for those homes and the land too, with overpayments to their credit. Some gave voice to this claim by declining to pay further rent.

Meanwhile the marae trustees, with whom the Crown had actually been dealing, were holding to a contradictory claim, that the state houses should pass to them, the rentals to support the marae, and also the adjoining uncommitted land to be used for Maori housing, for the benefit, of course, of “all Maoris”.

In this way the Maori Committee was both aided and constrained by other protests. In the months that followed the Maori claim won the greatest publicity but the open space league won more land.

Ngati Whatua gained something, quite a lot in terms of the second more limited claim, but it was probably fortunate the claim could be satisfied with minimal impact on the open space plan.

So much for the competing claims. The Orakei Maori Committee could see at once they were both aided and hindered by other claims. By the end of 1976 it had defined its position

- The Orakei marae to pass to Ngati Whatua control.
- The uncommitted land and parks to pass to a Ngati Whatua Board but with the developed parks to be administered as public reserves, (the Orakei Sports Domain by the Auckland City Council).

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- The Maori state tenants to have title to their houses (as being already paid for in rents), and
- The Youthline site to be used specifically for Maori Youth.

To advance that stance the Committee did something unheard of in the post European tradition of Ngati Whatua. It did not formulate another petition but formed instead an Action Group, in keeping with the tenor of the times. One of the claims with which the Committee had had to contend, that “the majority of Aucklanders have come to regard the whole of Bastion Point as public open space” had an ominous portent. If long term use and occupation was the test, the Committee was determined to put it to the test and on 5 January 1977, under the leadership of J P Hawke and J Rameka, the Action Group occupied the uncommitted land at Bastion Point, and held it for 506 days.

The claim had been formulated to the point of entrenchment when the Crown’s specific intentions were published by the Department of Lands and Survey in February 1977. By then the 19 acres requiring further investigation had been investigated and subject to engineering tests, seven acres were proposed for Maori housing and reserves and twelve acres for public housing. If this satisfied any of the Maori contenders it was too late. Conflict had already turned to confrontation. Protest had become the order of the day.

## Chapter 9

# Pride and Protest 1977–1978

### 9.1 Pathway to Protest

The Orakei Maori Committee Action Group was a product of the times. The change began with the move to the cities. A new awareness of things Maori developed. Maori studies were introduced to Universities and schools, not without a struggle, and the language was heard on radio and television, in a token way at first but later with greater earnest. Europeans rewrote history with new insights into a Maori past, while Maori pursued higher education, with new insights into a European present. The culture, rather than suffering a reverse, was born again in the hearts of many who had lost it, they adopting it at times with uncustomary fervour, but everywhere were the signs of loss, of language, family structure, tradition, land and status. A new weapon was added to Maori armaments—the art of protest.

At the other end of the spectrum Maori gangs emerging in the 1960's—Black Power, Mongrel Mob and Headhunters—were themselves a form of protest, given to some display of their position but not necessarily of their direction. Seen first as a threat to orderly society, they were later seen as symptomatic of social ills, and the malady was treated with social remedies and band aid. It took other groups to define the wider issues, and following the lead of other special interest campaigners in the 1970's to protest them. Nga Tamatoa led the way in the late 1960's and began the first protests at Waitangi in 1971. It was soon apparent that their youthful exuberance was more than matched by organisational abilities and (fortunately), responsibility. The Maori Organisation on Human Rights joined in about 1970, merging in 1974 with Te Ropu Matakite. The latter, taking their name from tohunga of old, made it clear the new movement did not involve a denial of the past or a breach with elders. They organised, and Whina Cooper (now Dame Whina) at age 82 led them in a Maori Land March the length of the North Island, from Cape Reinga to Wellington in 1974–1975, capturing on route those searching for their Maoritanga and those afraid of losing it. Whina added pride to protest. She captured too some Maori criticism but often the critics were from tribal areas less affected by land loss or social dislocation. The message was clear 'honour the Treaty', 'touch not one more acre of Maori land', and 'give it back'. The Land March was quickly followed with a sit in on Parliament Grounds, and the establishment of a 'Maori (tent) Embassy'.

Many non-Maori were sympathetic. If the cause was right the time was right too. There followed legislation, the making of Waitangi Day, the establishment of the Waitangi Tribunal, the return of Taupiri Mountain and changes to Maori

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land laws to recognise kin structures, restrict alienations and appoint agents for owners with power to contest the compulsory acquisition of Maori land. The protest turned then to specific issues. The status of the language was taken up by Te Reo Maori Society, and the loss of land at Raglan and Orakei by Rickard and Hawke. It was part of a world wide experience. In the United States the Blacks made an art of peaceful protest while in their stand at Wounded Knee the North American Indians drew world attention to the plight of indigenous peoples. The position of the Maori was not that of the Blacks or Indians in the States, but parallels were drawn and in New Zealand the stand was taken at Bastion Point, Orakei. In 1977 the flash point was near.

## 9.2 The Bastion Point Protest

The protesters camp at Bastion Point mushroomed in the spring of 1977. The Maori Action Committee had mobilised support from most of Ngati Whatua, trade unionists and the Matakite movement and about 150 persons took occupation in January 1977.

Dame Whina Cooper was amongst the first to visit the protestors. She was to acquire a large shed for their use, from engineering contractors in Penrose.

From a few tents and caravans the initial camp grew to a large meeting house ('Arohanui') with cooking, sleeping and office accommodation. Extra servicing buildings surrounded it and all on a 'marae' with gateway and watch tower. The untilled clay soil was laid in pasture or cropped to provide food. The group was supplemented by several hundred supporters, Maori from many tribes, Europeans from many disciplines, mainly young but including the old. Many groups especially tribal groups, visited the protestors' marae, if not to stay then at least to express sympathy and encouragement before leaving. There was a danger the protest would spread to other tribes (as indeed, it did).

Ten years after this spectacular event Maori views of it are still coloured by differing philosophies. It epitomised, in one opinion disoriented dissidents in search of a cause. In another view, it was the course of last recourse for a people who had tried every alternative for too long and had nothing left to lose. J P Hawke's submissions referred us to the long history of letters, petitions, pleas, Court hearings and enquiries—but for what? The people has lost the whole of their 700 acre reserve to end up as tenants on Crown Land. One did not have to investigate the details, he said, but to consider only the end result. The people had nothing and that spoke volumes in itself. For this they were branded 'willing sellers'. Well, a pile of petitions and Court cases didn't fit the brand, and what of the morality of the 'willing buyer'? He did not start the protest he claimed. For him his grandmother did. What grandson had any pride who could sit idly by, knowing of how his 'kuia' had travelled to Wellington (with Te Puea in 1950) filled with hope, to return, laden with despair, to die under the weight of an edict to vacate her home. Had he not made submissions too in the 'proper' way? They merely added weight to Government files, he said. What were the alternatives? Could any son love his family if he loved not honour too?

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It was argued by some the action was fundamentally wrong, bound to fail for it was founded on a wrongful breach of the law. The trouble was, Hawke claimed, there was not one Court in the land that could consider the issue in a direct way. The Indian's treaties were at least upheld in American and Canadian Courts. The Treaty of Waitangi was a lawyer's joke. The Indians had Claims Courts. The Maori could petition only a partisan Parliament.

If protest was not the Ngati Whatua way, the Ngati Whatua way seemed wrong. Where had reliance on the law got them? It is good to rely on the law, he said, provided the law is just, but a law where the Maori is always morally right but legally wrong is a law in disrepair, and protest was needed not to destroy but mend it. He went on to the Point, he claimed, not to invite an arrest but to arrest a wrong.

The protesters, others claimed, were spurred not by their principles but massive media coverage. That coverage, Hawke replied, was necessary to mobilise the widest possible support or at least to bring Maori claims to an otherwise disinterested public.

Some trenchant criticism revolved around the Action Group taking the claim to Maori outside Ngati Whatua ranks. The Action Group replied the broad issue was not limited to Ngati Whatua. It was a case example of Maori land issues throughout the country, a symbol of the plight of indigenous minorities throughout the world. They had a responsibility to a much wider group than the home tribe, and in any event, the past showed the need not just for a settlement of present claims, but a better law for the future. The latter was a national concern.

Many Maori groups flocked to Bastion Point to give encouragement and support. They could tell of similar cases 'at home' and if the stories differed in detail, the plot was still the same. Did they take the mana of the case from the people to whom it belonged? Some say they did but the Action Group said 'no'. They came to give support, and get support, reinforcement of their own views on their own issues and support for the Action Group seemed necessary for the Action Group was advocating a case example that illustrated others.

It needs to be said it was only after 'Bastion Point' that a new caution was apparent in the Crown's dealings with Maori land throughout the country and there was an awareness that something had to be done about old claims if only to properly research them before things got out of hand. It was appropriate that the lead came from Orakei for one hundred years earlier Orakei was the scene for the settlement of Maori issues of national concern. In that sense, Orakei belonged to many. It was the place where many forebears had gathered from all over, to plan a Maori strategy and as early as 1879, to call upon the Government to honour the Treaty. 1977 merely showed the failure of the Kohimarama conference, and the need for another. But others of Ngati Whatua considered the first need was to restore the mana of their own tribe. In their view that had to be done before the wider issues could be debated with the sort of direction that Tuhaere had given in 1879, and before 'all Maoris' could be invited to the camp.

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Although the Maori issue was confused by the desire of many to retain as much as possible as open space, or for low cost housing, Hawke and the Action Group succeeded in opening to public gaze the Maori case and the complicated and troubled history of Orakei. There is criticism that they took on board a number of students and others who had nothing to do with the matter. They reply without their help, in researching the past and exposing new interpretations on what had happened, in the claims and counter claims that were being made, a great deal of evidence may not have seen the light of day, or the Maori perspective given a wider debate.

The kaupapa (tribal policy) some say was wrong, for the whole tribe did not approve the action taken and later, elders distinctly disapproved. The kaupapa was fixed, said Michael Rameka, before the action was taken, on the basis that there would and could be no retreat. It was fixed by the Orakei Maori Committee, he said which included some elders and significantly, the residents, and which was the body most representative of Ngati Whatua at the time. Others changed the kaupapa later, it was argued, without prior consultation, and the elders 'on the outside' had by then as much responsibility to the group then encamped as they to them.

The protesters, some say, nearly jeopardized the 'handsome settlement' the Government eventually offered, with the result Ngati Whatua nearly got nothing. The protestors claim to have stimulated the move to a settlement, broadening the area for compromise making more moderate proposals, considered extreme only months earlier, appear quite tame. But they do not retreat from their view that the settlement was not nearly enough.

Trade unions and Churches came too, the former offering the weight in numbers the protestors lacked, the latter the weight of moral conscience. Officials had referred to the law, and the declared legality of past transactions by Courts and Commissions. Father Dibble referred to Galatians 3 v 11 which he paraphrased as 'the law will not justify anyone in the sight of God'.

The protestors included young and old, Maori and European, some trying to understand the present, others to understand the past. They came from many disciplines. One claim, most strenuously opposed by the Action Group, was that it was taken over. Michael Rameka insisted that throughout the Action Group was never comprised of other than members of Ngati Whatua and they alone set the rules and direction. The control, he said, never passed to 'communist infiltrators' or 'student activists' as was alleged.

The debate on the Bastion Point protest will no doubt continue, but the significance of the protest camp for some, transcends the immediate issues.

Many young people were there, knowing that they were Maori but not much more than that, seeking to discover what it was to be Maori and sensing in Hawke's protest, a picture of Maori pride, a pride they had not formerly known. Hilda Harawira described to us what this meant to her. Alcohol was not allowed in the protestors' camp. Drugs were forbidden. A strong sense of family and belonging made such things unnecessary and proved that young people could be held together without them. Classes were started, teaching



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things in both Maori and non-Maori and there was actually a joy in learning. Maori and European were there as one, learning from one another.

Language, custom and history were taught. Building, cleaning and catering for large crowds using open wood fires was learnt by both sexes. Children continued to go to school and additional instruction continued in what she thought were good homely conditions, one teenage protestor passing six subjects in school certificate. It was for her a new and better home and a turning point in her life.

For Emily Karaka it was a return home. She was one of Ngati Whatua lost to the city, her grandparents having left Okahu papakainga before her birth, carefully avoiding reference to it in her presence as though the pain would be too great for her to bear. She knew what it was to be rootless, to have a past withheld in whispers, but found her roots after reading of the protest and visiting the protest camp. There she found countless cousins, a large loving family, and not so much a mood of protest as of pride. Like Hilda, she stayed until eventually arrested.

Father Dibble, who joined the protestors, explained

In that meeting house I saw the flourishing of a vigorous Maori culture that I had never previously experienced. The people in occupation, led by Renee and Joe Hawke, demonstrated to the highest degree, ingenuity, skill, organisation and perseverance under adversity. I saw the development of a sense of pride, discipline and aroha. I saw young Maoris absorbing their language, their culture, their history and their customs. Many admitted to never having had real contact with anything specifically Maori before. Together, on Takaparawha, in the meeting house, which itself was a masterpiece of ingenuity, Maori people discovered a sense of purpose and identity.

Father Shirres had a similar view

Most of my life I have worked with young people. In the years that I worked with the Ponsonby Work Trust I came to some slight understanding of the plight of so many young Maoris—locked out of most of the opportunities for progress in European society, unsure of their identity, economically insecure, and with little access to the better things of either Maori or Pakeha culture. Here at Bastion Point, during the occupation of 1977–78 I saw those same young Maoris rediscovering themselves, their inheritance, their pride and their identity . . .

Forty-six ‘Young Maoris of Orakei’ who were there, signed a submission in which they explained their involvement as follows

Many marched for many different reasons. And many were the reasons for the occupation of Bastion Point (Takaparawha) in 1977. Those of us who were young were ignorant of the politics, but felt in our hearts that this was what we had to do. All our lives we were told what was right and what was wrong. We felt that what we were doing was right. Then ignorance turned to understanding which affected our lives, the things we learned, heard, saw and felt were experiences of a life time.

Those things were fine but back amongst the Orakei people was a more pragmatic concern that the protestors would lose themselves in a host of causes, and if the younger ones did not understand the politics, they need not, for the older people presumed to know them well enough. Their difference of view was not in reality a philosophical one, but one based on the reality of

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practical politics. In asking for the return of the parks, uncommitted lands and the homes the Action Group was seeking too much.

The question was not whether they were right, but what, having regard to the politics of the time, was the most that might be asked for. The political reality was too, what Government could negotiate with a large and many faceted group, for whom consultation was restricted by a confrontation stance and for whom loyalty to the group might be more compelling than loyalty to the case. Some of Ngati Whatua appreciated this. They felt the need to offer a more constrained negotiating front, as an alternative more in accord with the Ngati Whatua way, and due to the exigencies of the situation, as quickly as possible.

### 9.3 Compromise and Conflict

The former owners of the ten acre exchange block, or their successors, had a special interest in what was happening. They were mainly one family. They were also part of the 'non-sellers'. 'Their' block, taken for housing, was directly opposite Kitemoana Street and the marae. The people had sought housing on it without success. It was still vacant, and uncommitted. It seemed everyone was talking about it as though they had some right to it, but they in their view had a prior right for it had been taken from them. Many had sought the return of the papakainga, and other land too, but without success and there was no reason to believe official views had changed. Bastion Point itself was too much the 'prized possession' of Auckland for that to return, but the return of the ten acre block was a realistic possibility, and if the Crown had consistently denied the moral right of others to those lands that were sold, this was a block that had not been sold, but taken.

Thus the exchange block owners formulated a claim based on the principle that land taken, and not used for the purpose taken, should return, narrowing their claim to fit an established legal principle. Certainly at that time there was no general law requiring that such land return, but section 436 of the Maori Affairs Act 1953 had long provided a mechanism whereby Maori land taken for public works, and no longer needed, could be returned to the descendants of former owners. There was no obligation to use it, but still the provision was there and being there implied that it ought, on occasion, to be used. (In fact the provision was strengthened in 1975, land 'no longer required for any public work' being changed to land 'no longer required for the public work or other public purpose for which it was acquired or is held').

That immediately brought into account another block—the battery reserve—taken for defence and now used for park. That too should return, but since there was a substantial memorial on it, that would be impractical. Better to ask for other land, and what better than the houses that Ngati Whatua had long sought. With careful concern to limit their claim to established legal principles, for mere 'moral' claims had a singular record of failure, return of the papakainga would not be sought. It was taken for a park and used for a park. (It was in fact taken for recreation ground). In similar vein the roads and church site would be outside the claim, for roads had been provided and the

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Church provided for. It was important in their view to distinguish land taken and land sold, not just to fit the 'legal like' claim but also in case by asking for the return of the first as well as the second, Ngati Whatua should lose both. If all this seemed as if the 'exchange owners' were merely trying to look after themselves, that was certainly not the case. The exchange owners' proposal was not that the land return to them, from whom it was taken, but to the whole tribe—sellers and non-sellers, residents and non-residents, owners and non-owners, those mainly linked to Tainui and those to Kaipara or in a phrase—Ngati Whatua. It ought to be obvious—this was the family of Otene Paora!

The claim was formulated. The ten acre exchange block to be handed back, only this time to Ngati Whatua, and in exchange for the ten acre battery reserve, the Kitemoana Street properties of roughly equivalent acreage, but substantially lesser value as building sites. The whole it was claimed, should be vested in a tribal trust to house Ngati Whatua. The existing houses would be purchased from the Crown over a time less the difference in value between the Kitemoana and Bastion Point sites. The guiding principle was one of 'equivalence'.

On 5 January 1977 when the Action Group occupied Bastion Point the exchange block 'owners' had already thought through their proposals and were ready to act. They met privately on 9 January, gave final formulation to their claim, and arranged a meeting of the tribe (which included of course the Action Group).

The meeting was doomed to failure. To the Action Group the more moderate proposal appeared to concede the moral claim was not a claim, assumed the sellers were willing sellers and took no account of what had happened in the papakainga. By limiting the claim to land taken and not used for the purpose, in the Action Group's opinion, it discounted any claim in respect of anything else. It made no allowance for the Action Group's view that the homes had been more than 'paid for' in rents and gave no satisfaction to residents like the Hawke and Rameka families. They would still be paying rent. Therefore while the proposal was acceptable to most elders, for it fitted legal concepts without reliance on moralities and reinstated the Ngati Whatua preference to work within the law, it was unacceptable to the Action Group.

But like many issues debated in the heat of conflict the matter was determined by extraneous factors and in this case by a most unfortunate incident. The "moderates' proposal" as it shall now be called was to be put, if approved, to the Commissioner of Crown Lands, and to aid clarity, had been typed. In the course of typing a copy came into the hands of the press and without the moderates' knowledge was printed in the Auckland Star on the evening of the meeting.

At the meeting itself, on 15 January, Piriniha Reweti outlined the moderates' claim, thanked the Action Group for drawing attention to the case and bade them leave the Point lest they compromise the integrity of the proposal; but it was learnt, at the meeting, that the 'decision' was already printed in the press. The Action Group was not called upon to discuss, in their view, but to

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accept as a fait accompli a 'decision' of one group only that contradicted the prior policy of the Maori Committee. They immediately withdrew in protest, according to their bent, returning to the protest camp.

The elders remained to ratify the moderates' proposal distancing themselves from the Action Group in the process. While the Action Group considered the proposal 'a sell out', for the reasons earlier given, it was, to others, a realistic assessment of how far any Government could go. The plan was intentionally limited to matters raised in the Crown's planning initiatives of 1976, and was not intended to cover the wider areas of Ngati Whatua concern.

Whatever the pros and cons of the various views the most unfortunate result of all, from the meeting of 15 January, was the division created. For the first time there was a breach of that bond between elders and their more fervent young for which Maori society was once renowned. Those whom the elders traditionally cajole and encourage were now cast into the role of dissatisfied youth in rebellion against elder opinion. The great skill of elders in reconciling the young to them, had not been allowed to work. Nor could the young re-open the door to them. They had not been weaned from the camp but required to leave and at a point when the route for retreat had narrowed.

So it was the parties pursued their separate paths. Joe Hawke became the folk hero of large numbers, pushed to a point from which retreat was increasingly impossible. The elder Piriniha Reweti led the moderates, bound to maintain the more moderate stance of wise counsel. The Government was caught in the middle, accused of creating the division by dealing only with the moderates and yet faced with the moderates' insistence that the Crown deal only with them.

Still the Action Group, by returning to Bastion Point and continuing their demand for the whole of the undeveloped lands, made the Reweti group appear more moderate still. In this way, that which had been unacceptable to past Governments, became increasingly attractive to that then in office.

#### 9.4 The Assessment of Competing Claims

The moderates moved quickly, arranging a meeting with the Minister of Lands on 18 February 1977. The Minister moved quickly too establishing a few days later a joint Planning Study Group to consider how the competing claims might be accommodated within a land use planning strategy.

The Maori land claim should have been resolved first in our view. The determination of best land use was a distinct issue and acceptance of one ought not to have been contingent on support for the other.

Nonetheless, in an attempt to reconcile the two, provision was made for the Ngati Whatua community to elect a representative to the Group. At a community meeting at which all families were represented Professor Kawharu was chosen. He was appointed along with a representative for each the Crown, City Council and Regional Authority. The Group was backed by a planning team drawn from the central and local authorities.

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The Study Group was required to respect 'the identity and possible requirements of the existing Ngati Whatua community' but had no authority to determine the claim itself. In the result while the Study Group heard evidence, the Government continued to receive submissions from each the marae trustees, Action Group and moderates for settlement of the Maori land claim. The Study Group itself heard fifty one groups, one on behalf of the Orakei and Ngati Whatua people.

It was then that a third 'Maori' claim was manifest. At a meeting with the Minister of Lands at Orakei Marae on 13 March, the moderates reiterated their claim to the ten acre exchange block and the housing estate. The Action Group repeated their claim to all the undeveloped Crown Lands and control of the marae. The latter presented three petitions, 59 signatories supporting the Action Group's action, 243 supporting the return of all Crown Land at Orakei to Ngati Whatua and 4800 signing a petition that could be read as supporting either the return of that land or its retention for Auckland. The marae trustees were there too. It was thought they would simply repeat their earlier claim for more land to be added to Orakei Marae. In fact they produced a massive research document in support of a claim to the existing homes and the ten acres sought by both other claimants; the latter to house "persons of any race involved in the activities on the marae" and the rents from both to support the marae to benefit, of course, all people. Needless to say Ngati Whatua were incensed. Once again they were expected to take second place to the interests of Maori generally and the concept of a multi-cultural marae. The occasion marks a rapid decline in the fortunes of the marae trustees. The Government, not surprisingly, preferred increasingly to deal only with the Ngati Whatua moderates, to distance itself from the marae trustees, and to seek the removal of the Action Group from Bastion Point.

Removal of the protestors became a priority as more people gathered there and distant tribal groups made formal visits to display their support. On 28 April 1977 the *New Zealand Herald* reported the Minister of Lands as saying "if the squatters did not move soon, proposals he wanted to put to cabinet would be jeopardised". The same message was relayed at a further meeting with the moderates on 11 May. As reported in the *Auckland Star* on 18 May, the Minister was willing to recommend the vesting of land in Ngati Whatua provided the protestors vacated. Thereupon 18 elders went to the protest camp to plead with the Action Group to go lest an imminent settlement was upset.

Father M P Shirres, who spent much time with the protestors, referred to his article published in the *New Zealand Herald* on 23 May describing the event, and the discussion at the marae on 11 May before the elders went to the camp. The choice he thought, was that the protestors had to leave or the tribe would get nothing. He described as one of his saddest nights, that night "with the Orakei Maori Committee, and seeing the anguish they suffered over the choice the Cabinet and the Minister of Lands put to them. Would they reject the kaumatua and all the kaumatua stood for, or would they disown their people on Bastion Point?" "I was so sorry" said Michael Rameka, "but things had

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gone too far". The Action Group decided to stay but insisted, against his own wishes, that JP Hawke leave, to be a voice for the Group "on the outside".

The matter by now had political connotations. On 1 July, while the Minister for Maori Affairs held a meeting with J P Hawke at Orakei, along with Dame Whina Cooper and the President of the New Zealand Maori Council, the Opposition spokesperson on Maori Affairs introduced a Private Members Bill to transfer to a Ngati Whatua Board some 80 acres of the undeveloped Crown Lands, not including Okahu Domain, the Battery Reserve or Takaparawha Point.

The Bill was doomed to failure. Instead on 7 July the Minister of Lands announced that civil proceedings had been filed in the Supreme Court "to end the unlawful occupation of Crown Land at Bastion Point".

On 13 August the elders wrote to the Minister of Maori Affairs to distance themselves from the Action Group whom they could not persuade to leave. They wrote

We wish to state emphatically we give no support whatever to the various widely publicised proposals, claims and allegations made on our behalf. While we recognise the democratic right of individuals to express personal opinions, we deny anyone the right to speak for the Ngati Whatua of Orakei on any subject without our collective consent and the authority of the Kaumatua.

That stated their position clearly enough but left the Action Group with the rejoinder that the moderates revised tribal policy had itself been conveyed to the Commissioner of Crown Lands, in their opinion, without the prior collective consent of the tribe.

The elders then identified themselves by genealogy showing their connection to the blocks for which reparation was sought so underlining their prior right to speak. The pragmatic difficulty was that negated the traditional proposition that the land ought to have been held unpartitioned for all, and presumed the descendants of former owners in other blocks had no case. An owner in the papakainga block when it was compulsorily acquired was, for example, Te Mamae Hira Pateoro, a direct descendant of Te Kawau and grandmother of J P Hawke.

Nonetheless the elders referred to the 1898 partition which they said was illegal and resulted, it was claimed, in the eventual loss of the estate. Still they said, if their claim was accepted, Ngati Whatua would relinquish all claims against the Crown arising from the partition and support the balance of the Government's 1976 scheme. That at least left open the prospect of other claims not founded on the partition. Indeed we consider the real cause of Ngati Whatua's problem was not the partitions but the original Orakei Order and the Legislature's failure to provide for tribal ownership.

The letter was nonetheless impressive and effectively disowned the Action Group. It counteracts the popular view that the Government forced a division by dealing only with the elders. The letter stated in no uncertain terms that Government ought not to deal with anyone but them and it would have been hard for any Government not to heed it.

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Meanwhile, though the Government was keen to effect a settlement with the moderates, the moderates preferred to await the report of the Joint Planning Study Group (on which Ngati Whatua had representation).

Amongst the Action Group an air of despondency followed the death of 9 year old Joanna Hawke in an accidental fire at the camp and the supporters in actual residence dwindled to their lowest number of about twenty.

## 9.5 Settlement With The Moderates

The Joint Planning Study Group reported in November 1977, recommending a smaller area for public housing, a bigger area for reserves, and for Ngati Whatua, the existing Kitemoana Street houses to be vested in a Ngati Whatua Trust Board along with two nearby areas for future housing (in all some 24.5 acres).

It was strictly a planning answer. It sought development within an overall strategy to maintain the open space character of the Point. The Action Group's claims for example, were not judged on their merit, but simply noted, offset by a portended public reaction against any wholesale return of lands, then quantified by Government's willingness to compensate the loss of specific blocks, aggregating about 24.5 acres, in broad accordance with the moderate's claim. Having fixed quantum by that pragmatic method, location was settled by standard environmental determinators—visual impact and the location of the existing Maori community. The Steering Committee stressed

although the opportunity is presented to resolve a long-standing grievance in respect of Ngati Whatua of Orakei, the report itself provides for the most appropriate use of the land on Bastion Point, irrespective of moral or legal issues relating to ownership.

Nonetheless the report lent credence to the view that there was a moral claim that ought to be met, provided it did not unduly constrain the open space character of Bastion Point for the benefit of Auckland. It was not determinative but provided guidance for a compromised solution.

It certainly provided what the moderates were seeking, a settlement within the ambit of the Crown's 1976 proposals and a return of land clothed in a statute that would make it their 'turangawaewae for ever', an inalienable trust for all of Ngati Whatua of Orakei. They had withheld a final decision on any settlement until the Study Group had reported. The next month, December 1977, Piriniha Reweti wrote to the Prime Minister, Minister of Lands and Minister of Maori Affairs for a meeting between the Ministers and the moderates, a meeting that in his view ought best be held in Wellington.

Piriniha's opinions in that letter are interesting, not just because he was a leading elder but because they show he was not too distanced from the Action Group at least insofar as he acknowledged the existence of other grievances.

Underlying our proposals made to you in January, was one basic principle, a principle of equivalence—between land that the Crown might return to our section of Ngati Whatua, and land taken from us by the Crown in the face of our protests and not used for the purposes employed to justify its acquisition. We thus limited our claim: for we said nothing about the obliteration by the Crown of our marae in 1951 and

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the trampling on the tapu of our inalienable heritage in the 'public interest', because these acts were within pakeha law and in the end the land was used for the declared purposes. We were silent too, on the conniving by the Crown in its purchase of the four acres we gave to the Anglican Church to hold in trust for our children and our children's children. We simply felt obliged to confine our appeal in January to the former Battery Reserve and Orakei 4A2A blocks and to leave the remainder, not because they did not matter, but because the injustices they recalled to us were perhaps less evident to others.

Thus for the first time since 1950 you gave us hope that a measure of justice might be found in adapting your 1976 Plan to contain our proposals concerning the Battery Reserve and 4A2A blocks. The equivalence, we knew, would be meagre for the balance would remain heavily weighted in the Crown's favour. And so now to the new plan, which comes much closer to a true equivalence; and although we believe that on grounds of area and location alone the balance still favours the Crown, it is patently closer to a full measure of justice and to the means by which we may regain our identity as the tangata whenua of Tamaki. As it happens, we do not imagine that any other plan could be devised that would give us an exact equivalence and still meet with general approval.

Piriniha was not paving the way for further claims however, or tendering an olive branch to the children of his tribe still encamped on Bastion Point for he added

And finally, unless fresh evidence pertaining to the former Ngati Whatua ownership of the Orakei Block is unearthed and upheld in a New Zealand Court of law, we would forgo any further claims against the Crown at Orakei.

Gentlemen, these are our thoughts and our hopes for our people. We shall come to Wellington when you are free to see us.

The three Ministers agreed to a meeting, not in Wellington but still on neutral ground, at Auckland Town Hall, Saturday 25 February 1978. It is not known who said what to whom but only the result, announced by the Minister of Lands the following Monday (after consulting with the Council on Sunday). In short there would be allocated

for housing, low income variety, a mere .....	5 acres
for more reserves, for Auckland .....	22 acres
for Youthline,—an increase to .....	4 acres
and for a Ngati Whatua Trust Board, an increase to .....	29 acres

The Ngati Whatua award included the Kitemoana Street homes, adjoining land for more housing and land to be kept as open space. It carried a tag that payment for equivalence would be met, once thought to be \$257,000, later fixed on valuations at \$200,000. The details of the award are given later. For now the meeting itself is considered where the settlement is said to have been concluded.

One view of the meeting stresses that most elders were there with some 40 senior members of family groups and there was full accord after a long discussion. Another stresses it was not a tribal meeting, not at the marae and by invitation only, those not invited including the Chairman of the Orakei Maori Committee, the Action group, and elders or senior members for the Hawke and Rameka families. Others claim the families of the Action Group were not invited because they had absented themselves from prior community discussions.



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Hapi Pihema’s view is important for as he advised us, he was later chosen as chief spokesperson for Ngati Whatua of Orakei. He thought some who should have been there, were not. Of the meeting itself, most of the discussion was on the price, he thought, the elders not joining that debate, not wishing to haggle about the price so long as land returned. At the start, he recalled, one elder accepted the proposition put by the Crown but others present immediately objected. That had the effect of dropping the price but once that was settled the discussion did not return to the principle or the amount of land to be settled. Accord was not so much recorded as left in the eye of the beholder. The more important question for this tribunal is whether the meeting accepted the settlement in full and final satisfaction of all claims, including the claim to the marae, or only in settlement of the exchange block and Battery Reserve. This question and the responses to it weighed heavily with us and are considered in Chapter 12 of this report.

The details of the arrangement were spelt out in the Orakei Block (Vesting and Use) Act 1978 described as an Act to implement the agreement reached between the Crown and representatives of the Taou, Ngaoho and Te Uringutu hapu of Ngati Whatua for the vesting, use and management of certain portions of the Orakei block situated in the City of Auckland.

It vested in the Ngati Whatua of Orakei Maori Trust Board, then constituted

- |     |  |                            |
|-----|--|----------------------------|
| (a) | 24 houses at Kitemoana Street and 3 at Watene Crescent ...<br>(Nos 101 and 104, appendix III)..... | 6.75 acres<br>(2.6816 ha)  |
| (b) | Two separate areas by Kitemoana Street for future housing<br>(Nos 103, 109, 113).....              | 12 acres<br>(4.5404 ha)    |
| (c) | An adjoining area as private ‘open space’ (No 108).....  | 10.25 acres<br>(4.1817 ha) |

and by way of equalisation the Board was to pay to the Crown \$200,000.

In addition

- |     |   |                                      |
|-----|---|--------------------------------------|
| (a) | An area was added to the Church Cemetery reservation<br>(No 102) comprising some.....       | 0.50 acres<br>(2012 m <sup>2</sup> ) |
| (b) | Two areas were added to the Marae (No 107) comprising<br>some.....                          | 0.50 acres<br>(1824 m <sup>2</sup> ) |
| (c) | There was reserved for Youthline Trust Inc (No 110), as it<br>turned out, about.....        | 1 acre<br>(4304 m <sup>2</sup> )     |
| (d) | Reserved for community facilities, off Kupe Street (No 31),<br>was nearly.....              | 2 acres<br>(7798 m <sup>2</sup> )    |
| (e) | Added to the parks (Nos 29, 30) was about.....  | 30.25 acres<br>(12.2356 ha)          |
| (f) | And there was vested in the Housing Corporation for<br>housing purposes (No 111) about..... | 4.5 acres<br>(1.7986 ha)             |

As earlier seen the basis of the arrangement was one of equivalence for two blocks taken under the Public Works Act that ought to have been returned. It did not in any way challenge the legal process whereby the Orakei block as

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a whole was alienated from Ngati Whatua or question the policies that led to acquisition.

The assessment of the debt owing was explained in a letter to the tribunal from the Commissioner of Crown Lands, Auckland of 29 October 1985. Valuations were supplied as follows by the Valuation Department in July 1978

(a)	Lands vested in Ngati Whatua Trust Board	
	Residential properties .....	\$1,094,000
	future housing areas .....	<u>518,000</u>
		\$1,612,000
(b)	Lands taken under Public Works Act	
	Battery Reserve .....	\$1,000,000
	Exchange block .....	<u>412,000</u>
		\$1,412,000
(c)	Difference payable .....	\$200,000

Within the parameters of the moderates' claim, a claim limited to two blocks taken, the settlement was generous. The Battery Reserve was valued at its worth for residential subdivision though it was to be kept as open space. As a park reserve it was valued at only \$105,000. More significantly

- (a) Neither the 4.1817 ha 'open space' vested in Ngati Whatua, nor the land added to the urupa or marae were brought into account. (The 4.1817 ha was valued at \$560,000 as a block for residential development, and at \$52,000 with the open space restriction.)
- (b) Effectively the Crown paid twice for the Battery Reserve and exchange block for no account was taken of the compensation earlier paid, \$3000 in 1889 for the former, and \$16,000 in 1951 for the latter.

It remains to be added that Ngati Whatua did not have the funds necessary to fulfill their side of the settlement. In consequence the Maori Trustee came to their help and provided a loan of \$200,561 for a term of 40 years at 7.5% not reviewable. The Maori Trustee advised us that the money was advanced in good faith

that is to say . . . there was a danger that concessions might be lost if the Ngati Whatua people were unable to raise the required sum of money. The terms on which the loan was made available were concessionary in recognition of the particular circumstances applying.

The Maori Trustee added

What should be recognised is that the loan money granted by the Maori Trustee was made with what in effect is Maori money, that is to say, it was not appropriated to the Maori Trustee by the Government. The Maori Trustee's loan finance originates from rent moneys collected by him from Maori land.

Still the settlement continued to pose problems. For the Ngati Whatua residents there had simply been a change in landlord. The homes had been built in the 1950's for a total cost of \$144,153. Rental actually paid to 31 March 1977 was \$327,256. At March 1978 the combined value of land and buildings was \$1,094,000 but as the Housing Corporation pointed out in a letter to the Tribunal of 1 November 1985, the properties would have been more than paid for had rental payments been mortgage installments. Looking at a case approved in 1952, as an example, it was noted the sale price was \$5,500,

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weekly installments \$4.22, and over a 40 year mortgage term (the then standard term) total payments would have been \$8,778. Interest was not reviewable and installments would not have changed. Rental payments however were reviewable and from about 1968 averaged \$13.50 per week (the tenants however being relieved from rates, insurance, maintenance and other outgoings).

Whether the Ngati Whatua residents had or were denied a right to buy their homes is reviewed later (12.21), but in the view of the Action Group, which included two prominent 'resident families', the homes had been paid for and \$1,094,000 should not have been debited against them. They were better off in their view, in 1912. The settlement gave to the Board 27 state homes, 35 years old, nearing the end of their useful lives, subject to a debt of \$200,000, located in the gullies, and 4.1817 ha for future expansion. In 1912 they had more homes, debt free, rent free, on the flat and 700 acres besides. Certainly they now had roading and servicing but some servicing they would have been entitled to anyway as ratepayers.

## 9.6 Expulsion and Convictions

An argument between the Crown and City Council as to who should remove the protestors may have been resolved simply by the Crown's responsibility for the maintenance of order. The Minister of Lands had several times announced a settlement was unlikely as long as the protestors remained but they did remain and it seemed the protest could spread to other tribes. In April 1977 the Commissioner of Crown Lands delivered a letter ordering the protestors to vacate. On 27 June Maori groups protested at Parliament grounds. On 30 June 11 groups unsuccessfully sought a meeting with the Minister. In the meantime another argument was developing concerning certain land at Raglan, leased to a golf club, and there were threats of another protest camp being established there.

The Crown formulated a strategy. It could have settled on a simple action for eviction in the Magistrate's Court but chose instead to put the contest directly to the Supreme Court, on application for an injunction, in much the same way as it had bypassed the Supreme Court for the Court of Appeal in *Solicitor-General v Tokerau District Maori Land Board* (supra). The thought, it seems, was to enable matters of title and equitable relief, and thus the history of the land, to be fully aired and debated. Brookfield (1978:383) considers the same matters may have been relevant to proceedings in the Magistrates' Court but doubted the full issues could have been properly debated in either Court, in any event.

Nonetheless, on 7 July 1977 application for an injunction was filed against J P Hawke, J Rameka, G P Hawke and R P Rameka to restrain them from continuing in occupation. The defendants contended they were disadvantaged from the start. The Crown had access to a stockpile of relevant files, staff to research them, some 506 days to prepare, and senior counsel to lead. The defendants were without counsel. During the occupation they were without employment and had accumulated debts.

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Legal aid was declined. They appealed to the Legal Aid Appeal Authority, obtained a hearing in September 1977 and in November an unfavourable decision. Although they qualified on financial grounds, other provisions of the Legal Aid Act 1969 disqualified them, and in particular, that which required the likely cost to be commensurate with the chance of success. In this case, the estimated cost was \$ 10,000 and in the Authority's view, the prospects of success insufficient to justify the grant of such an amount. In addition "if the defence is successful then at best there remains only the possibility of a political settlement" while legal aid "is directed to achieving results by legal means".

Both F M Brookfield and the Legal Aid Appeal Authority were therefore of similar mind but for the defendants it meant they had to sift through a morass of legal and historical background without the help they had hoped for, and the data, Hawke claimed, was made available only one month beforehand. It has taken us some years to study, check and augment the same material.

To complicate matters the defendants were not privy to the Crown's settlement proposals, a settlement that was to weigh heavily in the eventual judgment. The case was scheduled for late 1977. At that point, the Joint Study Group had only just reported and there had not been a settlement. The hearing was adjourned to the beginning of March 1978 but it was not until 27 February that a settlement was announced and was only broadly outlined. On that basis a further adjournment was sought but the Crown was increasingly anxious to conclude the matter. Confrontation was spreading. In February 1978, another group of protestors encamped on Raglan Golf Course to bring to a head another Maori land claim. The case was adjourned another month but Hawke claimed to have only a 'newspaper' knowledge of the Orakei settlement when the seven day hearing began on 3 April.

Judgment was given for the Crown on 20 April. The Court reviewed the history of the block at length, circumscribed by this finding on the equitable issue

The defendants have naturally embraced with some relish the proposition that a plaintiff in equity must approach the Court 'with clean hands', and a wide variety of transactions over the last century or more have been subject to close scrutiny. Merely to speak glibly of the requirement of clean hands, however, is misleading if it is taken as suggesting that one must embark upon an abstract moral examination of all the actions of a plaintiff. It must be shown in order to justify the refusal of relief that there is an immediate and necessary relationship between the relief sought and the delinquent behaviour alleged . . .

. . . though the whole history will be regarded, it is necessary to bear in mind that we are concerned with the relationship of the plaintiff to the defendant in respect of the immediate area and that other dealings between the parties or their antecedents may have lesser relevance.

The immediate area occupied was former farm land that had been sold in 1913. The Court found

Despite every sinister innuendo which the defendants have attempted to cast upon actions of the Crown agents, I cannot see evidence to substantiate allegations of chicanery in relation to the acquisition of the Bastion Point site. It was a Government enacted policy to acquire this land. It was carried out by what appears to have been

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open-handed negotiation. No Court could declare such conduct to be unconscionable.

The Court nonetheless considered the acquisition of the papakainga. It referred to the findings of the Kennedy Commission on the papakainga purchase and concluded the purchases gave no impression of policies undertaken to disadvantage the native owners,

rather they were the historical result, partly unforeseen in the early days, where social developments persuaded the Government of the day to decide, from time to time, that certain steps were desirable for the benefit of the community at large and of the Maori people in particular.

The subsequent evictions were not seen as done

other than in good faith and because of a belief generally held by the authorities that this was the best solution for the benefit of the people.

Did that determine the moral claim? In the opinion of F M Brookfield (1978:392) it did not and could not. The claim was

the culmination of grievances caused by the policies of legislatures and governments, many of the grievances not justiciable and unlikely to have been concluded by a legal judgment which, however sympathetic, simply could not extend sufficiently to the issues of policy involved.

The defendants had opened their case with these words.

The starting point for all Maori people in their dealings with the Crown is always the Treaty of Waitangi . . . In considering the equities in this case the Court must compare the solemn statement (in Article 2 of the Treaty) with the history of legislation which follows.

The decision made no reference to the Treaty, and quite properly so for apart from the provisions in the Treaty of Waitangi Act 1975, the Treaty was not incorporated into law or equity.

The defendants were unconvinced the equities were against them and resolved to continue the occupation. When the Department of Lands and Survey published the Supreme Court judgment in glossy booklet form, the Action Group published a booklet in reply *Takaparawha Bastion Point—506 Days on Ancestral Maori Land*.

But eviction was now only a matter of time. With considerable emotion large numbers rallied at Bastion Point. The Action Group strove (successfully) to maintain control and prevent what could have been an ugly scene. It issued instruction sheets to each person

The Action Committee has decided on a policy of non-violence. Remember, be passive, and passive, and passive . . .

The eviction came on 25 May 1978 when some 600 policemen, army personnel in a fleet of army vehicles, buses, bulldozers and overhead helicopters arrived at Bastion Point. The protestors were surrounded. In the glare of full media coverage 222 people (108 Maori, 104 European and 10 Polynesian) were spectacularly but passively arrested, escorted to vans and buses and charged with wilful trespass under section 3 of the Trespass Act 1968. Included was J P Hawke, his parents, wife and children.

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It was 506 days since the occupation began. It was 26 years since the families of the Action Group had been evicted from the papakainga, the original marae and village destroyed and only the cemetery left. Once more the marae buildings were quickly demolished and all that remained was the memorial to Joanna Hawke.

Those arrested had then to be tried. Some pleaded guilty and were convicted and discharged. Others pleaded not guilty and elected to be individually tried with the result that the Attorney-General stayed the remaining prosecutions, a decision favourably reviewed by Black (1978:321) and Brookfield (1978:467).

Twenty one of those convicted appealed to the High Court where their convictions were upheld (see *Chisholm v Police* [1978] NZLR 612 and commentary Brookfield (1979:131) but some of those went further again to the Court of Appeal where their convictions were quashed (see *Ilolabia v Police* [1980] 2 NZLR 477). It was held any finding that the land was Crown land in the civil proceedings (the application for injunction), could not be relied upon to prove title in criminal proceedings, as it had been.

So it was some were convicted and discharged, some were not charged at all and others had their convictions quashed. It may have seemed to the casual observer a confused end to a confused situation but for Ngati Whatua of Orakei, for whom things could not have been worse, the period marked a new beginning on a pathway to a better future.

## Chapter 10

# Pathway to the Future 1978–1987

### 10.1 The Ngati Whatua of Orakei Maori Trust Board

The 1978 arrests did not mark the end of protests at Orakei but the settlement of 1978 provided vastly better hopes for the people, some land, and a vehicle on which to travel along a new route. A stock take of Ngati Whatua assets did not give cause for over-excitement. Some 29 acres hardly compared with the 700 acres once held, or the larger estates of other tribes or tribal trusts measured in thousands of acres. But such an accounting belies the potential of Ngati Whatua. Unlike the former estate, or the estates of those tribes with more land, that of Ngati Whatua is owned communally, like Maori land of old, and the plague that individual ownership brought to the tribe is finally buried. The real advance in 1978 was not the equivalence received but the recognition and concessions never previously allowed. The land has been made Maori freehold land, and by special Act was made inalienable; and 113 years after the Maori Land Court was constituted, it was decided the land could be held communally, vested in a tribally elected board “to hold, conserve and administer as a perpetual estate and turangawaewae for its beneficiaries” (section 7 Orakei Act 1978). Who said it couldn’t be done? How many tribes sought just that one hundred years ago? Ngati Whatua of Orakei may have little land left, but it is the only tribe in New Zealand to own all that it has in the customary way.

Even more significantly, after all the people had been through it was conceded Ngati Whatua *did* belong. No more a dying race, a race better off in the country, or a people better left to scatter, ‘to live the free life they prefer’. The most important part of the Orakei Act is in the preamble recognising “the special relationship of [the Orakei hapu of Ngati Whatua] with the land.” How many really understand the importance of that to a Maori?

On the relationship of land to mana H S Toia says

land therefore has significance not for its own physical attributes but because its location is perceived to reflect the mana of a group. The concept of territoriality emphasises that it is the location of the land rather than its magnitude which is the relevant consideration (Toia: 1985).

Pride led Hawke to protest and loyalty to people and place. The goal was never in dispute, only the means of getting there and the assessment of political realities. Who can say who was right and who wrong? Does it matter now? What matters more is whether the people can still pull together. For unlike many other Maori trusts where land development is an end in itself, the Orakei estate is people intensive and the development of the people takes priority. There is potential for over 100 new home units to swell the size of the

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community several times. The definition of beneficiaries makes the trust more tribally affiliated than family oriented and includes everyone, putting paid to past distinctions between owners, non owners and the like. There would seem to be, in the Ngati Whatua Trust Board, a potential to pull to order the multitudinous special interest committees of Orakei under the umbrella of one tribal authority representative of the people and existing for the benefit of just the people.

Michael Rameka led the way. Rather than hold to an independent trust for the Okahu Church and Urupa, and though he is its chairman, he asked that the reservation pass to the Board so that there might be but one body for Ngati Whatua. Meanwhile the Board itself in a careful dovetailing of modern and traditional expertise, has an advisory panel of elders serviced by a research support group of the young. The time honoured bond between young and old may yet be restored.

But does the Ngati Whatua Trust Board have the legal capability to represent its people and plot their progress? The history of Orakei is the history of all Maori, marked as it is by persistent attempts to uphold tribal authority—that which the Treaty terms ‘rangatiratanga’ and we call ‘mana’. The restoration of that mana is the key issue in this case and accordingly we made it clear in our hearings that the role of the Ngati Whatua Trust Board was very much in question. Is it really the modern embodiment of a traditional runanga or has Ngati Whatua authority still been denied the recognition it deserves?

Past criticisms of the Orakei Maori Committee as not exclusively Ngati Whatua nor inclusive of them all made it clear that that body was not the tribal authority the people sought but it appears to us the Board cannot represent Ngati Whatua on all issues either, at least in terms of its Act. There are also serious questions in our view as to whether the Board has appropriate freedom to acquire or hold further land for example, including by way of illustration, the marae. We raised those questions in the course of hearing and in the background Report sent to parties before the final hearings took place, for in terms of the Treaty the issue is fundamental. Rangatiratanga, or tribal authority, was meant to be guaranteed.

Our conclusions on that issue are in Chapter 12 of this report. For now we note the establishment of the Board did not immediately bring to heel the divisions of the past. The ideological struggle was continued with the refusal of some of the Action Group to pay their rent.

Though the Board cut the rents to the bone it needed an income to meet mortgage repayments to the Maori Trustee, rates, insurance and maintenance. From 1979 rents were cut, the rents then ranging from \$3.50 to \$14 per week depending on the number of bedrooms plus \$13 weekly, discounted for pensioners, for rates, insurance and maintenance. The outgoings compare favourably with those paid in 1978 to the Housing Corporation although the Corporation itself charged minimum rents. Corporation rents ranged from \$7.65 to \$47.55 and averaged \$27. That in turn was less than what are called ‘fair rents’ based on Government Valuations and which would have produced a range from \$30.40 to \$79.50 with an average of \$55.62.



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Despite concessions rent arrears at June 1984 were \$16,135 (excluding \$17,000 owing to the Corporation before change over). Of this \$13,593 was owed by five of the 'protest' families. Eventually the Board took legal action against them. Only then was the matter resolved. We are advised that the parties have since been reconciled over this problem and rents are now paid in full.

There are other indications that Ngati Whatua has better things in store. After some initial hiccups the Ngati Whatua Trust Board was in regular operation with every intention of maximising its potential.

An interim Board of seven elders, mainly in their sixties and seventies, was appointed by the Minister of Maori Affairs on 9 November 1978, all selected, with one exception, from those who attended the 'settlement' meeting the preceding February.

Their names, including those who replaced them are important for although most were not mentioned in the evidence and data compiled for this report, the history in this report is limited to the issues in the claim. Those appointed to the Board must stand as prominent figures in any general history of Orakei. The Interim Board included Piriniha Reweti, Pateoro Maihi, Pukekawa Poata Uruamo, Tautoko Morehu, Kelvin Povey Uruamo, Te Reo Hapai Morehu and Hapi Pihema. The Board included as well Paora Kawharu II and Mrs Kane Reweti, the two surviving children of Otene Paora. Another appointee, Mrs Rangiaho Puriri, was a daughter of Nia Hira, a principal kaumatua in Orakei in the 1930's and 1940's. These elders came to the Board to spearhead a five year struggle to mould the various factions into an effective community.

The Interim Board was to last only until beneficiaries could be defined and an election held but defining the beneficiaries took longer than expected. Since they are all the descendants of Tuperiri, circa 1740, the compilation of family trees necessarily took a time. It was not till July 1982 that the Maori Land Court could issue an official list of some 600 names (it is now about 1,000) and not till 20 February 1984 (after elections in 1982 were declared invalid) that an elected Board was announced.

Twenty-one sought to fill eleven vacancies. It is interesting to note that D T Tumahai, who was mainly neutral in the internal disputes, polled highest from a return of 217 valid ballot papers while I H Kawharu formerly in the moderates and M J Rameka, once of the Action Group, were elected with only three votes separating them. J P Hawke who continued the protests till 1982, was not elected. Most wanted an end to that sort of thing.

The new Board had many tasks to attend to. A new rent fixing formula was settled, scaled low to favour the tenants, cattle purchased, some commercial cropping begun, and, so long as rents were paid, the Board was put on a viable footing. Then major planning started. Optional development plans were investigated, alternative accommodation strategies debated and finite plans for a subdivision costing some \$2 million (at 1984) were produced to provide for 28 home units. There is a prospect of a better pathway to the future beginning with a call to the scattered seeds of Ngati Whatua to come home, and to those already there, to knit together. In the Maori idiom, Ngati Whatua

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may yet hear again the call of the tui—tuia, tuia, tuia mai tatou (bind, bind, bind us together).

Still unity for Ngati Whatua remains illusory without resolution of two major sources of division. The first relates to the Orakei marae, a topic left out of the debate in the settlement of 1978, the second to the settlement itself, for in the eyes of some a settlement based on reparation in respect of two blocks only with no account taken of other land losses and the destruction of the papakainga in particular, is not a proper settlement at all. We now refer to each in turn.

## 10.2 The Status of Orakei Marae

The development of the Orakei Marae has been covered (para 8.6). We have seen that the 'natural control' passed from Ngati Whatua residents to a widely representative body of marae trustees. Aided by the hardworking Education Centre and a Development Council formed for the conduct of a public appeal, a multi-cultural marae was taking shape. Maori however called it 'a pakeha marae' where things were ordered on Pakeha terms. The suspicions of Ngati Whatua that that was so were affirmed in 1976 when a reception centre was erected ahead of a dining room much needed for the proper conduct of tangi. Yet Ngati Whatua responsibility to the new marae, even at the expense of forsaking the old one, was inevitable from the moment the meeting house was ritually named Tumutumuwheua.

We noted too (para 9.4), that in the following year, 1977, the split with the marae trustees and Education Centre became an open chasm. The trustees had been in communication with the Government since 1968 when they sought (and in 1974 obtained) an extension to the marae area. They wrote subsequently for more land but had not had a reply when in 1976, the Government announced a comprehensive development plan for the area and protests erupted at Bastion Point. In 1977, when the Minister of Maori Affairs visited Orakei the marae trustees responded with a proposal far wider than their earlier request for another boundary extension. In diametric contradiction of both the Action Group and moderates the marae trustees and Education Centre presented a carefully prepared sixty page submission, for the Kitemoana Street houses to be vested in the marae trustees with rents applied to the maintenance of the multi-cultural marae, and for the new housing area to be allocated to them too, to house, of course, all people. With bitterness the elders listened as references to Ngati Whatua became replaced by eulogies to all Maoris, the submissions stating

The [marae] Trust Board has as basic policy recognised the need to establish a marae for the traditional uses of the peoples of the tribes of Tamaki to replace the ancestral marae lost on Okahu Bay.

Did the Okahu Bay marae belong to the 'tribes of Tamaki'? Were the new migrant tribes and the people of Auckland generally to receive the compensation for Ngati Whatua's loss?

To the tribunal the late Hapi Pihema replied

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Who are these people that aspire to control my Orakei marae? What is their relationship to the lands and to the people? . . . Ever since my ancestor Apihai Te Kawau, invited Governor Hobson to this location, there has been trouble over these lands. First the Crown, then the Church and now these people—all were welcomed by Ngati Whatua, they expressing their friendship and concern about my future well being. They finished up coveting my turangawaewae.

The split further divided Ngati Whatua, some preferring to stand alongside those of the marae trustees and the Education Centre who had done much valuable work. But there were to be many changes and eventually Ngati Whatua were to rally to the view that the marae was theirs and they ought to have its control.

The enthusiasm of the Development Council was dimmed by charges of 'outside domination' and criticism from elders and 'Bastion Protestors' alike. In 1977 it went into recess. Work continued in carving, scroll painting, tukutuku panelling and landscaping, the Education Centre raising enough money to keep three carvers employed.

In 1979 the Education Centre sponsored and managed a Temporary Employment Programme through the Labour Department to keep the carvers employed and to start work on a dining hall. It ran for about two years, engaging 50–60 workers, mainly local young people. It ran into numerous management difficulties, mainly because the Government money came 2–3 months behind the actual payment of wages (which were met by an overdraft), and the Centre ended up with a shortfall of \$38,000 and interest of some \$8,000 both of which had to be met from its own fundraising accumulations. In the midst of this, economy cuts forced the termination of the Administration Officer's job, and later that of the Director.

The programme ended in 1979, but the foundations had been laid for a dining hall, and in the following year the Centre opened another public appeal to build it.

The dining room has yet to be built. Progress slowed considerably as another order came to pass. The former chairman of the marae trustees, one of Maoridom's notable figures, died in 1978. Several elders died including two who had taken notable roles in the past. Piriniha Reweti, a sixth generation descendant of Tuperiri died in 1978, and Te Puru o Tamaki Downs, a seventh generation descendant, died in 1979. There were also vacancies amongst the marae trustees—and Ngati Whatua made its move.

They approached the Auckland District Maori Council and advised their concerns. The latter agreed that its two vacancies amongst the trustees be filled by Ngati Whatua representatives. The move was upheld by the Maori Land Court, despite opposition from the Director for the Education Centre, and in 1980 Ngati Whatua had six trustees out of sixteen. Later they obtained another 'seat' from the Auckland District Maori Council and had seven.

There were now other trustees who seriously questioned whether the right thing had been done by Ngati Whatua and for the first time the Ngati Whatua view predominated. The Education Centre tendered its resignation as the body responsible for marae administration. By a slender majority the resigna-

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tion was accepted, and in 1982 the Orakei Marae Committee was appointed to the task under the Chairmanship of none other than J P Hawke. The control was shifting to persons of Ngati Whatua.

Since then the marae trustees have been unable to obtain a quorum for their meetings. The carving work continued through the Labour Department's Work Skills Programme. The Education Centre continues its numerous educational and cultural programmes with success. It has added to its many projects a community house, a neighbourhood support group, and a school-leavers training and employment preparation scheme. There is now a substantial bursary fund for all levels of schooling. It is to the great credit of the Centre that despite the upheavals and its loss of the control of the marae, it has never waned nor retreated from its primary goal—the education of the marae children. But neither do some of its members retreat from its other goal—the control of the marae.

Meanwhile, in other parts of Auckland other marae were being built. In 1959, when the Maori Land Court order was made, there were only two marae, both in South Auckland. Now there are at least sixteen. Seven are multitribal, two are church based and six are distinctly tribal. Even more significantly Maoridom has come to recognise that amongst the many marae, Orakei should take precedence, at least in central Auckland, as the marae matua or parent marae of the tangata whenua, Ngati Whatua of Orakei, just as Piritahi, Pukaki, Ihumatao and Te Puea hold status in South Auckland. For shortly after their 'urbanisation' the new Maori migrants were questioning the initial move to multi-tribalism and asking after the essence of marae and what it is to be Maori. Does one belong to a race or does one belong to a family that belongs to a hapu that belongs to a tribe? The true nature of Maori society and Maori marae was in issue.

We will pursue that issue in Chapter 12. For now we follow the action taken by Ngati Whatua, who, having gained some 'seats' on the Trust Body, were increasingly looking once more to matters of original title. The marae issue had lain dormant for a few years while Ngati Whatua dealt with the protests at Bastion Point and negotiated for a settlement. Later they were busy constituting a Trust Board, arranging a loan, deaning beneficiaries and becoming operational. It was not until 1982 that they could bring their energies to bear on the marae issue again and indeed the sound establishment of the Trust Board was necessary to underpin the claim. It was hoped the marae would be vested in that Board, with some representation for local civic bodies, and representation for Ngati Whatua of other areas (for the naming of the house as Tumutumuhenua meant they too had a say). To that end a meeting was held at 51 Kitemoana Street on 26 March 1983 with the Prime Minister in attendance.

It was then considered again, for whom is the marae held, in terms of law, and from the face of the Court Order the answer was "Maoris". "Maoris" it seemed meant Maoris, not "all people". The Prime Minister seemed sympathetic but then the Government changed. The matter was raised with the

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current Minister of Maori Affairs in November 1984 but then this claim to the Waitangi Tribunal intervened.

Ngati Whatua, not presuming for one moment that “Maoris” might really mean just them, held three meetings to consult with Maoris. True to local protocol they consulted first with their Ngati Whatua ‘cousins’ at a general meeting in Aropawa Kaipara. On Friday 7 October the Kaipara sector carried the ‘take’ (issue) back to Orakei for a second meeting with Ngati Whatua as a whole. Meantime a powhiri (invitation) had issued to ‘all Maoris’ to gather at Orakei and discuss the issue, by notifying each of the Auckland marae, the Maori Members of Parliament, the New Zealand Maori Council and Department of Maori Affairs.

The marae trustees, Mayor and Minister of Lands were also invited. The latter advised that as the land was not Crown Reserve but Maori Land it would be better to consult the Minister of Maori Affairs. That was done. The meeting to discuss the issue was held at the marae on Saturday 8 October with the Minister of Maori Affairs present with representatives of his Department along with the Maori Council, the Maori Members of Parliament and some 80 adults. Nearly all of the several Auckland marae were represented too. Those that were not, Tirahou, Freemans Bay and Waititi, sent letters supporting Ngati Whatua control, the latter listing 30 Maori organisations that also supported that view.

Those present unanimously favoured the Ngati Whatua claim. In the three meetings there was no dissent. And so it was put to us that this marae was reserved for ‘Maoris’, and now ‘Maoris’ had unanimously resolved that the mana of the marae, the right to its control, belonged to the tangata whenua, Ngati Whatua.

That is how Maori people settled the matter. Tradition had at last followed the children to the cities. The symbolism in Auckland’s Maori name, Tamaki Makaurau took new meaning—Tamaki where all may belong, not despite, but because of Ngati Whatua. It remained only to see if officialdom would be moved to acknowledge tradition too.

But the general public was involved as well, by virtue of the public appeals. The total net income from the appeals was applied to the meeting house and reception centre in conjunction with monies raised locally. There were three public appeals.

- (1) The Centre’s radio appeal in 1971 which raised about \$4000.
- (2) The Development Council’s Appeal 1973–1977 which raised \$173,671, from local bodies (\$45,000), Savings Banks (\$10,000), Charitable Trusts (\$27,350), businesses (\$34,265), churches and schools (\$1,793), individuals (\$19,195), fund raising events (\$33,360) and interest (\$2,438). After deduction of costs, \$153,600 was applied to the main buildings.
- (3) The Centre’s 1980 appeal which included donations from the Auckland City Council (\$10,000), Auckland Savings Bank (\$10,000) and an accountancy firm (\$1,000).

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It is difficult to quantify how much is 'public' and how much 'local' as local people were engaged in the fund raising events. Only some things can be identified, like the gift of electrical wiring by an Auckland businessman. It is clear however the largest single contributor was the Crown. P H Corvette advised of an additional \$60,637 Government subsidy through the Department of Maori Affairs. The New Zealand Forest Service gave totara logs for carving. The Department of Labour gave most through the TEP scheme that operated for just over two years. Full figures were not supplied but for 12 months to 31 March 1980 it was given as \$375,000. Here again an apportionment is difficult because the scheme served social purposes other than marae building.

Nor is it easy to assess who might 'own' the various buildings on the marae, legal technicalities apart. The Education Centre accepts the marae trustees own the Reception Centre, Te Pou Whakairo, the meeting house Tumutumuhenua, the dining hall foundations and a share in the toilet and ablution block as these were paid from appeal funds and subsidies. It claims to own the buildings called Te Koha and Te Puawai, the 'wharehui' and carving shed, a storehouse and storage shed and a share in the toilet and ablution block. There are difficulties here again because the community assisted the Centre's fund raising and worked voluntarily on buildings.

The Centre allows its buildings to be used by Ngati Whatua people. It also houses two caretakers on the marae.

In its accounts to March 1982 the fixed assets of the marae trustees are valued at \$564,202.

The conflict was not resolved when the matter was referred to this Tribunal, some of Ngati Whatua insisting that the marae be vested in the Ngati Whatua Trust Board, some of the Education Centre insisting that it be held as a public marae with the trustees constituted as provided for in 1959.

### 10.3 The Status of the 1978 Settlement

Nor did the 1978 settlement bring resolution to the continuing debate. For the Action Group the settlement made matters more pressing. The success of their claim depended on the uncommitted Crown lands remaining uncommitted, but the settlement contained a commitment to settle future use for all time. Even in the month following the arrests of May 1978 the Action Group moved back into action publishing a newsletter to clarify the Group's stand—the return to Ngati Whatua of all the 'open land' on the Orakei sea front to be administered by the Ngati Whatua Trust Board, the vesting of the marae in the Board, the 'removal' of the \$200,000 'price tag', and the vesting of the old houses in the Board for occupation, free of rent, by former tenants.

No sooner had the Court of Appeal disposed of the complaints about the convictions than protest was renewed. In 1981 the Crown moved to sell its 4.25 acres. As far as the Action Group was concerned it had never retreated from its view that it was part of the land to which Ngati Whatua were entitled. Then to its surprise it learnt few others had retreated either. The open-space

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campaigners were back campaigning for more open space too. A 'Joint Working Group on Bastion Point' was formed, but many different and conflicting interests it needed to represent. This time however the 'low income' housing group had a special case.

Low income housing had been specifically recommended for the area by the joint Planning Study Group in 1977, the report adding, "the land should remain with a public agency such as the Housing Corporation or the Auckland City Council." There was a view the Crown had accepted that. The Minister of Lands' announced in February 1978 that the decision to vest the land in the Housing Corporation was "in line with the planning proposals" and the preamble to the Orakei Block (Vesting and Use) Act 1978 said the land was vested in the Corporation "in broad accordance" with the Study Group's recommendations. The Corporation however proposed to sell the land to the highest bidder, and when tenders were prepared in April 1981, the battle was renewed.

On 4 May the Prime Minister countered mounting criticism by advising the profit would assist in forming the area added to the Parks. Nonetheless the criticism continued and the Corporation's drainage and sealing operations were continually hampered by 'sit in' protests led by the Action Group. A first set of protestors was arrested in March 1982. There were then no injunction proceedings and not the same mistakes in the prosecution. Amongst those convicted and fined were the 13 claimants in this case. Others escaped conviction because the Court could not be satisfied beyond reasonable doubt that they were present on the Crown's land. Then there was a second 'sit in'.

It was followed by a deputation to Parliament, not of protestors but prominent citizens, but there was no change in the Government's heart. The Ngati Whatua Trust Board had till then been intentionally silent but on 29 March, Professor Kawharu for the Board issued a prepared statement to the *New Zealand Herald*, removing the Board from the debate. "Ngati Whatua" he stated, after referring to the settlement of 1978, "have taken the matter no further, regarding the administration of Crown land to be the sole responsibility of the Crown".

Some of Ngati Whatua disagreed and were amongst the 120 included in the second arrests of 4 April 1982. On that occasion there were fewer mistakes still. Nearly 100 were convicted and fined, amongst them once more the 13 claimants in this case. Twenty two appealed, including the current claimants, but the appeals clearly lacked substance and were readily dismissed.

Something was achieved from the protestors' point of view. The furore attracted few developers and there were no acceptable tenders. J P Hawke's offer of blankets and other goods of the kind and quantity proffered to Te Kawau for the sale of Central Auckland, was amongst the tenders rejected.

Then the Government changed. The Branch Manager for the Housing Corporation confirmed that since then there have been no instructions to deal with the land. J P Hawke confirmed the claimants' fines had not been paid. Two weeks earlier his wife had been arrested at home, his daughter before

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then, and Hilda Harawira had been apprehended at the airport, but for him the 'knock on the door' had still to come.

#### 10.4 Unity and 'the necessary Laws'

Hope came when the Treaty of Waitangi Amendment Act 1985 enabled a review of Crown policy and action prior to 1975, and indeed from 1840. For the first time the issues confronting Orakei could be directly addressed in full. A new claim was filed and in November 1986 was heard at Orakei marae. In the course of hearing evidence in the afternoon of the opening day, the House was largely emptied. We learnt later Ngati Whatua was meeting separately at the same time.

Rev. Marsden explained the purport of that meeting the following day. The Orakei Trust Board, he said, had striven to uphold the tribal kaupapa that Ngati Whatua should act only in accordance with the law. The Board and many tribal members had felt unable to support the original Hawke claim and at the tribunal's last sittings, had confined themselves strictly to matters arising post 1975. Since then the law had changed.

The tribunal had been reconstituted, was able to hear the sorts of concerns the Orakei people had and to review afresh the whole of their post European progress this time in the light of the Treaty their forebears had signed. The tribe had therefore to meet to reconsider its position and had chosen to do so when the tribunal met and the people were together.

As a result, Marsden announced, "we are now one entity". It was resolved, he said, that the tribe would stand united with its tamaiti (son), Joe Hawke, in the matter of the claim.

Danny Tumahai, Vice Chairman of the Ngati Whatua Trust Board affirmed that resolve. In 1978 he said, the Board adopting the opinion of the past elder Piriniha, stated publicly it would forego further claims against the Crown at Orakei, unless fresh evidence were unearthed and upheld in a New Zealand Court of law. We did not think it necessary to quibble whether the tribunal is a Court. Of significance was the search for unity, after a century of division, as Mr Tumahai advised that the Board, elders and whanau now stood together and supported the claim (subsequently affirmed in a letter from the Board of 12 March 1987). They had healed the past. "Yesterday" said Tumahai "there were tears in the eyes of our elders as we came to that agreement." The house was packed with emotion as the settlement was relayed to us. Unity was found not in spite of the law but because of it.

Such is the remarkable consistency of Ngati Whatua policy, recalling to mind Te Kawau's exhortation to his people to respect the whiteman's laws. It brought back to us his reasons for seeking both the Treaty of Waitangi, and, through a settlement in Auckland, a partnership with the white man's tribe. It reminded us too of the reliance of this great leader, born in pre-settlement times, on even the documentation of the law, as expressed in his farewell to Governor Grey in 1853



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Friend, when you arrive on the other side tell the Queen about the good arrangements you have made in regard to the formation of a township on our land and let this land [Orakei] be reserved for our own use forever and let us have a Deed for it so that it may be safe.

Despite all that has happened we do not think faith in legal process can be seen to be misplaced. To contemplate otherwise is to invite the disorder that Te Kawau and Tuhaere sought firmly to put in the past. It should not be forgotten however, whenever the story of Auckland is told, that Ngati Whatua of Orakei was never other than a loyal tribe that sought no more than one corner of the world to be forever theirs. Save for the protests of the last decade, those of Orakei never sought to pursue that quest through other than “the necessary Laws and Institutions” promised in the Treaty of Waitangi. We have attempted no complete count of the number of occasions Ngati Whatua attended before Courts of many sorts, Commissions, committees, and Parliament, the highest Court in the land, in the pursuit of their single goal, but we have reviewed the results, and now with hindsight we ask, what laws and institutions are needed today?



PART II  
APPLICATION

Chapter 11

The Status and Scope of  
The Treaty of Waitangi

11.1 Introduction

*11.1.1* It is helpful at this point to recapitulate certain earlier findings made by this Tribunal on the status and scope of the Treaty before proceeding to deal in detail with the claims before us. We now have the great advantage of the considered views of the Court of Appeal in *New Zealand Maori Council v Attorney-General* (1987) 6 NZAR 353 on the principles of the Treaty which they saw as being relevant to the case before them. We will, of course, be guided by the judgments in that case. We would emphasise that we are not attempting to lay down a set of definitive or exclusive criteria by which future claims should be assessed; they are intended to be guidelines and a base for our consideration of the present claims. No doubt they will be amplified, developed and refined in the light of subsequent claims which come before us. We proceed now to indicate our approach to the interpretation of the Treaty.

11.2 Status

*11.2.1* We do not find it necessary or helpful to review in any detail the precise legal status of the Treaty of Waitangi whether under international or municipal law. It should however be noted that the Colonial Secretary's instructions of 14 August 1839 to Captain Hobson

- acknowledged (be it with qualifications) the Maori sovereignty of New Zealand as an independent state;
- disclaimed any pretension to seize the Islands of New Zealand or to govern them without the free and intelligent consent of the Natives first obtained;
- authorised Captain Hobson as Consul to treat with the aborigines of New Zealand for the recognition of the Queen's sovereign authority over the whole or any part of those Islands which they may be willing to place under Her Majesty's Dominion. In doing so he advised that he was "not unaware of the difficulty by which such a Treaty may be encountered."

*11.2.2* The English text of the Treaty is consistent with the form of treaties of International law and is concerned with matters such as the cession of sovereignty (or *Kawanatanga*) in exchange for the grant of British citizenship which properly fall within the scope of an international Treaty. Despite subsequent doubt expressed by some colonists and others the Colonial

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Secretary Lord Stanley in a dispatch dated 13 June 1845 to the newly appointed Governor Grey expressly

repudiated the notion that the treaties which we have entered into with these people are to be considered as a mere blind to amuse and deceive ignorant savages. In the name of the Queen I utterly deny that any Treaty entered into and ratified by her Majesty's Command was, or could have been made in a spirit thus disingenuous or for a purpose thus unworthy. You will honourably and scrupulously fulfil the conditions of the Treaty of Waitangi.

11.2.3 It is surely reasonable, given the intention of the British Government to treat with the Maori people as a sovereign independent nation, to apply to the interpretation of the Treaty the general principles of Treaty interpretation as applicable under municipal law.

Whatever its strictly legal standing, good faith and the honour of the Crown call for such an approach.

### 11.3 Principles of Treaty Interpretation

11.3.1 We have discussed this topic in earlier decisions (see for instance *Te Atiawa Report* (1983:10.1) and *Manukau Report* (1985:8.2)). We are required by s.5(2) of the Treaty of Waitangi Act 1975 to have regard to both the Maori and English language versions of the Treaty and “to determine the meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by the differences between them.”

11.3.2 Lord McNair in his authoritative work on *The Law of Treaties* discusses “interpretation” which he says is often loosely used as if it included “application”. Strictly speaking, when the meaning of a treaty is clear, it is applied, not interpreted. Interpretation is a secondary process which only comes into play when it is impossible to make sense of the plain terms of the treaty, or where they are susceptible of different meanings (McNair, 1961:365). Given that the Treaty of Waitangi is bilingual, different meanings are inevitable. McNair states the primary duty of a tribunal charged with applying or interpreting a treaty as being to give “effect to the expressed intention of the parties, that is, their intention *as expressed in the words used by them in the light of the surrounding circumstances.*” (McNair's emphasis, 1961:365). He warns against over reliance on what he calls the plain terms of a treaty (366). McNair also stresses the need to bear in mind what may be called the overall aim and purpose of the treaty (380). In relation to bilingual treaties McNair says that neither text is superior to the other and that it is permissible to interpret one by reference to another (1961:432–3). In the case of the Treaty of Waitangi it is important to note that with very few exceptions, the Maori version of the Treaty was signed by the Maori chiefs. We believe that where there is a difference between the two versions considerable weight should be given the Maori text since this is the version assented to by virtually all the Maori signatories. Moreover, this is consistent with the contra proferentem rule that, in the event of ambiguity, a provision should be construed against the party which drafted or proposed that provision (1961:464). McNair stresses that the performance of treaties is subject to “an over-riding

obligation of mutual good faith” and that obligation also applies to the interpretation of treaties (1961:465).

11.3.3 The United States experience in the interpretation of treaties with the Indian people is instructive (McNair, 1961:470). As we indicated in the *Manukau Report* (1985:8.2) the United States Supreme Court has laid down an indulgent rule which requires such treaties to be construed “in the sense which they would naturally be understood by Indians”—see *Jones v Meehan* (1899) 175 US 1. The reasons given for this rule of construction appear in the following passage at pp 10–11 of the Opinion of the United States Supreme Court delivered by Mr Justice Gray.

In construing any Treaty between the United States and an Indian tribe, it must always (as was pointed out by Counsel for the appellees) be borne in mind that the negotiations for the Treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the Treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all forms of legal expression, and whose only knowledge of the terms in which the Treaty is framed is that imported to them by the interpreter employed by the United States; and that the Treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

11.3.4 We recall that the Treaty of Waitangi was prepared on instructions from Governor Hobson who, in turn, was acting on instructions from Lord Normanby, the Colonial Secretary. The Rev Henry Williams was responsible for the Maori text (Ross, 1972:133). Few, if any, of the Maori signatories could read English nor could all of them read Maori. But the Maori version was for them the only relevant text. It seems clear that it was written and subsequently explained by Williams in terms that were most likely to be acceptable to the Maori chiefs (Ross, *supra*). The circumstances related in the foregoing extract from *Jones v Meehan* although not in all respects similar to those surrounding the signing of the Treaty of Waitangi by the Maori signatories, are sufficiently similar as to warrant considerable weight being given to the Maori version where ambiguity or doubt exists.

11.3.5 We must also have regard to the principle that treaties should be interpreted in the spirit in which they were drawn taking into account the surrounding circumstances and any declared or apparent objects and purposes. See *Fothergill v Monarch Airlines Limited* [1980] 2 All ER 696 (HL) and *Minister of Home Affairs v Fisher* [1980] AC 319. In the latter case, which concerned the interpretation of a provision in the constitution of Bermuda, Lord Wilberforce in delivering the judgment of the Privy Council considered the proper approach to the interpretation of a constitutional instrument. He drew attention to certain special characteristics of Chapter 1 of the Constitution pointing out that it was drafted in a broad and ample style which laid down principles of width and generality. He drew attention to the influence on the drafting of Chapter 1 of the European Convention for the Protection

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of Human Rights and the earlier United Nations Universal Declaration of Human Rights. In a much quoted and memorable passage he said

These antecedents, and the form of Chapter 1 call for a generous interpretation avoiding what has been called ‘the austerity of tabulated legalism’.

We believe it is equally essential, in interpreting the Treaty of Waitangi, to avoid ‘the austerity of tabulated legalism’.

**11.3.6** A recent Canadian case which, like the US case of *Jones v Meehan*, concerned the Chippewa Indian nation, also affords useful guidance to the interpretation of treaties. In *R v Taylor and Williams* (1981) 62 CCC (2d) 227 the Ontario Court of Appeal laid down an important principle that in the interpretation of treaties (as distinct from contracts at domestic law) surrounding circumstances may be considered though on its face the treaty is not lacking for certainty. Land had been ceded in that case, without reservation of Indian hunting rights. Though the treaty was unambiguous in that respect, the Ontario Court of Appeal read into the arrangement an understanding that hunting rights would not be extinguished having regard to the importance of hunting for tribal survival, Indian customary practices and things said at the time. The Court added

Cases on Indian and Aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the Treaty, relied on by both parties, in determining the Treaty’s effect . . . (p 232)

Further, if there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible . . . (pp 235–236)

Finally, if there is evidence by conduct or otherwise as to how the parties understood the terms of the Treaty, then such understanding and practice is of assistance in giving content to the term or terms (p 236).

A similar approach, that the history and oral traditions of a tribe are relevant in construing a treaty was taken in *Choctaw Nation v United States* (1886) 119 US 1, 7 SCt 75.

**11.3.7** As to the relevance of surrounding circumstances in interpreting the Treaty see now the *New Zealand Maori Council* case per Richardson J at 377 and Casey J at 410. See also Bisson J at 422.

In considering what the parties to the Treaty laid down as that foundation [for the future relationship between the Crown and the Maori race] in the documents they signed it would be appropriate to adopt from another context the words of Lord Wilberforce in *James Buchanan & Co Limited v Babco Forwarding and Shipping (UK) Ltd* (1977) 3 All ER 1048 and determine the principles of the Treaty, unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptance.

As evidence of the Maori concept of the Treaty Bisson J then quotes the reported words of Tamati Waka Nene, Chief of Ngatihao when Captain Hobson presented the Treaty to the Chiefs at Waitangi for signature and the words of Eruera Maeha Patuone the elder brother of Waka Nene.

## 11.4 Broad Implications of the Treaty

11.4.1 Elsewhere (*Te Atiawa Report*, 1983:10.3) we have stressed that the Treaty was an acknowledgement of Maori existence, of their prior occupation of the land and of an intent that the Maori presence would remain and be respected. It made us one country, but acknowledged that we were two people. We would re-affirm this statement as an important and basic proposition. It is fundamental to an understanding of the Treaty of Waitangi.

11.4.2 In his instructions to Captain Hobson of 14 August 1839 Lord Normanby the Colonial Secretary acknowledged that “the Maori title to the soil and to the Sovereignty of New Zealand is indisputable, and has been solemnly recognised by the British Government”. While he instructed Hobson to obtain “by fair and equal contracts with the Natives the cession to the Crown of such *waste lands* as may be progressively required for the occupation of Settlers resorting to New Zealand” this was subject to the important caveat that he was not to purchase “any Territory the retention of which by them would be essential or highly conducive, to their own comfort, safety or subsistence”.

11.4.3 Although the Colonial Secretary refers to “waste lands” it should not be inferred that these were not owned by the Maori people. Hobson was authorised to purchase waste lands which the Maoris did not need or wish to retain; it necessarily follows from this the Colonial Secretary acknowledged that the Maori owned all such land.

11.4.4 It is indeed well established that in 1840 the Maori claimed ownership of the whole of the islands of New Zealand (Adams, 1977:176–7). In support of this claim Adams cites:

It may firmly be stated that, in the European days, there was no area of land that was not claimed by some tribe. (Elsdon Best, *The Maori*, 1924).

There is not an inch of land in the islands which is not claimed, nor a hill, nor valley, stream or forest, which has not a name (AJHR 1890, G-1, White’s evidence).

The Maoris claim and exercise ownership over the whole surface of the country; and there is no part of it, however lonely, of which they do not know the owners. Forests in the wildest part of the country have their claimants. Land, apparently waste, is highly valued by them. Forests are preserved for birds; swamps and streams for eel-weirs and fisheries. Trees, rocks and stones are used to define the well-known boundaries (W Swainson, *New Zealand and its Colonization*, 1859).

The value of its land, therefore, not only for its produce, but also for dignity and rank that was attached to its ownership, was very great, and its possession was coveted beyond all other things . . . (AJHR 1890, G-1 F E Maning’s evidence).

It is well to recall that the Maori people by no means relied only on their cultivated land for their food. For them the distinction between ‘cultivated’ and ‘waste’ land in the European sense did not exist. This was, in part, because the Maori followed a practice of ‘shifting agriculture’ but more importantly, because they resorted to the produce that lived and grew naturally upon it, or in the streams, lakes and swamps. From it they took flax, timber, and fern root, rats, birds, eels and fish (Adams, 1977:177).

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Land so essential could not in the Maori mind be considered 'waste'. The Maori laid claim to remote interiors by naming features of the landscape for parts of the body of tribal forebears and leaders and by lighting fires at strategic points in appropriate seasons. Hunting and fishing areas were apportioned to various hapu.

*11.4.5* While the Colonial Government may not have been fully aware of the effect and nature of Maori occupation of the land the Colonial Secretary's instructions, as we have seen, recognised Maori ownership of the land. This was known to and acknowledged by the first two Governors of New Zealand, by Shortland who acted as Governor after Hobson's death pending FitzRoy's arrival, and by George Clarke the Chief Protector of Aborigines (Adams, 1977:178)

Whatever Hobson's views on the content of a Treaty before he arrived in New Zealand, he must have been immediately informed by Busby and the missionaries that a guarantee of their lands would be absolutely necessary if the Maori were to be induced to cede their sovereignty. The speeches of many of the chiefs at the Waitangi and Hokianga ceremonies showed how correct this view was and how clearly the Maoris saw the protection of their lands as the crux of the matter. They had no doubts that all their lands, cultivated or otherwise, were confirmed to them by the Treaty. Neither had Hobson, who acted on that basis during the brief course of his administration till his death in September 1842. (Adams, 1977:179).

*11.4.6* And see now Cooke P in the *New Zealand Maori Council* case at p 358

The view generally accepted by historians and lawyers at the present day is that expressed as long ago as 1846 by Sir William Martin, the first Chief Justice. As he put it, before the Treaty of Waitangi the whole of New Zealand "or as much of it as is of any value to man" was divided among the Maori tribes and subtribes. Communal ownership was not confined to areas in actual occupation.

*11.4.7* The Colonial Office, albeit reluctantly, accepted in the first five years of the Colony that the Treaty recognised the Maori ownership of the whole of New Zealand. But constant pressure by the New Zealand Company for the adoption of a narrower view and persistent misgivings among some British politicians led Earl Grey in his despatch of 23 December 1846 to Governor Grey to adopt a more aggressive approach to the acquisition of Maori land. He held that Maori owned only occupied and cultivated land and that all unoccupied land was waste land and the property of the Crown. Governor Grey however, with support from Bishop Selwyn and Chief Justice Martin, refused to accept this narrow view and continued to recognise Maori ownership of the whole of the country (Adams 1977:187). Grey nonetheless proceeded to buy up extensive areas in both islands.

## 11.5 The Two Versions of the Treaty

*11.5.1* There are important differences between the Maori and English versions of the Treaty. Under s5 of the Treaty of Waitangi Act 1975 it is our function to determine the meaning and effect of the Treaty as embodied in the two texts and to settle issues raised by the differences between them. On earlier occasions we have given careful consideration to submissions and



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evidence on the significance of the cession in the Maori text of Article 1 of 'Kawanatanga' to the Queen while the English version speaks of "all rights and powers of Sovereignty". A further important question arises as to whether the grant or recognition of "te tino rangatiratanga" of their lands, homes and all things prized in the Maori text was wider in scope than the "full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties" guaranteed in Article 2 of the English text. (The words "so long as they wished to retain the same" do not appear in the Maori version.)

**11.5.2** The meaning of 'tino rangatiratanga' has caused us much trouble. There is no precise English equivalent and it is used in the Treaty in an 'un-Maori' manner. To give it the meaning both parties appear to have understood, we would render it as 'full authority'. The opening to Article the second would then be interpreted as

The Queen of England assures to the chiefs, the sub-tribes and [Maori] people of New Zealand and agrees [to their having] full authority over their lands, homes etc.

**11.5.3** Literally it may mean full chieftainship. The missionary Henry Williams, author of the Maori text, rendered it as "their full rights as chiefs" while Sir William Martin, New Zealand's first Chief Justice used "full chiefship" (refer *Te Atiawa Report* 1983:10.2). Modern Maori scholars accept 'chieftainship' in literal translations. Professor I H Kawharu gives this

The Queen of England agrees to protect the chiefs, the sub-tribes and the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures (Kawharu, evidence to Court of Appeal in *New Zealand Maori Council case*, supra, 1987)

**11.5.4** In Professor Hirini Mead's view 'tino rangatiratanga' means not 'full chieftainship' but 'hereditary chieftainship' for chieftainship he considers was hereditary (submissions to Waitangi Tribunal, 1983, *Te Reo Maori* claim). Kawharu, on the other hand, saw descent as only one criterion for chiefly leadership, 'proven ability' being the other (Kawharu, submissions to Waitangi Tribunal, 1984, *Kaituna* Claim). That view is supported by Cleave (1983:52) who describes 'rangatiratanga' as simply 'leadership', with the rangatira embodying the prestigious and spiritual powers of his ancestors (p 55).

He adds

A rangatira must fight the claims of others to seniority as well as assert his own. This is true also of other principles of seniority. For example, there is what would best be described as an ascribed distinction between chief, rangatira, and commoner, tutua. But few people would admit to being of a tutua category. Everyone can trace his descent back to a rangatira of note and, within specific social contexts, it is up to the individual to prove his rangatiratanga (p56).

**11.5.5** The differences are important, as will be seen later, but for now the problem appears to be that Maori used 'rangatiratanga' to describe chiefly leadership, while Williams used it in the Treaty to describe 'authority'. Williams *Dictionary* (1985:323) however cites no other meaning for 'rangatiratanga' than "evidence of breeding and greatness" the example relied upon being an extract from Grey's collation *Nga Mahi a Nga Tupuna* (1854).

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11.5.6 The Maori word for ‘authority’ is ‘mana’. ‘Rangatiratanga’ and ‘mana’ we have said are “inextricably related words” (*Te Atiawa Report*, 1983: 10.2).] In the *Manukau Report* (1985:8.3) we related that ‘mana’ had been used in the earlier Declaration of the Independence of New Zealand to describe “all sovereign power and authority” but Williams was careful to avoid using ‘mana’ for ‘sovereignty’ in the Treaty, for due to its spiritual and highly personal connotations, no person of mana could cede it. Thus he used ‘kawanatanga’ for ‘sovereignty’ and ‘rangatiratanga’ for the Maori authority though to Maori, ‘mana’ would have described both, Kuini Mana for one (as was colloquially used), Mana Maori for the other, and Mana Motuhake to describe the autonomous character of the latter.

11.5.7 But the continued use of ‘rangatiratanga’ to describe the authority of the Maori in respect of their lands and other interests may perpetuate a Victorian view that Maori society was hierarchical. That opinion was extended to a belief, shared by Chief Judge Fenton, that only the chiefs mattered in Maori society and that the rest “should be allowed to labour for a living” (Ward 1974: ). It had the horrendous result that only chiefs were sometimes put upon titles, often only one but in the case of Orakei thirteen, as absolute owners and to the exclusion of all others of the tribe.

11.5.8 It is patently obvious Orakei Maori did not see things that way. The problem was that colonial opinion effectively grafted onto Maori chieftainship, feudal notions of inheritance that restrict land rights to a privileged minority.

11.5.9 The ‘missionary Maori’ that predominates the Maori text helps to perpetuate the Victorian view, the missionaries using ‘rangatiratanga’ to describe, for example, ‘the Kingdom of God’ (see *Te Atiawa Report* 1983:10.2). Western secular and religious cultures combine to depict authority as imposed from ‘the top’ as from God, Kings and Princes. But there is evidence that in Maori society, authority belongs to the people, with chiefs as leaders, not rulers.

11.5.10 The nature of Maori chieftainship (rangatiratanga) was considered in about 1849 by Te Rangikaheke of Ngati Rangiwewehi in *Te Tikanga o tenei Mea o te Rangatiratanga o te Tangata Maori* as recorded in *Grey’s New Zealand Maori Manuscript 85*, pp 91–97. A translation is given in Mead (1984:286).

11.5.11 Te Rangikaheke however defines the qualities of traditional leadership rather than the nature of tribal authority. After reviewing the attributes of chieftainship, the chief’s ability to conduct discussions, lead in battle, supply food, entertain guests and the like, he says, according to the translation.

That is why it is proclaimed to the land, “So-and-so is a rangatira”.

The people of the land will enquire, “What does the rangatiratanga of that man consist of?” Then the people who have seen will perhaps enumerate all the traits noted. The listener will say, “There indeed is a true rangatira. Who were his parents? Who was his ancestor?” The people who heard this would then reply, “According to what I heard So-and-so was the ancestor”. Who then were the parents? So-and-so was the father and the mother was the daughter of So-and-so. Then the people will

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say, “No wonder! It is because of his chiefly birth! Such chieftainship will not lie dormant. That which was begun before must continue on down; that [line] is of So-and-so. His name is being heard. Never shall be found wanting the chiefly heritage, the capacity for courage, the ability at battle speeches, the capacity to produce food, industry, feasts or celebrations, the urging against departure of travelling parties, council speeches, welcoming of guests and the kindness and also the liberality to travelling parties, large or small”.

None of these qualities repose in the belly of the common man. They are possible only from the noble heritage.

*11.5.12* On this view, chiefly status belongs to those who exhibit the chiefly traits of their noble forbears. But Te Rangikaheke appears to say that chiefly traits are hereditary, not the right to rule. It is not an affirmation of the western view that ‘ascent to the throne’ follows one line but an opinion that leadership in Maori terms requires both status proven by descent and a strong display of certain personal attributes. Most significantly it is for the people to recognise those qualities and so identify the rangatira in the course of time.

*11.5.13* So at Orakei, it was the nephew Tuhaere who led after Te Kawau, and there was no hurry to acknowledge a ‘successor’ to the equally prestigious Uruamo.

Kawharu and Cleave would therefore hold common ground with Rangikaheke, that leadership depended on recognition of both descent and ability. The judges however are the people of the tribal community. The leaders they are bound to follow are none other than those they recognise as worthy or who prove their prowess. The rangatira “is a trustee for his people, an entrepreneur in all their enterprises” (Kawharu, 1984:5) and always answerable to them, it being succinctly stated that “a chief who persistently flouted majority opinion committed political suicide” (Kawharu 1977:56).

*11.5.14* Recognition by the people was, according to John Rangihau of Tuhoe, a very important element in the identification of a rangatira. In a recent discussion with two of our members, just ten days before he departed to his final resting place, Te Rangihau took the view that there was no such thing as a chief in Maori terms, insofar as the concept of “chief” was an English concept, suggesting the rangatira above and the people below.

*11.5.15* Rather, the position was that certain people assumed leadership or took on the mantle of rangatira by virtue of a number of factors, one of the most important being recognition by the people. Te Rangihau was firm in the view that given the attributes of noble descent and strong leadership ability, taking the role of rangatira was dependent upon confirmation of such by the people—in his words, “rangatira was people bestowed”.

*11.5.16* Te Rangihau went further in his analysis. In his opinion that which distinguished the true rangatira was the quality of commonality. In other words the rangatira has the ability to bring himself to the same level as those who recognise him as their leader. So it is not uncommon to hear the rangatira address his people “e aku rangatira”, thereby acknowledging that all his people are rangatira.

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11.5.17 The quality of commonality is the component that binds the leader as one with his people, for in fact in Te Rangihau’s opinion, every person is a rangatira, in that every person is regarded as being his/her own person, and allowed his/her own space. Thus in greeting a person by saying “tena koe”, one is not merely saying “hello”. In fact one is saying exactly what the words mean—“there you are”. Embodied in that statement are the following sentiments as expressed by Te Rangihau, “I acknowledge you as the person you are, for the aura that you have”.

11.5.18 It is this element of commonality and the part it plays in recognizing that every person is a rangatira that highlights the importance of the people component in the concept of rangatiratanga, confirming the view that the authority embodied in that concept is also the authority of the people.

11.5.19 ‘Rangatiratanga’ by Williams *Dictionary* means “evidence of breeding and greatness” but it makes little sense to say the Queen assured to the chiefs and tribes the evidence of breeding and greatness of their lands. Williams clearly meant ‘the authority’ (mana) of their lands, but at least the Maori were not confused, for they naturally substituted ‘mana’ to make the text sound right and to give it sense. From the well recorded manuscript of the conference of 200 chiefs at Kohimarama in 1860, where the Treaty was discussed at length, ‘mana’ consistently replaces ‘rangatiratanga’ in the recorded Maori discussion, as we explained in the *Manukau Report* (1985:8.3).

The Queen stipulated in the Treaty that we should retain the mana of our lands . . .

The words of the Queen were that the mana of the chiefs would be left in their possession, that they were to retain the mana of their lands . . .

The Queen in the Treaty of Waitangi promised that the Maoris would retain their mana . . .

And so on, not one speaker using ‘rangatiratanga’ for each spoke his native tongue as he knew how. Used that way, mana meant ‘authority’. Indeed, Hori Tauroa was the exception.

He said simply

We ought to have the authority over our lands . . .

Therefore, to maintain the Maori syntax, avoid confusion on whether chiefs were hereditary in the western way and ruled or simply arose out of the people as leaders, and to give effect to the apparent understandings of both Williams and the Maori, we render ‘rangatiratanga’ as ‘authority’, ‘tino rangatiratanga’ as ‘full authority’ and to give it a Maori form we use ‘mana’.

11.5.20 We also considered ‘taonga’ in the *Te Atiawa* and *Manukau* reports. William’s *Dictionary* renders it as ‘property, anything highly prized’. (1985:381) We emphasise here, as described in our earlier reports, that ‘taonga’ is not limited to property and possessions. Ancient sayings include the haka (posture dance) as a ‘taonga’ presented to visitors. ‘Taonga’ may even include thoughts. We have found it includes fisheries (*Te Atiawa Report* 1983) and language (*Te Reo Maori Report* 1986).

11.5.21 The Maori text thus conveyed an intention that the Maori would retain full authority over their lands, homes and things important to them, or in a

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phrase, that they would retain their mana Maori. That of course is wider than the English text which guaranteed “the full, exclusive and undisturbed possession of lands, estates, forests, fisheries and other properties” so long as the Maori wished to retain them. The Maori text gave that and more.

11.5.22 To the Crown was given ‘Kawanatanga’ in the Maori text, not ‘mana’ for as we noted in the *Manukau Report* (1985:8.3) the missionaries knew well enough no Maori would cede that. ‘Kawanatanga’ was another missionary coined word and for reasons given in the above report, likely meant to the Maori, the right to make laws for peace and good order and to protect the mana Maori. That, on its face, is less than the supreme sovereignty of the English text and does not carry the English cultural assumptions that go with it, the unfettered authority of Parliament or the principles of common law administered by the Queen’s Judges in the Queen’s name. But nor does the Maori text invalidate the proclamation of sovereignty that followed the Treaty. Contemporary statements show well enough Maori accepted the Crown’s higher authority and saw themselves as subjects be it with the substantial rights reserved to them under the Treaty.

11.5.23 It is the concept of partnership and the special relationship between the Maori and the Crown, as described by the Court of Appeal in the *New Zealand Maori Council* case that over reaches the two texts. For now, we need look only to the application of both texts to particular cases and concerns.

11.5.24 The present case is concerned with land. It is plain that land, which is expressly referred to in both texts, is covered by the Treaty. The real question is the nature and extent of the interest in the land secured to the Maori. In the *Te Atiawa Report* (1983) we stressed that ‘rangatiratanga’ and ‘mana’ are inextricably related and that rangatiratanga denotes the mana not only to possess what one owns but, and we emphasise this, to manage and control it in accordance with the preferences of the owner. We thought the Maori text would have conveyed to Maori people that, amongst other things, they were to be protected not only in the possession of their fishing grounds (the subject matter of the *Te Atiawa* claim) but in the mana to control them in accordance with their own customs and having regard to their own cultural preferences. Clearly the same understanding would have been held in relation to land. We continue to believe that this is the proper interpretation to be given to the Treaty, because the Maori text is clearly persuasive in advancing this view, and because the English text, referring to a “full exclusive and undisturbed possession” also permits it.

11.5.25 Article 2 of the English text speaks of the lands and other properties which the chiefs, tribes, families, and individuals might collectively or individually possess. It acknowledges that collective ownership may exist. Colonial administrators had earlier experience of tribal land ownership from the settlement of other colonies, notably in North America and Africa. The second article envisaged the retention of Maori lands by Maori people for as long as they wished to retain them and then in accordance with their

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customary lore and tenure. If anything other than that were intended it would need to have been expressly said.

11.5.26 Rev Maori Marsden submitted to us that the third article in the Maori text shows the Maori was assured the use of his own rites and customs (tikanga) in the same way as the settlers were to be assured of theirs. In the *Te Reo Maori* claim Mr Manuka Henare of the Catholic Commission for Evangelisation, justice and Development referred to a question raised before the signing of the Treaty, at Waitangi, concerning the right to practice one's own religion and faith. After an adjournment to consider the point the Governor announced that all faiths and customs were to be respected. As we have seen, a Court may consider such surrounding circumstances but in this case there is no need to do so. It is the view of most writers and commentators that Maori customary rights were protected. Thus

The Maori knew nothing of a title held in severalty. On the contrary his rights of occupancy were vested in him subject to the paramount rights of the tribe to whom all lands occupied by its members belong. Lands occupied by Maoris were held by them tribally and communally, subject to the customs and usages which prevailed amongst them before the advent of the Pakeha.

The communal right so existing was recognised by the Crown in the Treaty of Waitangi . . . “(Smith, later a Judge of the Maori Land Court,

Both P G McHugh and F Hackshaw have also argued that the native right to retain native lands until voluntarily ceded included the right to retain those lands in accordance with customary tenures and laws. It remains to be added that the Maori text puts the matter beyond doubt.

11.5.27 The acknowledgement in the Maori text, of the “tino rangatiratanga” of the Maori over their lands necessarily carries with it, given the nature of their ownership and possession of their land, all the incidents of tribal communalism and paramountcy. These, as we have already indicated in 3.4 include the holding of land as a community resource and the subordination of individual rights to maintaining tribal unity and cohesion. A consequence of this was that only the group with the consent of its chiefs could alienate land.

11.5.28 In recognising the “tino rangatiratanga” over their lands the Queen was acknowledging the right of the Maori people for as long as they wished, to hold their lands in accordance with longstanding custom on a tribal and communal basis.

## 11.6 The Nature of the Guarantee

11.6.1 Under Article 2 of the English text of the Treaty, the Queen “confirms and guarantees” to the Maori people “the full exclusive and undisturbed possession of their lands . . . “for as long as they wish to retain them. In our *Te Reo Maori Report* (1986) we referred to submissions made by the International Commission of Jurists on the meaning of the word “guarantee” in Article 2. After referring to the *Shorter Oxford Dictionary* (3rd ed 1964) together with various law dictionaries and a *Dictionary of International Law and Diplomacy*, the point was made that the word denotes an active execu-

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tive sense rather than a passive permissive sense, or in a phrase, “affirmative action” (*Te Reo Maori Report 1986:4.2.7*).

Thus, in the context of that case, it was submitted that the word “guarantee” meant more than merely leaving the Maori people unhindered in their enjoyment of language and culture. It required active steps to be taken to ensure that the Maori people have and retain the full exclusive and undisturbed possession of their language and culture.

#### **11.6.2 In the *Manukau Report* (1985:8.4) we put the matter this way**

The Treaty of Waitangi obliges the Crown not only to recognise the Maori interests specified in the Treaty but actively to protect them. The possessory guarantees of the Second Article must be read in conjunction with the Preamble (where the Crown is “anxious to protect” the Tribes against the envisioned exigencies of emigration) and the Third Article where a “royal protection” is conferred. It follows that the omission to provide that protection is as much a breach of the Treaty as a positive act that removes those rights. It is the omission of the Crown to provide that protection that has been the main cause of complaint in this Claim.

And see now Cooke P in the *New Zealand Maori Council* case at p 370

Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal’s *Te Atiawa*, *Manukau* and *Te Reo Maori* reports which support that proposition and are undoubtedly well-founded.

See also Richardson J at 381 and Casey J at 410.

**11.6.3** It is clear that the Crown incurred an obligation actively to ensure that its Treaty undertakings given in reciprocity for concessions by the Maori chiefs, are adhered to. We reiterate our view that an omission to provide the protection guaranteed under Article 2 is as much a breach of the Treaty as a positive act that removes those rights. This view is reinforced by the express reference in s6(l) of the Treaty of Waitangi Act 1975 (as amended in 1985) to any act done or omitted at any time on or after the 6th day of February 1840 or proposed to be done or *omitted*, by or on behalf of the Crown.

## **11.7 The Delegation of Responsibility**

**11.7.1** We have had occasion in this Report to examine and comment upon several decisions of Judges in the Native Land Court in the exercise or purported exercise of their jurisdiction under Native Lands Acts. The question arises as to whether such decisions might constitute an “act done or omitted . . . by or on behalf of the Crown” in terms of s6(l)(d) of the Treaty of Waitangi Act 1975. If not, it would seem they would fall outside the jurisdiction of this Tribunal.

**11.7.2** “Crown” for the purposes of the Treaty of Waitangi Act has the same meaning as that given in the Crown Proceedings Act 1950, that is, “Her Majesty in right of Her Government in New Zealand”. Currie (1953:11) states

Where particularisation is not required it is convenient to use the compendious term “the Crown” to include the Sovereign and also the Governor-General, Ministers and other servants of the Crown through whom and through which the executive functions assumed by the State are exercised.

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It is well recognised that the Courts are not part of the Executive arm of Government and indeed are required to function independently of it. They are not the Crown nor are they agents of the Crown.

*11.7.3* We had occasion to consider an analogous point in our *Manukau Report* (1985:8.4) in which certain actions of the Auckland Harbour Board fell for consideration. It was contended for the Board that it was not an agent of the Crown. In that case we did not find it necessary to question particular acts of the Board except insofar as they related to the nature of its statutory jurisdiction. We found the question to be whether the statutory parameters prescribed for others in defining the responsibility of the Crown under the Treaty were adequate having regard to the principles of the Treaty. It follows that the Crown cannot divest itself of its Treaty obligations by conferring an inconsistent jurisdiction on others.

*11.7.4* Accordingly, it is not any act or omission of the Native Land Court that is justiciable, but any omission of the Crown to provide a proper assurance of its Treaty promises when vesting any responsibility in the Court.

## 11.8 Provisions and Principles

*11.8.1* We are mindful of the fact that we are required to determine whether any matter of which complaint can be made under s.6 of the Treaty of Waitangi Act “was or is inconsistent with the *principles* of the Treaty”, rather than with its *provisions* as such. We are not confined to the strict legalities. We believe that the essence of the Treaty of Waitangi transcends the sum total of its component written words and puts narrow or literal interpretation out of place. This appears to be recognised by the Treaty of Waitangi Act 1975 which, had it contemplated a strict interpretation reflecting ‘the austerity of tabulated legalism’ would not have directed us to have regard to the principles of the Treaty. A consideration of the provisions of the Treaty in a vacuum is a barren exercise and not calculated to assist in the formulation of the principles of the Treaty.

*11.8.2* As we indicated in our *Te Atiawa Report* (1983:10.3) the Treaty was more than an affirmation of existing rights. It was not intended merely to fossilise the status quo but to provide a direction for future growth and development. The broad and general nature of its words indicates that it was not intended as a finite contract. It follows that there is room for movement and scope for agreement between the Crown and the Maori people which involves a measure of compromise and change.

*11.8.3* High authority for the validity of the foregoing approach is now to be found in the judgment of Casey J in the *New Zealand Maori Council* case in the following passage at 410

I think the deliberate choice of expression “inconsistent with the principles of the Treaty” in preference to one such as “inconsistent with its terms or provisions” points to an adoption in the legislation of the Treaty’s actual terms understood in the light of the fundamental concepts underlying them. It calls for an assessment of the relationship the parties hoped to create and reflect in that document, and an enquiry



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into the benefits and obligations involved in applying its language in today's changed conditions and expectations in the light of that relationship.

## 11.9 Pre-Emption and Reciprocal Duties

*11.9.1* Under Article 2 of the Treaty the Crown obtained the valuable monopoly right to purchase land from the Maori to the exclusion of all others. The question arises as to whether the granting of this right imposed any reciprocal obligation or duty on the Crown. In the Tribunal's *Waiheke Report* (1987) Chief Judge Durie found that this right of preemption imposed on the Crown a corresponding duty to ensure that each tribe maintained a sufficient endowment for its foreseen needs. Another member of the Tribunal in that case, Mr M J Q Poole, differed from the Chief Judge and found no such duty or obligation to arise under the Treaty provisions. He found it unnecessary to look beyond the strict terms of Article 2 in reaching this conclusion. We bear in mind McNair's warning against over-reliance on the 'plain terms' of the Treaty and recall the need to have regard to the overall aim and purpose of the Treaty (11.3.2). We have earlier (11.3.3) adopted the rule laid down by the United States Supreme Court that treaties with an indigenous people should be construed in the sense in which they would naturally be understood by them. We have also (11.3.5) adopted the principle that treaties should be interpreted in the spirit in which they were drawn taking into account surrounding circumstances and any declared or apparent object or purpose. In our view it is entirely proper that, in determining the scope and meaning of the provisions in Article 2 of the Treaty, we should have regard to all these considerations.

*11.9.2* Captain Hobson came to New Zealand with Instructions from Lord Normanby, the Colonial Secretary to enter into a pact with the Maori chiefs. Soon after his arrival in the Bay of Islands Hobson had drafted a Treaty to give effect to these Instructions. Considerable light can be shed on the terms of the Treaty as finally settled by Hobson by reference to the Instructions under which he was acting. Lord Normanby's Instructions were dated 14 August 1839. Immediately on receiving them Captain Hobson wrote to the Under Secretary of the Colonial Department seeking elucidation of some aspects. Lord Normanby responded to Hobson's enquiries the following day, 15 August 1839. Given their central importance it is desirable to reproduce here the relevant extracts from the Instructions of 14 August 1839.

Sir,

1. Your appointment to the office of Her Majesty's Consul at New Zealand having been signified to you by Viscount Palmerston, and his Lordship having conveyed to you the usual instructions for your guidance in that character, it remains for me to address you on the subject of the duties which you will be called to discharge, in a separate capacity, and under my own official superintendence.
2. The acquaintance which your service in Her Majesty's Navy has enabled you to obtain with the state of society in New Zealand, relieves me from the necessity of entering on any explanations on that subject. It is sufficient that I should generally notice the fact, that a very considerable body of Her Majesty's subjects have already established their residence and effected settlements there, and that many persons

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in this kingdom have formed themselves into a society, having for its object the acquisition of land, and the removal of emigrants to those islands.

3. Her Majesty's Government have watched these proceedings with attention and solicitude. We have not been insensible to the importance of New Zealand to the interests of Great Britain in Australia, nor unaware of the great natural resources by which that Country is distinguished, or that its geographical position must in seasons, either of peace or of war, enable it, in the hands of Civilized men to exercise a paramount influence in that quarter of the globe. There is probably no part of the earth in which Colonization could be effected with a greater or surer prospect of national advantage.
4. On the other hand, the Ministers of the Crown have been restrained by still higher motives from engaging in such an enterprise. They have deferred to the advice of the Committee appointed by the House of Commons in the year 1836, to inquire into the state of the Aborigines residing in the vicinity of our Colonial Settlements; and have concurred with that Committee in thinking that the increase of national wealth and power promised by the acquisition of New Zealand, would be a most inadequate compensation for the injury which must be inflicted on this Kingdom itself, by embarking in a measure essentially unjust, and but too certainly fraught with calamity to a numerous and inoffensive people, whose title to the soil and to the Sovereignty of New Zealand is indisputable, and has been solemnly recognised by the British Government. We retain these opinions in unimpaired force; and though circumstances entirely beyond our control have at length compelled us to alter our course, I do not scruple to avow that we depart from it with extreme reluctance.
5. The necessity for the interposition of the Government has however become too evident to admit of any further inaction. The reports which have reached this Office within the last few months establish the facts that, about the commencement of the year 1838, a Body of not less than two thousand British Subjects had become permanent inhabitants of New Zealand, that amongst them were many persons of bad or doubtful character—convicts who had fled from our penal Settlements, or Seamen who had deserted their Ships; and that these people, unrestrained by any Law, and amenable to no tribunals, were alternately the authors and the victims of every species of Crime and outrage. It further appears that extensive cessions of Land have been obtained from the Natives, and that several hundred persons have recently sailed from this Country to occupy and cultivate those Lands. The spirit of adventure having been thus effectually roused, it can no longer be doubted that an extensive Settlement of British Subjects will be rapidly established in New Zealand; and that, unless protected and restrained by necessary Laws and Institutions, they will repeat, unchecked, in that corner of the Globe, the same process of War and spoliation, under which uncivilized Tribes have almost invariably disappeared as often as they have been brought into the immediate vicinity of Emigrants from the Nations of Christendom. To mitigate, and, if possible, to avert these disasters, and to rescue the Emigrants themselves from the evils of a lawless state of Society, it has been resolved to adopt the most effective measures for establishing amongst them a settled form of Civil Government. To accomplish this design is the principal object of your Mission.
6. I have already stated that we acknowledge New Zealand as a Sovereign and independent State, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed, and petty Tribes, who possess few political relations to each other, and are incompetent to act, or even deliberate, in concert. But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown. The Queen, in common with Her Majesty's immediate Predecessor, disclaims for herself and for

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her Subjects, every pretention to seize on the Islands of New Zealand, or to govern them as a part of the Dominion of Great Britain, unless the free and intelligent consent of the Natives, expressed according to their established usages, shall be first obtained. Believing however that their own welfare would, under the circumstances I have mentioned, be best promoted by the surrender to Her Majesty of a right now so precarious and little more than nominal and persuaded that the benefits of British protection, and of Laws administered by British Judges would far more than compensate for the sacrifice by the Natives of a national independence which they are no longer able to maintain, Her Majesty's Government have resolved to authorize you to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any parts of those Islands which they may be willing to place under Her Majesty's Dominion. I am not unaware of the difficulty by which such a Treaty may be encountered. The motives by which it is recommended are of course open to suspicion. The natives may, probably, regard with distrust a proposal which may carry on the face of it the appearance of humiliation on their side, and of a formidable encroachment on ours; and their ignorance even of the technical terms in which that proposal must be conveyed, may enhance their aversion to an arrangement of which they may be unable to comprehend the exact meaning, or the probable results. These, however, are impediments to be gradually overcome by the exercise, on your part, of mildness, justice, and perfect sincerity in your intercourse with them. You will, I trust, find powerful auxiliaries amongst the missionaries, who have won and deserved their confidence, and amongst the older British residents who have studied their character, and acquired their language.

7. It is almost superfluous to say that in selecting you for the discharge of this duty, I have been guided by a firm reliance on your uprightness and plain dealing. You will, therefore frankly and unreservedly explain to the natives, or their chiefs, the reasons which should urge them to acquiesce in the proposals you will make to them. Especially you will point out to them the dangers to which they may be exposed by the residence amongst them of settlers amenable to no laws or tribunals of their own; and the impossibility of Her Majesty's extending to them any effectual protection unless the Queen be acknowledged as the sovereign of their country, or at least of those districts within, or adjacent to which, Her Majesty's subjects may acquire lands or habitations. If it should be necessary to propitiate their consent by presents or other pecuniary arrangements, you will be authorized to advance at once, to a certain extent, in meeting such demands, and beyond those limits you will reserve and refer them for the decision of Her Majesty's Government.
8. It is not however to the mere recognition of the sovereign authority of the Queen that your endeavours are to be confined, or your negotiations directed. It is further necessary that the Chiefs should be induced, if possible, to contract with you, as representing Her Majesty, that henceforward no Lands shall be ceded either gratuitously or otherwise, except to the Crown of Great Britain. Contemplating the future growth and extension of a British Colony in New Zealand, it is an object of the first importance that the alienation of the unsettled lands within its limits should be conducted, from its commencement, upon that system of Sale, of which experience has proved the wisdom, and the disregard of which has been so fatal to the prosperity of other British Settlements . . . You will, therefore, immediately on your arrival announce by a Proclamation addressed to all the Queen's Subjects in New Zealand, that Her Majesty will not acknowledge as valid any title to Land in that Country which is not either derived from, or confirmed by, a Grant to be made in Her Majesty's name, and on her behalf. You will however at the same time take care to dispel any apprehensions which may be created in the minds of the Settlers that it is intended to dispossess the owners of any property which has been

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acquired on equitable conditions, & which is not upon a scale which must be prejudicial to the latent interest of the community . . .

9. I shall in the sequel explain the relation in which the proposed Colony will stand to the Government of New South Wales. From that relation I propose to derive the resource necessary for encountering the difficulty I have mentioned. The Governor of that Colony will, with the advice of the Legislative Council, be instructed to appoint a legislative Commission, to investigate and ascertain, what are the Lands in New Zealand held by British Subjects under Grants from the Natives, how far such grants were lawfully acquired, and ought to be respected,—and what may have been the price or other valuable considerations given for them. The Commissioners will make their Report to the Governor, and it will then be decided by him, how far the Claimants or any of them may be entitled to confirmatory Grants from the Crown; and on what conditions such confirmations ought to be made . . .
10. Having by these methods obviated the dangers of the acquisition of large tracts of Country by mere Landjobbers, it will be your duty to obtain, by fair and equal contracts with the Natives, the Cession to the Crown of such Waste Lands as may be progressively required for the occupation of Settlers resorting to New Zealand. All such contracts should be made by yourself, through the intervention of an Officer expressly appointed to watch over the interests of the Aborigines as their Protector. The resales of the first purchases that may be made, will provide the Funds necessary for future acquisitions; and, beyond the original investment of a comparatively small sum of money, no other resource will be necessary for this purpose. I thus assume that the price to be paid to the Natives by the local Government will bear an exceedingly small proportion to the price for which the same Lands will be resold by the Government to the Settlers. Nor is there any real injustice in this inequality. To the Natives or their Chiefs much of the Land of the Country is of no actual use, and in their hands, it possesses scarcely any exchangeable value. Much of it must long remain useless, even in the hands of the British Government also, but its value in exchange will be first created, and then progressively increased, by the introduction of Capital and of Settlers from this Country. In the benefits of that increase the Natives themselves will gradually participate.
11. All dealings with the Aborigines for their Lands must be conducted on the same principles of sincerity, justice, and good faith as must govern your transactions with them for the recognition of Her Majesty's Sovereignty in the Islands. Nor is this all. They must not be permitted to enter into any Contracts in which they might be the ignorant and unintentional authors of injuries to themselves. You will not, for example, purchase from them any Territory the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence. The acquisition of Land by the Crown for the future Settlement of British Subjects must be confined to such Districts as the Natives can alienate without distress or serious inconvenience to themselves. To secure the observance of this rule will be one of the first duties of their official protector . . .

(NB: Paragraph numbers have been added to facilitate reference.)

*11.9.3* The first four paragraphs of Lord Normanby's Instructions portray succinctly and graphically the "extreme reluctance" of the British Government actively to intervene in New Zealand. For some years during the 1830s the Church Missionary Society had strongly opposed the colonisation of New Zealand. The 1837 Report of the Aborigines Committee urged that the sovereignty of indigenous peoples should be recognised but in the case of New Zealand colonisation should be opposed at least until Parliament had considered the question. Its Report has been characterised by McLintock

(1958: Ch 2, Idealism Rampant) as being “the most remarkable expression of liberal opinion in the treatment of aborigines put forward by any parliamentary inquiry in the 19th century”. It was, says McLintock, “deeply tinged with Christian idealism” and “it expressed in noble and moving prose Burke’s concept of trusteeship”. See also Adams (1958:146) who refers to the Church Missionary Society’s role as a guardian of humanitarian attitudes towards the Maoris. “Through its insistence on the sovereignty, independence and rights of the Maoris” says Adams, the Society contributed to the humanitarian ethos of the late 1830s and its persistent advocacy of Maori rights “helped to ensure that the protection of those rights was a major aim of British policy.” Accordingly, the Colonial Office in the years between 1837 and 1839 resisted the efforts of Wakefield and the then New Zealand Association to obtain official recognition and support for its colonisation plans for New Zealand. Finally, the New Zealand Company determined in 1839 to proceed without official sanction.

*11.9.4* Meanwhile, as is indicated in paragraph five of the Instructions, there were by 1838 an estimated two thousand or so British subjects including ‘many persons of bad or doubtful character’. Moreover, it appeared that extensive cessions of land had been obtained from the Maoris and, further, that several hundred colonists had recently left Britain to settle in New Zealand. Lord Normanby expresses his fear that unless “necessary laws and institutions” are imposed the indigenous Maori people will be endangered by war and spoliation and may disappear as has often happened in other countries brought into contact with “emigrants from the Nations of Christendom”. Accordingly, the British Government felt reluctantly compelled to intervene in order to protect the New Zealand tribes and also to rescue the emigrants from a lawless state of society. Historians have differed as to the principle motivation for British intervention at this time. McLintock (1958:45) sees British intervention as being more for the benefit of the natives than for the protection of the British subjects. Adams (1977:59) considers the British intervention was intended to protect both British subjects and the Maori. “The humanitarian motive was only half the story” but, says Adams, “it was the half which Captain Hobson was instructed to emphasise and explain most carefully to the Maoris when he negotiated the cession of sovereignty in 1840.”

*11.9.5* Lord Normanby, in paragraph 4 of his Instructions, acknowledged the Maori title to the soil and to the sovereignty of New Zealand as being ‘indisputable’. Later, in paragraph 6, he in a sense qualifies his acknowledgement of Maori sovereignty but nevertheless disowns any pretention on the part of his Government to annex New Zealand without the “free and intelligent consent of the natives” being first obtained. Being of the opinion that the benefits of British protection would be greatly to their advantage he authorises Captain Hobson to treat with the Maori for the recognition of the Queen’s sovereign authority over the whole or parts of New Zealand. In his discussions with the Maori, Hobson is urged by Lord Normanby to be frank in explaining why they should cede sovereignty to the Queen. “Especially”

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Lord Normanby directs, “you will point out to them the dangers to which they may be exposed by residence amongst them of settlers amenable to no laws or tribunals of their own, and the impossibility of Her Majesty’s extending to them any effectual protection unless the Queen be acknowledged as the sovereign of their country.” Clearly Hobson had all this in mind when he caused to be inserted early in the preamble to the Treaty the reference to the Queen being anxious to protect the just rights and property of the Chiefs and Tribes and to secure to them peace and good order.

*11.9.6* Adams considers that there was a difference between what Hobson was instructed to tell the Maori and what the Colonial Office actually meant. Yet these Instructions were drafted by the Colonial Office

Hobson was told to explain to the chiefs that Britain was intervening “especially” on their behalf because there was no other way to protect them. The Colonial Office meant that Britain was intervening partly to protect the Maoris, but also to protect the British settlers in New Zealand and the interests they had created. Hobson was not directed to emphasize this, nor to explain the Government’s new willingness to promote the systematic colonisation of New Zealand. The Maoris were to be told only half the story. (1977:166)

*11.9.7* What then were the Maori told when their signatures to the Treaty were being sought? In answering this question it is necessary to have regard not merely to what was said at the signing at Waitangi on 6 February 1840 but in other parts of the country where copies of the Treaty were taken by emissaries of Governor Hobson (who for a time was ill and unable to travel). A quite detailed account of various signings is given by Buick (1936) and Colenso’s eye-witness account (1890) of the signing at Waitangi is frequently cited. In his opening speech the Governor, so Colenso tells us (1890:17), emphasised that the Treaty was for their own good and for their protection. Before general discussion among the Chiefs commenced Mr Busby (hitherto the British Resident) informed the Chiefs that the Governor had not come to take away their land but rather to secure them in the possession of what they had not sold. The reaction of the early speakers was one of hostility to the Governor’s proposal and was interspersed by frequent reference to land already lost and concern for the protection of their land. At one stage this prompted the Governor to interpose that “all lands unjustly held would be returned; and that all claims to lands, however purchased, after the date of the proclamation would not be held to be lawful”. As the discussion continued a few chiefs spoke in favour of signing the Treaty. But the turning point occurred following a reportedly eloquent intervention by Tamati Waka Nene who, after addressing his fellow chiefs, turned to the Governor saying

O Governor, remain. I, Tamati Waaka, say to thee, remain. Do not go away from us; 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. Yes it is good, it is straight. Stay then here, dwell in our midst. Remain, do not go away . . . Stay then, our friend, our father, our Governor. (Buick, 1936:143)

In the event, some 45 chiefs signed the Treaty the following day, 6 February 1840.

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11.9.8 At Hokianga, Buick tells us, (1936 : Ch.5) there was initially strong opposition to the Treaty from various chiefs. Hobson emphasised that their only hope of protection against unscrupulous Europeans was to become a party to the Treaty. Otherwise, he said, they would be stripped of their lands by a worthless class of British subjects who would trample on their rights. He sought authority from the chiefs to control such people. Mohi Tawhai, among others, responded saying “Well, let him come, let him stop all the lands falling into the hands of the Pakehas.” Taonui was another chief who requested the Governor to protect his children and take care of his land which he did not wish to sell. It was at Kaitaia where Lt Shortland, the newly appointed New Zealand Colonial Secretary presided, that the chief Nopera Panakareao made his celebrated remark that “the shadow of the land goes to the Queen, but the substance remains with us”. Nopera’s speech was made after Lt Shortland had assured all the assembled chiefs that Governor Hobson would strictly honour all the obligations which the Treaty imposed on him in the Queen’s name. Buick (1936:341–2) refers to a letter written to Lord Stanley in 1845 by Lt Shortland in which Shortland emphasised that “without a reciprocal guarantee by the Crown to them of the perfect enjoyment of their territorial rights” the Maori would never have agreed to cede sovereignty to the Crown. He further stressed the Maori feeling of great anxiety and mistrust in regard to the security of their lands citing, by way of example, a statement to the missionaries that “Your Queen will serve us as she has done the black fellows of New South Wales; our lands will be taken from us, and we shall become slaves.” It appears that at Manukau and other places visited by Captain Symonds on behalf of Hobson considerable opposition was met. Accordingly, Governor Hobson issued in the Maori language a circular letter the text of which is cited by Buick (1936 : 191). In this letter Hobson referred to the activities of an ill-disposed Pakeha who was circulating false statements that the Maori’s land would be wrested from them and their customs abolished. To these allegations the Governor issued a categorical denial and he repeated the assurances which he had given at Waitangi and Hokianga namely, that he would “ever strive to assure unto you the customs and all the possessions belonging to the Maori”.

11.9.9 Adams, who considers that Lord Normanby’s Instructions were consciously oriented towards persuading the Maori that their protection was the main object of intervention says

Hobson carried out his instructions faithfully. James Busby noted that ‘the alleged grounds’ of the cession proposal were the impossibility of preventing or controlling the great influx of British subjects into New Zealand and of protecting law abiding members of both races from violent men. Willoughby Shortland believed that the preservation and civilisation of the Maoris and the protection of their rights and privileges were the principles on which New Zealand was annexed. George Clarke believed that the Maoris would never have signed the Treaty of Waitangi had not Hobson assured them that Britain’s object in seeking the cession was ‘solely’ to protect the Maoris and punish criminal Europeans and that the happiness and prosperity of all would probably be promoted thereby. (1977:167)

11.9.10 It is apparent then, that categorical assurances were given to the Maori Chiefs by Hobson and his representatives whereby, in return for ceding

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sovereignty to the Queen, they would be protected by the Queen in respect of both their property and their rights. The preamble to the Treaty expressly says so. But Lord Normanby's Instructions to Captain Hobson did not stop there. Immediately after giving his directions to obtain cession of sovereignty Lord Normanby, in paragraph 8, requires Hobson to induce the chiefs, if possible, to agree that they will not cede any lands except to the Crown. This was seen to be essential given the contemplated future growth and extension of a British Colony in New Zealand. In furtherance of this aim Captain Hobson was directed, immediately on his arrival in this country, to issue a Proclamation announcing that the Crown would not acknowledge as valid any title to land which was not either derived from or confirmed by a Crown grant. Proclamations were duly issued first by Governor Gipps in Sydney on 19 January and then by Hobson in New Zealand on 30 January 1840 simply declaring all future land purchases from the Maori null and void. (Adams 1977:194)

*11.9.11* Lord Normanby next advised Captain Hobson that the Governor of New South Wales (of which New Zealand at the time formed a part) would be instructed to appoint a Commission to investigate how far land acquired from the Maori had been lawfully acquired and whether they should be confirmed as Crown Grants. Such a Commission was duly appointed by the Governor of New South Wales on 30 September 1840 and was superseded by Commissioners appointed by the Governor of New Zealand under Clause 3 of the 1841 Land Claims Ordinance No 1. Clause 2 of the same Ordinance vested in the Crown the sole and absolute right of preemption of land from the Maori. It appears from paragraph 10 of his Instructions that Lord Normanby hoped by the foregoing methods to obviate "the dangers of the acquisition of large tracts of country by mere landjobbers." Captain Hobson in the same paragraph, was then directed "to obtain, by fair and equal contracts with the Natives, the cession to the Crown of such waste lands as may be progressively required for the occupation of settlers resorting to New Zealand". All contracts for the purchase by the Crown of Maori land were to be made through the intervention of "an officer expressly appointed to watch over the interests of the Aborigines as their Protector."

*11.9.12* Lord Normanby went on in paragraph 10 of his Instructions to say that only a comparatively small sum would be required to commence land purchases from the Maori. This was because the price to be paid to the Maori "will bear an exceedingly small proportion to the price for which the same lands would be resold to the settlers". In short, the Maori by accepting little more than a nominal price, would enable the Government, by means of extremely profitable re-sales, to build up a fund not only to acquire further land but to meet development expenses and to finance the cost of bringing more British emigrants to the new Colony. This is made clear in the following extract from Lord Normanby's Instructions not previously reproduced

The system at present established in New South Wales regarding land, will be applied to all waste lands which may be acquired by the Crown in New Zealand. Separate accounts must be kept of the Land Revenue. ' Subject to the necessary deductions for the expense of surveys and management, and for the improvement by roads and



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otherwise, of the unsold Territory, and subject to any deductions which may be required to meet the exigencies of the local Government, the surplus of the revenue will be applicable, as in New South Wales, to the charge of removing emigrants from this Kingdom to the new Colony . . .

Few, if any, of these proposals were communicated by Captain Hobson or his representatives, when explaining the “pre-emptive” clause in Article 2 of the Treaty to the chiefs. Had this been done the likelihood of the chiefs agreeing to such a proposal would have been remote. Given the constant reiteration by Captain Hobson and his agents of the Crown’s commitment to the protection of their lands and their rights the chiefs understandably failed to appreciate the risk they ran in agreeing to this provision. It is difficult not to agree with Adams when he says the Maori were to be told only half the story (1977:166). It would, however, not be right to accuse Lord Normanby of bad faith. For in paragraph 10 of his Instructions he justifies his proposal for a minimal payment only to the Maori on two main grounds.

First, he considers that much Maori land is of no actual use to them and in their hands possesses scarcely any exchangeable value. These are, in themselves, questionable assumptions.

Secondly, he says, the land value will be created and progressively enhanced by the introduction of capital and settlers from Britain. “In the benefits of that increase the Natives themselves will gradually participate.” This is an important statement for it assumes that the Maori people will be left in possession of sufficient land for them to benefit from the predicted increase in land values resulting from progressive colonisation. If the Maori were not to be left with an adequate endowment then the anticipated benefit occurring to them would be illusory.

*11.9.13* That it was not Lord Normanby’s intention that the Maori should not benefit from the exercise of the Crown’s rights of pre-emption is made apparent in the succeeding paragraph 11 of his Instructions. In this paragraph he set the parameters and imposed the limitations within which the Crown was to exercise its pre-emptive right to purchase Maori land.

- All dealings with the Maori were to be conducted on the basis of sincerity, justice and good faith just as were negotiations for the recognition of the Queen’s Sovereignty over New Zealand.
- They must be prevented from entering into contracts which would be injurious to their interests. By way of example Lord Normanby stipulates that the agents of the Crown are not to purchase from the Maori any land “the retention of which by them would be essential, or highly conducive to their own comfort, safety or subsistence”.
- Lord Normanby further emphasised this point when he next stipulated that the acquisition of land by the Crown for the future settlement of British emigrants must be confined to such districts as the Maori can alienate “without distress or serious inconvenience to themselves”.
- Lastly, an Official Protector was to be appointed to ensure that this stipulation is complied with.

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11.9.14 It is abundantly evident from the foregoing that Lord Normanby, in instructing Captain Hobson to obtain for the Crown the right of the pre-emption of Maori land, and in stipulating how such right was to be exercised, made it clear that no land was to be so purchased which was needed to provide for the comfort and subsistence of the Maori people. In short, they were to be left with a sufficient endowment for their own needs. An official protector was to ensure this. The right of pre-emption was to be a limited right. It was not to extend to land needed by the Maori.

11.9.15 It should be added that the philosophy of assuring sufficient areas to native peoples was nothing new in British colonial practice. It was a well established policy to be found as early as 1755 and 1756 in the instructions to the Governors of New York and Virginia, which described in detail the boundaries of lands to be reserved for the Indians and instructed the Governors to use their “utmost endeavours to prevent any settlements being made within the same” (Labaree *Royal Instructions to British Colonial Governors* vol 1 pp 468–469). Lord Normanby’s instructions lacked the same precision in requiring reserves, the obligation on the Crown to approach its purchasing rights with proper sensibility being directed to the same end. Early maps in New Zealand delineated areas as intended native reserves and lands were in fact reserved, or promised as reserves in several subsequent New Zealand transactions. As we have seen at 4.5, ‘native districts’ were expressly contemplated in s.73 of the New Zealand Constitution Act 1852. Districts were not created but native reserves were recognised and provided for in the Native Reserves Act 1856. Section 22 of the Native Reserves Act 1882 added an important criterion, that reserves could not be alienated unless

a final reservation has been made, or is about to be made, amply sufficient for the future wants and the maintenance of the tribe, hapu or persons to whom the reserve wholly or in part belongs.

The preamble to the Native Land Act 1873 reiterated the objective of reserving areas for 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.

11.9.16 The emphasis had already shifted however from assuring tribal requirements to assessing individual needs. The bulk of Maori land was not in Reserves and the Native Land Act 1873, which applied to non reserve land, quantified the need by requiring 50 acres to be set aside for every man, woman and child resident in the relevant district.

11.9.17 The Native Land Act 1909 introduced another test—that no sale of an interest was to be confirmed to make the seller ‘landless’, that is, without sufficient other land for the seller’s maintenance, but added a proviso, unless the native selling had other means.

(By 1953 the test was simply that sales were not to be approved if contrary to equity, good conscience or the interests of the native seller. It was not until the Maori Affairs Amendment Act 1967 that such provisions for the retention of Maori land disappeared altogether from the statute books.)

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11.9.18 What explanations, if any, were given to the Maori chiefs by Captain Hobson and his representatives of the pre-emptive provisions in Article 2 of the Treaty? At the outset it should be said that it is by no means certain that the chiefs understood that Article 2 of the Treaty was intended to give the Crown the sole and exclusive right to purchase Maori land rather than simply the right of first refusal of the land (Adams, 1977:198). In this respect, there is a significant difference between the English and Maori texts—see *Waikeke Report*, 1987:Ch.8. There is surprisingly little on record as to what explanation was given to the Maori by way of justification for the pre-emptive provision in Article 2. Adams points out (1977:199) that there is no surviving account of the signing at Waitangi which mentions whether the Maori were told why pre-emption was necessary. Yet it is scarcely conceivable that some explanation was not given for such an important constraint on the right to alienate their land. Adams proceeds to relate explanations given by Major Bunbury (an emissary for Captain Hobson) in terms similar to those given by Buick (1936:216–220). At Coromandel Bunbury, through a missionary interpreter, told the chiefs that pre-emption was intended ‘to check their imprudently selling their lands without sufficiently benefiting themselves or obtaining a fair equivalent’. At Tauranga the Major said that pre-emption was ‘intended equally for their benefit and to encourage industrious white men to settle amongst them’ rather than allowing the appropriation of large areas of land by absentee speculators; the Queen would buy their land at a just valuation (Adams 1977:199). Adams considers it reasonable to conclude that if Bunbury, acting directly under Hobson’s instructions, explained the need for pre-emption on the grounds of preventing land speculation and protecting the Maori, then this was the explanation which the Government gave generally (1977:199). Adams considers it most unlikely that Hobson and his delegates would have explained that it was intended to use the profits from resale at a much higher price for furthering emigration of British settlers. Yet this, Adams contends, ‘was precisely the reason for pre-emption’. He invokes Normanby’s Instructions in support (1977:199). We believe Adams’ contention is an over-simplification of Lord Normanby’s instructions. In particular, it overlooks the critically important fact that Lord Normanby coupled his instructions about pre-emption with his clear and unambiguous direction that the Crown should not exercise the right of pre-emption in respect of land needed by the Maori for their support and livelihood. It was to be exercised in such a way that the Maori, equally with the new settlers, would gain from the progressive appreciation in land values resulting from systematic colonisation. Obviously this would occur only if the Maori were left with sufficient land. Hence Lord Normanby’s directive restricting and qualifying the exercise of the Crown’s right of pre-emption.

11.9.19 It is instructive to note again the observations of Chapman J in *R v Symonds* (1847) [1840–1932] NZPCC 387. Referring to the legal doctrine of the Crown’s right of pre-emption Chapman J in the Supreme Court says (391)

. . . This 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 evil consequences of the intercourse to which we have introduced them, or have

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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.

Chapman J found that ‘the existing rule contemplates the Native race under a species of guardianship’ and he went on to hold that, practically,

it secures to them all the enjoyments from the land which they had before our intercourse, and as much more as the opportunity of selling portions, *useless to themselves*, affords. (Emphasis added)

It is also relevant to note certain observations in the same case made by Chief Justice Martin. The learned Chief Justice quotes from the first part of Clause 8 of Lord Normanby’s instructions (the direction to secure to the Crown the rights of pre-emption) and then says (p 397)

Now, these directions appear to have been in no way confined to the Governor to whom they were personally addressed. They were clearly indicative of a policy to be steadily pursued by successive Governors whilst the colonisation of the country should be proceeding. These instructions were carried out, first, by the Treaty of Waitangi and, afterwards by the Land Claims Ordinances . . .

*11.9.20* It needs to be added, for the sake of completeness, that the rule of pre-emption did not entirely rest on the humanitarian concern to protect native interests. The origin of the rule, as exemplified in North America, lay in the feudal theory that all freehold titles must emanate from the Crown, with the corollary that only the Crown can extinguish native titles, and the political policy that British citizens may not establish colonies without the Crown’s licence. Chief Justice Martin explained the rationale this way, in *R v Symonds* (supra, p 395)

If a subject of the Crown could by his own act unauthorised by the Crown acquire against the Crown a right to any portion of the lands of a new country, it is plain that he might, acting upon that right, proceed to form a colony there. Now the law of England denies to any subject the right of forming a colony without the licence of the Crown.

On the settlement of New Zealand however, there were grafted to the rule the humanitarian concerns upper-most in the minds of Colonial Office officials at the time. Doubtless those concerns received pre-eminence in discussions on the Treaty. We suspect, neither the legal intricacies of feudal tenure, nor the political expedient of preventing private citizens from establishing colonies, nor the fiscal device of funding colonisation from resale profits, ranked significantly in comparison.

*11.9.21* As is well known Governor FitzRoy, for a short time in 1844–45 waived, or purported to waive, the Crown’s right of pre-emption. In doing so he was clearly conscious of the need to ensure that sufficient land was retained by Maori vendors. In this connection Chief Judge Durie in the *Waiheke Report* (1987:76) quotes from Commissioner Mackay in his 1891 report to the General Assembly on native claims in the South Island, who, with regard to South Island landless natives, said (G7 and G7A)

. . . 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 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’ . . .

*11.9.22* Sir George Grey reinstated the Crown’s right of pre-emption shortly after taking up office as Governor. It will be recalled that he was directed by Lord Stanley in his Instructions dated 13 June 1845 to “honourably and scrupulously fulfil the conditions of the Treaty of Waitangi”. The Crown’s right of pre-emption was subsequently provided for in s.73 of the New Zealand Constitution Act 1852. Significantly the British Government in 1859 disallowed the Native Territorial Rights Bill in which the New Zealand General Assembly proposed to dispense with the Crown’s right of pre-emption and to allow Maori land to be freely sold on the 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 from the British to the New Zealand Government, that the Crown’s pre-emptive right was finally abolished.

*11.9.23* We return now, belatedly it may be thought, to the question posed in 11.9.1 which has given rise to the foregoing discussion, the question being whether the valuable monopoly right conferred on the Crown by the Maori chiefs in the Treaty of Waitangi which enabled the Crown, to the exclusion of all others, to purchase Maori land, imposed any reciprocal duty on the Crown. And if so, what was the nature of any such reciprocal duty?

*11.9.24* It will be recalled that Lord Normanby, in paragraph 8 of his Instructions to Captain Hobson, directed Hobson to secure from the Maori a right of pre-emption in favour of the Crown. Later in his Instructions (paragraph 11), he significantly narrowed the ambit of the exercise of the right of pre-emption so as to exclude all land needed by the Maori for their “comfort, safety or subsistence”. No land was to be so acquired which would cause “distress or serious inconvenience” to the Maori. When Captain Hobson came to implement these Instructions in the Treaty he did so in reverse order. Thus in Article 2 reference to the right of pre-emption follows, rather than precedes, the guarantee by the Crown to the Maori people of “the full exclusive and undisturbed possession of their lands . . . so long as it is their wish and desire to retain the same in their possession.” Only after making this re-assuring provision did Hobson insert the exclusive right of pre-emption in favour of the Crown over such lands as the owners may be disposed to alienate. We recall that this provision follows the earlier expression of anxiety on the part of the Crown to protect the just rights and property of the Maori people.

*11.9.25* It is axiomatic in construing the provisions of a Treaty such as the Treaty of Waitangi between the head of a powerful highly civilised nation and representatives of a relatively unsophisticated and powerless native people that the utmost good faith must be imputed to the British Crown. It is necessary to have regard to the sense in which the provisions of the Treaty

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would be understood by the Maori signatories. It is also necessary that regard should be had to all relevant surrounding circumstances and any declared or apparent objects and purposes. A generous interpretation avoiding “the austerity of tabulated legalism” is clearly called for. In seeking an answer to the question posed we should have regard to the various matters discussed in the preceding paragraphs of this section and in particular

- The humanitarian impulses which played an extremely important part in the decision of the British Government to intervene in New Zealand with a view to protecting the Maori people from the adverse consequences of colonisation and the emphasis given to these considerations by Captain Hobson and his representatives in seeking to persuade the Maori chiefs to adhere to the Treaty.
- The emphatic direction from Lord Normanby to Captain Hobson that any right of pre-emption in favour of the Crown obtained from the Maori chiefs was to be restricted to land not required by the Maori people for their own livelihood.
- Lord Normanby’s assurance to Captain Hobson that the Maoris would benefit from the predicted increase in land values resulting from progressive colonisation (this being possible only if the Maori were left with an adequate endowment of land to reflect the anticipated increase in value).
- The many expressions of concern by the chiefs that they might be dispossessed of their land if they signed the Treaty and the repeated assurances by Governor Hobson and his various representatives at the times the chiefs were being urged to sign the Treaty, that their lands would be protected.
- The specific assurance in the preamble to the Treaty that the Crown was anxious to protect the just rights and property of the Maori people.
- The explanation given to the Maori chiefs of the need for pre-emption on the grounds of preventing land speculation and protecting the Maori and the apparent absence of any reference to the purpose to which the Government would put resulting profits.
- The well-established fact that, had the Maori chiefs not been assured that their possession of their lands would be protected, they would not have become parties to the Treaty.

11.9.26 In our view the two parts of Article 2 of the Treaty must be read together and construed in the light of the foregoing considerations. If this is done, we find that Article 2, read as a whole, imposed on the Crown certain duties and responsibilities, the first to ensure that the Maori people in fact wished to sell; the second to ensure that they were left with sufficient land for their maintenance and support or livelihood or, as Chief Judge Durie puts it in the *Waiheke Report* (1987:77), that each tribe maintained a sufficient endowment for its foreseen needs.

## 11.10 The Duties of the Treaty Partners

*11.10.1* Finally, and perhaps most importantly, we state a leading principle of the Treaty articulated by the Court of Appeal in the *New Zealand Maori Council* case. There are two essential elements. The first is the recognition in the words of Cooke P at 369 that “the Treaty signified a partnership between the races”. The second is the obligation which arises from, indeed is inherent in, this relationship for each partner to act towards the other as Cooke P puts it at 370, “with the utmost good faith which is the characteristic obligation of partnership.” Later, the learned President says

It should be added, and again this appears to be consistent with the Tribunal’s thinking, that the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable cooperation.

Richardson J puts the matter in this way at 388

There is, however one paramount principle which I have suggested emerges from consideration of the Treaty in its historical setting: that the compact between the Crown and the Maori through which the peaceful settlement of New Zealand was contemplated called for the protection by the Crown of both Maori interests and British interests and rested on the premise that each party would act reasonably and in good faith towards the other within their respective spheres. That is I think reflected both in the nature of the Treaty and in its terms.

Somers J expressed his view succinctly at 400

Each party in my view owed to the other a duty of good faith. It is the kind of duty which in civil law partners owe to each other.

Finally, Casey J puts it in this way at 410

I see such a principle as very relevant in this case, inherent in the concept of an on-going partnership founded on the Treaty. Implicit in that relationship is the expectation of good faith by each side in their dealings with each other, and in the way that the Crown exercises the rights of Government ceded to it. To say this is to do no more than assert the maintenance of the “honour of the Crown” underlying all its treaty relationships.

We would state the principle which emerges in this way. The Treaty signifies a partnership between the Crown and the Maori people and the compact between them rests on the premise that each partner will act reasonably and in the utmost good faith towards the other.

## 11.11 Summary

*11.11.1* At the risk of over-simplifying our discussion of the status and scope of the Treaty of Waitangi it is convenient here to summarise the main elements. In doing so we reiterate our earlier disclaimer that we are not attempting to lay down a definitive and exclusive set of criteria by which claims should be assessed. We believe however that the following criteria are relevant to a consideration of the present claim.

*11.11.2* It is reasonable to apply to the interpretation of the Treaty of Waitangi the general principles of treaty interpretation as applicable to municipal law.

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*Relevant principles are:*

- (a) The primary duty of a tribunal charged with interpreting a treaty is to give effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of surrounding circumstances.
- (b) It is necessary to bear in mind the overall aim and purpose of the treaty.
- (c) In relation to bilingual treaties neither text is superior;
- (d) Given that almost all Maori signatories signed the Maori text, considerable weight should be given to that version;
- (e) The *contra proferentem* rule that in the event of ambiguity such a provision should be construed against the party which drafted or proposed that provision (in this case the Crown) applies;
- (f) The United States Supreme Court “indulgent rule” that treaties with indigenous people (American Indians) should be construed “in the sense which they would naturally be understood by Indians” supports the principle (d) above;
- (g) Treaties should be interpreted in the spirit in which they were drawn taking into account the surrounding circumstances and any declared or apparent objects and purposes.

*11.11.3 Broad Implications of the Treaty*

- (a) The Treaty was an acknowledgement of Maori existence, of their prior occupation of the land and of an intent that the Maori presence should remain and be respected.
- (b) While the Colonial Secretary’s instructions to Captain Hobson required him to obtain “by fair and equal contracts with the Natives the cession to the Crown of such ‘waste lands’ as may be progressively required for the occupation of settlers resorting to New Zealand” this was subject to the qualification that he was not to purchase “any territory the retention of which by them would be essential or highly conducive to their own comfort, safety or subsistence.”
- (c) The Treaty recognised the Maori ownership of the whole of New Zealand and the Maori signed the Treaty on the basis that all their lands, cultivated or otherwise, were confirmed to them by the Treaty.

*11.11.4 The Two Versions of the Treaty*

- (a) In the Maori text the chiefs ceded to the Queen ‘kawanatanga’. This is less than the sovereignty ceded in the English text, and means the authority to make laws for the good order and security of the country but subject to the protection of Maori interests. The cession of sovereignty however is implicit from surrounding circumstances.
- (b) The Maori text conveys an intention that the Maori would retain full authority over their lands, homes and things prized. This is more than the “full exclusive and undisturbed possession” guaranteed in the English text.



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- (c) In Maori thinking “rangatiratanga” and “mana” are inseparable. One cannot have one without the other. The Maori text of the Treaty conveyed to the Maori people that, amongst other things, they were to be protected not only in the possession of their lands but in the mana to control them in accordance with their own customs and having regard to their own cultural preferences.
- (d) The lands owned by the Maori were held by them tribally and communally. The communal right so existing was recognised by the Crown in the Treaty. The conferral in the Maori text of “te tino rangatiratanga” of their lands on the Maori people carries with it, given the nature of their ownership and possession of their land, all the incidents of tribal communalism and paramountcy. These include the holding of land as a community resource and the subordination of individual rights to maintaining tribal unity and cohesion.
- (e) In recognising the “tino rangatiratanga” of their lands the Crown acknowledged the right of the Maori people for as long as they wished, to hold their land in accordance with long standing custom on a tribal and communal basis.

#### *11.11.5 The Nature of the Guarantee*

In agreeing to confirm and guarantee to the Maori people the rights conferred on them in Article 2 of the Treaty in respect of their lands the Crown incurred an obligation actively to ensure that its Treaty undertakings were adhered to. It follows that an omission to provide protection is as much a breach of the Treaty as a positive act that removes or abrogates those rights.

#### *11.11.6 The Delegation of Responsibility*

- (a) Decisions of the Native Land Court in the exercise or purported exercise of their jurisdiction under Native Lands Acts or other statutes are not “acts done or omitted . . . by or on behalf of the Crown” in terms of s 6(1)(d) of the Treaty of Waitangi Act 1975, but
- (b) the Crown cannot divest itself of its Treaty obligations by conferring an inconsistent jurisdiction on the Native Land Court or other judicial or non-judicial bodies.
- (c) Accordingly, it is not any act or omission of the Native Land Court that is justiciable but any omission of the Crown to provide a proper assurance of its Treaty promises when vesting any responsibility in the Court or, indeed, any other body.

#### *11.11.7 Provisions and Principles*

- (a) The Tribunal is required to determine whether any matter of which a complaint can be made under s6 of the Treaty of Waitangi Act 1975 “was or is inconsistent with the principles of the Treaty” rather than with its provisions as such.
- (b) The essence of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretation out of place.
- (c) The Treaty was more than an affirmation of existing rights. It was not intended merely to fossilise the status quo but to provide a direction for future growth and

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development. It is not intended as a finite contract but is the foundation for a developing social contract.

*11.11.8 Pre-emption and Reciprocal Duties*

The two parts of Article 2 of the Treaty must be read together and construed in the light of the surrounding circumstances and other considerations referred to in 11.9.1 to 11.9.20. So read and construed, Article 2 imposed on the Crown certain duties and responsibilities, the first to ensure that the Maori people in fact wished to sell; the second to ensure that they were left with sufficient land for their maintenance and support or livelihood or, as Chief Judge Durie puts it in the *Waiheke Report* (1987:77), that each tribe maintained a sufficient endowment for its needs.

*11.11.9 The Duties of the Treaty Partners*

The Treaty signifies a partnership between the Crown and the Maori people and the compact between them rests on the premise that each partner will act reasonably and in the utmost good faith towards the other.

## Chapter 12

# Issues and Findings

### 12.1 Tribal Ownership and Tribal Endowments

*12.1.1* In Part I we have related in some detail the unhappy events in the life of the Ngati Whatua hapu of Orakei which as early as 1855 found them possessed of a mere 700 of their former many thousands of acres in and around Auckland City; and which some one hundred years later saw them rendered landless and unceremoniously evicted from their papakainga.

*12.1.2* The principal claim before us is that certain of the claimants and the hapu of which they are members were wrongly deprived of the 700 acre Orakei block which they say ought to have been reserved, in tribal ownership and control, in accordance with custom. They claim that this wrongful deprivation resulted from policies and practices of the Crown which are contrary to the principles of the Treaty of Waitangi. Particular policies and practices complained of are specified in paragraph 3 of the claim, as printed in Appendix I, and we will shortly be considering them; but here we deal with the main claim which is, in essence, that there was an obligation on the Crown as a party to the Treaty to secure an appropriate land endowment for Ngati Whatua at Orakei held in accordance with their custom and tradition and protected from alienation.

*12.1.3* Accordingly, in paragraph 4 of the claim it is said . . . Being cognizant of the Tribunal's obligation to make recommendations on the practical application of the Treaty of Waitangi to our claim, we do not seek the return of the entire 700 acres Orakei Block to Ngati Whatua but we claim that the Tribunal should declare that we are rightly entitled to the whole of it.

*12.1.4* We find

- (a) The Orakei block ought to have been vested in the tribe as some form of corporate entity. We found (11.11.4) that the lands owned by the Maori were held tribally and communally. The communal right so existing was recognised by the Crown in both texts of the Treaty, in the Maori by the conferral of "te tino rangatiratanga".
- (b) The failure to uphold tribal ownership is the genesis of the tribe's subsequent troubles. The finding above is in itself sufficient to justify the claim and is, in our view, the main finding. The initial failure, as we will soon relate, stems from the provisions of the Native Lands Act 1865 which resulted in the 700 acres being no longer possessed in communal ownership in accordance with custom and tradition. It is not enough to consider that Chief Judge Fenton by-passed the 1867 amendment and should have appointed trustees to hold for every individual tribal mem-

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ber named on a separate roll. At the very least the law should have enabled the trustees to hold not for individuals but the tribe, for as time showed, individual beneficiaries could still have partitioned their individual shares and could still have privately sold them without tribal approval or the sanction of tribal trustees. (In that respect the law has still not changed.)

- (c) The failure to provide for tribal ownership was no oversight. The evidence is rather that it was conscious policy to break down the tribal control the Treaty in fact guaranteed.
- (d) It follows Ngati Whatua were not willing sellers of any part of Orakei for Ngati Whatua never held the legal title that was awarded. Such as owned and may have willingly sold, sold individually and by law were not representatives of the tribe. It follows further that in terms of the Treaty there was no legitimate basis whatsoever for the Crown's acquisitions in Orakei. The land by custom being tribally owned, and that custom being protected by the Treaty, the Crown was bound to inquire of the tribe if the tribe wished to sell, and the Crown never did. It dealt only with individuals whose customary title was no greater than a right of occupancy in common with unspecified others and subject to the over-right of the group.
- (e) The Crown carried a particularly high responsibility to guard against encroachments on the Orakei block. We found at 11.11.8 that Article 2 carried a reciprocal duty to ensure the tribes were left with sufficient land for their support. We have considered in this context the massive extent of the tribe's original holdings, its former dependence on agriculture and trade, the likely size of the tribe, and the minimum test as late as the Native Lands Act 1873 of 50 acres for every man, woman and child. We have considered the tribe's careful selection of Orakei as a distinctive headland removed from Auckland yet not remote. The 700 acre Orakei block was in our view a minimum endowment to secure to the tribe, and because it could not have been less, so much greater was the duty to preserve it.
- (f) The evidence is that without the Crown's interference a workable endowment would have been maintained. Especially significant was Tuhaere's plan to lease sections to Europeans with ground rents to fund tribal development. Local bodies were doing much the same thing at the time and Tuhaere may have obtained the idea from what the Anglican Church was doing on nearby lands. The Anglican Church scheme worked well enough and has more than adequately endowed a fine theological college but then the assets of that Church were not apportioned to its members.

12.1.5 Accordingly, we have no difficulty in finding that save for subsequent sales to private interests, Ngati Whatua today would be rightly entitled to the whole of the Orakei block. That finding is relevant to the consideration of remedies in chapter 14 below. For now we consider the more particular

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claims that are made, bearing in mind that our conclusions on each are subservient to the main findings in 12.1.

## 12.2 The Native Lands Acts 1865 and 1867

*12.2.1* We have earlier related in some detail (4.2, 4.7, 5.1, 5.2) Te Kawau's aspiration for a deed to "make safe" the Orakei land, his application under the Native Lands Act 1865 and the outcome of that application as determined by Chief Judge Fenton. It resulted in the whole of the land passing to thirteen members of a tribe numbering well over a hundred. Such vesting moreover was not in trust for the whole tribe. The thirteen became the beneficial owners and as a result, all the remaining members of the tribe were, without their consent, involuntarily dispossessed of any interest in the land. The position then was much more serious than the denial of communal ownership in accordance with custom, serious though that matter was in itself. That the majority of Ngati Whatua were rendered landless with a stroke of the pen as early as 1869 and without their consent, was a most flagrant violation of the Treaty.

*12.2.2* It is clear that the legislature was anxious that the right of Ngati Whatua and all other Maori to hold their lands on a tribal basis, guaranteed to them by the Crown in the Treaty, should if possible be extinguished. The preamble to the Native Lands Act 1865, is (in retrospect at least) disconcertingly candid. It says

Whereas it is expedient to amend and consolidate the laws relating to lands in the Colony which are still subject to Maori proprietary customs and to provide for the ascertainment of the persons who according to such customs are the owners thereof *and to encourage the extinction of such proprietary customs* and to provide for the conversion of such modes of ownership into titles derived from the Crown . . . (emphasis added).

And so it happened. The Ngati Whatua communal ownership of the land was extinguished. The stage was set for the individualisation of the title to the land.

*12.2.3* The next point to note about the 1865 Act is that any one Maori could request an investigation of the title to a particular block of Maori land. The Court, after hearing such evidence as it thought fit, might order a certificate of title to be issued specifying the names of the persons or of the tribe who according to native custom own or are interested in the land. Or the Court might, if it chose, refuse to order a certificate to the claimant or anyone else. But if the Court decided to order a certificate in respect of land under 5000 acres, no more than ten persons could be named in it. The Court could decide to divide the land and issue two or more certificates if there was more than one owner or set of owners who wished this to be done. This provision was presumably intended to meet the difficulty arising from the inability of the Court to include more than ten owners in the certificate to a given piece of land.

Lastly, the Court was given a discretion to recommend to the Government that a restriction on the alienability of any piece of land be appended to the certificate. It was not mandatory to make the land inalienable.

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12.2.4 That it was intended by the 1865 Act to facilitate the individualisation of customary land is further evidenced by s 50 of the Act which enabled more than five persons named in a crown grant following the issue of a certificate of ownership to apply to the Court to subdivide the land and partition the shares.

12.2.5 It will be observed that it required only one person to instigate an investigation under the 1865 Act and the Court would proceed whether or not the remainder or a majority of a tribe agreed. The limitation of ten names to a certificate would inevitably mean in the case of a tribe such as Ngati Whatua of Orakei that if the names of all members of a tribe were to be included, the land would have to be surveyed into many separate pieces (a matter incidentally of great expense). This could result in a form of involuntary partition. Tribal ownership of land under 5,000 acres was not possible under the 1865 Act, and so, on the initiative of one person, tribal ownership could be extinguished without tribal consent. These provisions of the 1865 Act are clearly inconsistent with the principles of the Treaty referred to in 11.11.4 whereby in recognising ‘the full authority’ of the Maori over their lands the Crown was acknowledging their right to hold their land in accordance with long-standing custom on a tribal and communal basis.

12.2.6 We earlier discussed in some detail s 17 of the Native Lands Act 1867 and related how Chief Judge Fenton declined to implement it. Had he done so the Orakei Block would have been awarded to not more than ten as tribal representatives with the names of each and every member of the tribe being then recorded in a separate record of the Court. In fact, as we have seen, thirteen were held entitled and no other names were recorded Chief Judge Fenton choosing not to act under s 17. It is clear that Chief Judge Fenton made that election because he was ideologically opposed to s 17 and considered he had a discretion to disregard it and act under the Native Lands Act 1865, which was the course he purported to follow. It is instructive to examine further the minute which he made in respect of that matter on 7 April 1868 at the very time the Orakei case was before him. In commenting on s 17 he said it appeared the effect of the clause would be to make perpetual the communal holdings of the Maori. Later in his minute he says

It has been the practice of the Court hitherto, in cases where more than ten persons have appeared on the evidence to be interested in the land, to order a subdivision or more subdivisions than one, if one division did not sufficiently reduce the number of owners to the ten limited by the Acts; and I believe this practice has been beneficial, and in furtherance of the great objects of these laws, as declared in the preambles of the Acts of 1862 and 1865—namely, the extinction of the Native communal ownerships, and the substitution of titles known to the laws in lieu thereof . . . But it does not appear clear that, by the enactment of this provision, [s 17 of the 1867 Act], Parliament intended to take from the Court the discretion which it previously had, as to the issue or the refusing to issue a grant, after it shall have heard the evidence and the arguments on the case. On the contrary, I think the discretion is still left with us; and believing that the great object of this system of legislation is the abolition of communal ownerships of land, and the substitution of titles known to the law in lieu thereof, the inclination of my mind will be so to exercise the discretion which the Court, in my view, is still entrusted, as to refuse to issue a certificate of title, which will not on the face of it disclose the names of all the persons

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who are shown to the Court by evidence to be the owners, according to Native custom, of the lands described therein; or, in other words, to order subdivisions until the names in the grant are brought within the legal number, and display the whole of the persons interested in the property. (1871 AJHR A-2A: 40)

12.2.7 There could be no plainer indication than this statement of Chief Judge Fenton that he proposed not to exercise the powers conferred on his Court by s17 since he saw the provision as incompatible with the “great object” of the 1865 Act which was “the abolition of communal ownership of land”. Such was his state of mind at the time the Orakei case was before him. Regrettably, the Government of the day, although aware of Fenton’s attitude and thus of the Court’s interpretation of the law took no steps to clarify the legislation. The omission to take prompt action left Chief Judge Fenton free to do as he preferred and thereby deprive the great majority of their interest.

12.2.8 The Hon Mr Richmond, Minister of Native Affairs, was aware of the Court’s practice of vesting tribal communally owned land in a limited number of members. In the second reading debate on the Native Lands Act Amendment Bill 1868 he said

. . . The Government finding themselves foiled by the unwillingness of Mr Fenton to co-operate with them, had sent circulars round to discover cases where the 17th section had been overleaped by the Court and to obtain declarations of trusts on behalf of those Natives who had received grants for their tribes. (NZPD (1868) Vol IV: 231)

How effective (if at all) this action was we are not aware. Certainly no such action was taken in the case of Ngati Whatua. Suffice it to say that Chief Judge Fenton chose early in the following year, as we have seen, to exclude most members of the tribe from any interest in their land by declining to use s17 and by omitting to indicate that the thirteen held in trust for all. The Government of the day, well aware of the highly prejudicial and arbitrary way in which the Land Acts of 1865 and 1867 were being operated, took no effective steps to protect the Ngati Whatua people from dispossession.

12.2.9 These people were not afforded the protection in their lands guaranteed them under the Treaty. In the first instance tribal ownership was denied. In the second the Crown omitted to take timely and appropriate action to ensure that the provisions of s17 of the 1867 Act were mandatory and hence complied with to prevent members of Ngati Whatua from being dispossessed of any interest in their land involuntarily and without their consent. We emphasise again however that even the deployment of s17, while allowing all to be in, would not have allowed of tribal ownership. As it turned out, individual beneficiaries could still have partitioned, or sold, without tribal sanction or control, or without reference to tribal trustees.

### 12.3 Orakei Native Reserve Act 1882

12.3.1 Chief Judge Fenton did take one step which, in practice, gave a measure of protection to those tribal members he had stripped of any interest. He made the land inalienable. We have earlier indicated however that such restrictions were temporary measures which could be removed by the Court or the Crown at any time. Tuhaere, who succeeded Te Kawau, was anxious to prevent the individualisation of the Orakei title and, as we have seen, along with others petitioned Parliament for a Bill to hold the Orakei land intact and turn it into

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a tribal endowment. The result was the Orakei Native Reserve Act 1882 which enabled Tuhaere, as the new trustee, with the consent of the beneficiaries named in the Crown grant, to lease the land for up to 42 years. It could not be sold. The Orakei Act did not in law restore customary ownership, for rents were meant to be divided equally between the thirteen owners. It was rather through Tuhaere's manipulation of the Act that the tribal principle was for a time maintained. Communal cultivation continued and rents and profits were applied for the benefit of the tribe. But meanwhile, succession orders were being made and in 1891 the first application by owners to partition "their" shares was filed.

## 12.4 The Equitable Owners Act 1886

*12.4.1* Government did endeavour to provide some relief for those who had been disinherited. The long title to The Equitable Owners Act 1886 was "an Act to confirm to Natives certain Equitable Rights" and the preamble was as follows

Whereas under the Native Lands Act 1865 certificates of title to, and Crown grants of, certain lands were made in favour of or to Natives nominally as absolute owners: And whereas in many cases such Natives are only entitled and were only intended to be clothed with title as Trustees for themselves and others, members of their tribe or hapu or otherwise . . .

That Act did not restore tribal ownership however. It merely allowed more individuals to be included in the individualisation process. It gave in any event no relief to Ngati Whatua, where, on the face of the Court order, the legal owner was admitted as being a trustee, and the thirteen were declared to be absolutely entitled. Accordingly the application of Renata Uruamo to overturn the Orakei Order, as we have related (5.4), received slight consideration. It was dismissed without a substantive hearing and without Renata being present or represented. The inevitable outcome was to hasten the process of partition which was now under way.

## 12.5 The 1894 Act and 1898 Partitions

*12.5.1* The Treaty of Waitangi guarantees the Maori people absolute authority over their tribal lands. The Native Lands Act 1865 was specifically enacted to encourage the extinction of customary land tenure. In the case of the Orakei land, sustained efforts were made on behalf of the tribe, despite the operation of the 1865 and 1867 Acts, to maintain the tribal principle. But a fatal inroad was made by Chief Judge Fenton's 1869 decision. The effect of this was mitigated for a time by the passage of the Orakei Native Reserves Act 1882, but its extinction was consummated by the legislative provisions which enabled individual owners to obtain a partition. In the words of Williams J in *Solicitor-General v Tokerau District Maori Land Board* [1913 32 NZLR 866, 877] . . . the Act of 1882 has become a dead letter".

*12.5.2* As we have earlier related (5.6) the first applications for the partition of Orakei were heard in 1896 under the Native Land Court Act 1894 s14 of which authorised the partition of land among the persons entitled to it. This



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resulted in the farm lands being divided by the Court into several lots, ranging from 10 to 20 acres, and owners being assigned different portions. The papakainga thought to contain 43 acres but later surveyed at 39 was awarded to the owners as a whole (that is, the original 'legal' owners and their successors, not all members of the tribe).

*12.5.3* In making these orders partitioning the Orakei block the Court, as we have said, negated the effect of the Orakei Native Reserves Act 1882 which although it did not provide for a tribal trust did provide for overall administration of the whole block by a trustee acting with the consent of the owner group as a whole. As Otene Paora said (5.6) as late as the year before the partition was made the land continued in practice to be held in common by the tribe with part being communally fanned.

*12.5.4* While the partition orders continued the caveat on alienations except by way of lease the decision to lease was now solely the prerogative of the owners of the partitioned lands. The consent of owners of the whole block was not required. The individualisation of title was complete. The mana of the tribe in the land was extinguished. The Native Lands Act 1894 effectively negated the Orakei Native Reserves Act 1882 by facilitating the making of orders partitioning the Orakei block thereby laying the ground for its complete individualisation and subsequently, its alienation. The 1894 Act, following as it did the Native Lands Acts of 1865 and 1867, exacerbated the already severely adverse effects of those statutes by finally destroying the mana of Ngati Whatua in and over their land at Orakei and confirmed the dispossession of the majority of the tribe of all interest in their land. The cumulative effect of the Acts of 1865, 1867 and 1894 was to prejudicially affect the Ngati Whatua people in the manner indicated and was accordingly inconsistent with the principles of the Treaty which guaranteed that this would not occur. The Crown failed adequately to honour its obligations under the Treaty to protect the people at Orakei in the possession of their lands.

## 12.6 Stout–Ngata Commission and Native Land Settlement Act 1907

*12.6.1* On 21 January 1907 the Governor appointed the Chief justice, Sir Robert Stout, and Mr AT Ngata as members of the Native Land Commission. This Commission, popularly known as the Stout–Ngata Commission, was required to review the occupancy and use of Native Land and to report which land should be retained by the Maori owners and which might be disposed of. Late in the same year the Native Land Settlement Act 1907 enabled the recommendations of the Stout–Ngata Commission (some of which had already been made) to be implemented.

*12.6.2* We have already adverted (5.7) to the extraordinary nature of certain powers under this Act. It is necessary to recall the principal provisions which are contained in two parts. Part I is concerned with land which the Stout–Ngata Commission found was not required for occupation by the Maori owners and is 'available' for sale and leasing. The Governor by Order-in-Council may declare such land to be subject to Part I with the following consequences

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- The land vests in the Maori Land Board to be held in trust for the Maori owners.
- The Board, with the approval of the Native Member, is to divide such land into two equal parts and set aside one part for sale and the other for leasing in accordance with the Act.
- The Board is to sell the land set aside for sale and to lease for a maximum of 50 years without a right of renewal the land set aside for leasing.
- The consent of Maori owners is not required for either the sale or leasing of such land.
- The net revenue after deduction of expenses is to be paid to the Maori owners.

Under these provisions, subject to the report of the Commission, the Governor could, by Order-in-Council, vest Maori land in a Maori Land Board for sale to settlers, with or without the consent of the owners, simply on the ground that the land was considered in excess of their needs.

12.6.3 Fortunately for Ngati Whatua, or so it seemed at the time, and as we have related (5.8) the Stout–Ngata Commission found that no part of the Orakei Block was “not required for occupation by the Maori owners”. And so it appeared they would be immune from the compulsory and involuntary dispossession of their land under Part 1 of the 1907 Act. For, as we have recounted, the Stout–Ngata Commission recommended that some 85 acres comprising the village and nearby lands be reserved for occupation of the Ngati Whatua people; that certain existing leases comprising some 496 acres be confirmed and that the remaining 63 acres might be leased through the Maori Land Board. None was to be sold. All was to remain in the ownership of Ngati Whatua.

12.6.4 The Stout–Ngata Commission reported to Government on the Orakei land on 30 July 1908 on which date the 1907 Act was still in force. The 85 acres of Orakei land recommended for Maori occupation fell to be administered under Part II of the Act which provided

- for the making of an Order-in-Council declaring the land to be subject to Part II of the Act.
- making it unlawful for anyone without the consent of the Governor in Council to acquire any interest in such land, whether by purchase or otherwise.

In fact, no such Order-in-Council was made in respect of the 85 acres or any lesser part under Part II nor was any order made in respect of the balance of the land providing for its leasing under Part I of the 1907 Act.

12.6.5 As we have earlier related (5.9) the recommendations of the Stout–Ngata Commission for the extension and protection of the papakainga (the 85 acres) and the alienation of the balance by lease only, were never implemented by the Crown. While the Native Land Settlement Act 1907 was repealed by the Native Land Act 1909 its provisions were continued in Parts XIV and XVI. So, had Orders-in-Council been made by the Crown to implement the recommendations of the Commission, these would have been

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continued in force under the 1909 Act. Even if, by the time the 1909 Act came into force, no such Orders-in-Council had been made, provision was made in Parts XIV and XVI (which continued the provisions of Parts I and II of the 1907 Act) for the Stout–Ngata recommendations to be made the subject of an Order-in-Council under the 1909 Act. But nothing was done. The Crown simply ignored the Stout–Ngata findings and recommendations. Yet its duty as a Treaty partner was clear.

12.6.6 In our earlier discussion (5.9) we have suggested that the provisions of the 1907 Act, continued in force in the 1909 Act, offered a unique solution to the Orakei problem. The papakainga could be vested in a Board and the Board could give occupational licences to owners and non-owners alike; through the Board, the remainder could be leased.

12.6.7 We must now consider whether the failure of the Crown to implement the recommendations of the Stout–Ngata Commission by securing appropriate Orders-in-Council under either the 1907 or 1909 Acts, was inconsistent with the principles of the Treaty of Waitangi. For reasons which follow we find there was such inconsistency and that the omission of the Crown so to act was in breach of principles of the Treaty.

12.6.8 We have earlier found (12.2.8) that the Crown acted inconsistently with the principles of the Treaty in providing the machinery under the Native Lands Acts 1865 and 1867 for the dispossession, without the consent of the great majority of the Ngati Whatua people, from their interest in their land at Orakei and also (12.5.1–12.5.3) for the legislative provisions culminating in the partitioning of the land which effectively destroyed, again without tribal consent, tribal mana in and over the land. The Crown, had it implemented the Stout–Ngata recommendations, would have gone some distance towards ameliorating the damage already sustained. The basis for maintaining a reasonable degree of tribal cohesion and the retention of their land would have been secured. The Crown omitted to take this action, which was clearly contemplated by the 1907 and 1909 Acts. The Crown, by omitting to implement the recommendations of the Stout–Ngata Commission under the legislative provisions then in force which contemplated such implementation, thereby failed to take the active steps necessary to restore to the Ngati Whatua people in part at least, the lands of which the majority had been dispossessed in 1869 in breach of the Treaty. This omission of the Crown was inconsistent with the principles of the Treaty which obliged the Crown in these circumstances to protect the property of the Ngati Whatua and to restore the tribal mana over the papakainga of 85 acres and over the remaining areas amounting to 558 acres approved by the Commission for leasing, and none of which was to be sold.

12.6.9 On the contrary, the Crown shortly after embarked upon and progressively implemented a planned programme to acquire the whole of the land at Orakei in Ngati Whatua ownership. It was urged upon us, in submissions by Dr David Williams, that the closer a Maori hapu and their papakainga was to a centre of settlers' trade and commerce the greater was the obligation on the Crown to ensure protection of Maori against being rendered homeless as a

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result of settler pressures for land. There is considerable force in this submission. Ironically, it was the Crown itself which, far from seeking to protect Ngati Whatua, actively embarked on its plan to acquire all their land at Orakei and to render the Ngati Whatua people landless. We are unable to reconcile this outcome with the Crown's responsibility under the Treaty which obliged it in the circumstances of this case to ensure that Ngati Whatua were left with an adequate endowment of land at Orakei. The recommendations of the Stout–Ngata Commission afforded it an opportunity to ensure this and the Treaty required it to take appropriate actions. Instead, it elected to follow precisely the opposite course. The outcome, a landless people, was inevitable and foreseen.

## 12.7 Otene Paora's Petitions

*12.7.1* In paragraph 5.9 we have described the various petitions by Otene in which he sought to have all the descendants of Tuperiri included in the title to the land at Orakei, or if not all, then at least the heads of all the families including, in particular, a descendant of Uruamo. As we have recorded (5.9) the Native Affairs Committee voted seven to five in favour of Otene's petition on a motion, in October 1912, that the evidence be tabled in the House with a recommendation that the Petition be referred to an enquiry. This recommendation suffered the same fate as the Stout–Ngata recommendations; it was ignored. Nor, given that earlier in the year the Crown had by Proclamation of 7 May 1912 prohibited all alienations in the Orakei Block other than to the Crown, is this surprising. For, as we have said, it was not to protect Ngati Whatua that it placed a caveat on sales until the true ownership could be established, but rather to enable the Crown to acquire the land from those whose title was in dispute. Once again it is impossible to reconcile these events with the Crown's obligation to protect the interests of the Ngati Whatua. Those interests had to give way to the determination of the Crown to acquire all the Ngati Whatua land at Orakei.

## 12.8 The Sewer and Flooding

*12.8.1* Before we proceed to consider the implications of the purchase by the Crown of the greater part of the Orakei Block we should refer to the physical intrusion from neighbouring Auckland into Okahu Bay, the site of the Ngati Whatua village. We have described (6. 1) how in 1912 construction of a sewer pipe was commenced across Hobson Bay to be extended along the foreshore cutting the villagers' access to their craft in the harbour. It was a raised pipeline supported by a concrete retaining wall both being above the level of the papakainga flats behind it. No proper provision was made for drainage and the papakainga became a swampy quagmire. Even worse, the sewer outlet itself was placed at one end of the Bay and in 1914 Auckland's sewage was discharged onto the shellfish beds of Ngati Whatua opposite their village. We reiterate our finding that there could be no greater insult to a Maori tribe even if one were intended. Not surprisingly this action is the subject of a claim before us. Witnesses at our hearings made repeated references to this despolia-

tion of their beach and fishing grounds and the flooding of the papakainga. More than 70 years after the initial opposition expressed by Hone Heke in 1907 to the Council and the Government the intrusion and the insult continues to be deeply felt and bitterly resented. The construction of the sewer was the work of the Auckland City Council, but was effected under special legislation, the Auckland and Suburban Drainage Act 1908. Amongst other things the Act authorised the Okahu discharge site without the necessity of obtaining the consent of the Auckland Harbour Board.

*12.8.2* As we have indicated (6.1) neither the loss of the shellfish beds nor the insult nor the consequential flooding was compensated. Compensation was confined to land loss, land severance, lost access and depreciation. In fact, the flooding of the papakainga worsened in 1931, when a raised roadway largely financed by the Crown was built over the sewer pipeline along the beachfront. Not surprisingly, this added to the villagers' discomfort, turning the papakainga into a swamp in heavy rain. It was only after the people had been evicted that more adequate drainage was installed. For the land had by then become a public domain. In the same way it was only after the last remaining Maori land in the papakainga had been acquired by the Crown, that Auckland took its sewage elsewhere (again to an area adjoining Maori land, this time near Makaurau marae).

*12.8.3* In the *Te Atiawa Report* (1983:1.1) we found that the Treaty of Waitangi obliges the Crown to protect Maori people in the use of their fishing grounds and from the consequences of the settlement and development of the land. In the same way we believe the Treaty obliged the Crown to protect the papakainga and especially the site of the marae from the deleterious effects of a public work. It is clear that the Crown failed to meet its obligation in these various respects.

## 12.9 The Initial Crown Purchases—the Farm Lands

*12.9.1* In one year, 1914, the Crown bought the bulk of the Orakei Block having ensured by its May 1912 Order-in-Council that no one other than the Crown could purchase any part of it. We have shown (6.2) how, to facilitate its acquisition, s 109 of the Native Land Amendment Act 1913 was enacted. This provision enabled the Crown to buy the individual interests of owners in any blocks, regardless of how many were on the title, and without the necessity for a meeting. Some 460 acres, or most of the farm land, was acquired by December 1914.

*12.9.2* These purchases were a direct consequence of the Crown's deliberate policy, deliberately executed, to acquire all property at Orakei belonging to the Ngati Whatua people. It knew, indeed it clearly intended, that the implementation of this policy would render the Ngati Whatua people landless. It can be said that the Maori owners agreed to sell. And so many did, although for years methods employed by the Crown's agents were the subject of complaints which have never been independently reviewed and there is considerable evidence of duress (see 12.15). But we do not see this as a justification. The Crown's planned programme to dispossess the Ngati

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Whatua from their lands at Orakei must be considered in the light of the following circumstances as more particularly described earlier in this Report

- The fact that by 1855 Ngati Whatua were left with only 700 acres out of many thousands which the Crown had acquired to establish Auckland City.
- The fact that in 1869, as a result of the provisions of the 1865 and 1867 Native Lands Acts and the acts and omissions of the Crown in relation to those Acts, all but thirteen of the Ngati Whatua people were dispossessed of their interest in their tribal and communal land at Orakei.
- The fact that, as a further result of the 1865 and 1867 Acts, the mana of Ngati Whatua to hold their land in accordance with their preferences was extinguished and tribal control was lost.
- The fact that Acts passed between 1865 and 1895 enabled the Crown to lay the ground for the complete individualisation and, thereafter, the alienation of the partitioned Orakei Block, thereby making more certain the impossibility of any continued communal use of the land and facilitating its alienation.
- The fact that the Crown deliberately chose not to implement the clear finding of the Stout–Ngata Commission which was intended to secure an endowment for Ngati Whatua at Orakei.
- That the foregoing events from 1869 on were the result of a series of breaches by the Crown of its obligations under the Treaty of Waitangi.

12.9.3 The cumulative effect of these breaches of its Treaty obligations was such that the Crown, by 1914, was under a heavy duty to make good its failure to protect the Ngati Whatua people. The only effective way it could redress the situation, as the Chief Justice, Sir Robert Stout and Mr A T Ngata so clearly saw, was to provide a sufficient endowment for them at Orakei. It was even then, not too late to implement the Stout–Ngata findings. No less was required of the Crown as a Treaty partner ‘acting’, in the words of Sir Robin Cooke in *New Zealand Maori Council v Attorney-General* 6 NZAR 353, 370 ‘towards the Maori partner with the utmost good faith which is the characteristic obligation of partnership’. Instead, the Crown, being either indifferent to or oblivious of its obligation, embarked on a course which in a single year, 1914, resulted in the Crown acquiring the bulk of the farm lands at Orakei and which, far from providing an endowment would ensure that the Ngati Whatua had none. In so doing, we find that the Crown acted in breach of its obligations under the Treaty.

## 12.10 The Failure to Maintain House Sites

12.10.1 Another cause for complaint over many years was the refusal of the Crown by its purchasing agents to agree to reserve out of a sale of Maori land at Orakei a part for the occupation of the owner. By contrast, the Crown reserved or allocated to a number of European lessees, house sites or other sections for their personal occupation. And so it transpired that while not a single Maori was able to keep the land on which his or her house stood

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(whether on the farm lands or the papakainga) the European lessees' lands were leased back to them until the Crown was ready to subdivide. The European lessees then obtained from the Crown the freehold of those parts on which their houses stood. No Maori were able to persuade the Crown to reserve a house site for their occupation. There was not one partition to cut out a house site despite the clear request of some Ngati Whatua owners for that to be done.

**12.10.2** The reason for this transparent discrimination on the part of the Treaty partner can, we believe, be found in the report of 20 April 1918 of the Commissioner of Lands at Auckland (6.3) and we quote from this Report

In this connection I would bring before you the undesirability of the Natives retaining any of these lands. To permit them to do so, would certainly spoil any subdivisional scheme for settlement purposes.

From my point of view it is absolutely necessary that the Crown should acquire this entire block, and therefore suggest that in the event of the Land Purchase Officer being unsuccessful in his negotiations, that special legislation should be introduced to enable the Crown to compulsorily acquire the balance of the block.

**12.10.3** We are compelled, in the light of the foregoing statement, confirmed as Government policy as it is by our lengthy narrative of events in Chapters 6 and 7, to conclude that the Crown was resolved to dispossess the Ngati Whatua people of all their interest in their lands at Orakei. Not to do so would "spoil" any subdivisional scheme for settlement purposes. The Commissioner of Lands was prophetic in his view that resort to compulsory acquisition might be necessary. For so it proved to be as the 'recalcitrant' elderly and others resisted all attempts to remove them from their ancestral home on the papakainga. We find that this policy of the Crown, which worked so prejudicially to the interests of those sellers who wished to retain their house or house site, to be clearly inconsistent with the Treaty which obliged the Crown to protect the right of those Ngati Whatua who wished to retain an interest in their land to be able to do so.

## **12.11 The Crown Purchase of the Papakainga**

**12.11.1** Having in so short a period of time succeeded in acquiring most of the farm land, the Crown turned its energies to the acquisition of the papakainga. It will be recalled that the Stout–Ngata Commission, being of the opinion that the Orakei Block was Native and communal land and was meant to be preserved as a dwelling-place for the 'remnant' of a tribe, considered that the Orakei settlement should be so arranged as to provide ample reservations for Maori occupation. The balance not required for this purpose, it said should be leased in small areas up to 2 acres and the more remote land up to 5 to 10 acres. None was to be sold. In the result, the Commission proposed that some 85 acres should be permanently reserved as a papakainga.

**12.11.2** The area of 85 acres recommended by the Stout–Ngata Commission was in fact more than twice the area of 40 acres (reduced to 38 acres 3 roods 16 perches in 1904 after land was taken later for roads) generally known as the papakainga. This area constituted one unpartitioned block in which

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various members of the tribe held undivided interests or shares. The Crown met considerable opposition in its attempts to acquire the papakainga. It was able to purchase undivided interests or shares only, each interest representing a certain acreage.

*12.11.3* By 1927 however, the Crown had acquired all but 12.5 acres of the Orakei Block. In 1928 Orders were obtained in the Native Land Court whereby some owners of interests in the papakainga relinquished those interests in exchange for an interest in a 10 acre block on the western hillside. Those who did not agree to relinquish their interests in the papakainga found that the remaining 2.5 acres (being all that was left unpurchased in the papakainga) was partitioned into two blocks. One block of 1 acre went to Maki Waata solely and included her two homes. The remaining owners were put in a block of 1.5 acres taking in some homes and the Marae. In addition, in 1928 the Court set aside about 1 acre as a Maori reservation incorporating the Okahu Church and cemetery. This was vested in trustees for the tribe. Strangely, the Marae itself was not also set aside as a Maori reservation.

*12.11.4* And so by 1928 the Crown had almost achieved its objective of dispossessing the Ngati Whatua of their lands at Orakei. But the people, perversely perhaps in the eyes of the Crown, remained. In 1935, the 32 buildings in the Maori settlement at Orakei comprised 24 dwellings, five tents, two halls and a Church of which 17 dwellings, four tents, two halls and the Church were in the main village or papakainga. But as we have related, three enquiries were to intervene before the remaining land was compulsorily acquired by the Crown.

## 12.12 The Acheson Inquiry 1930

*12.12.1* In this inquiry (see 7.1 for a full discussion) Judge Acheson found that the Orakei Block ought properly to have been a tribal reserve protected from sales and, in the absence of evidence to the contrary (the Crown having withdrawn) that there was an undertaking, in securing the purchase of the farm lands, that the papakainga would not be touched. He recommended a conference between the Orakei people and the Ministers of the Crown without officials. No action was taken by the Government as, in the terms of the Chief Judge's recommendations, none was required. Nevertheless pressure was maintained by Ngati Whatua for the recognition of the papakainga both with the Auckland City Council and Government. On the change of Government the restoration of the papakainga and Church site was again sought. After a meeting with the new Prime Minister the Lee Committee was appointed.

## 12.13 The Lee Committee 1936

*12.13.1* The Lee Committee was required to report on the Church site, unsold interests, the Maori preference for a "model pa", health concerns and a Government housing scheme. Its findings (Judge Acheson dissenting) in respect of the papakainga were, briefly that the unsold interests in the papakainga ought to be purchased as being necessary for the development



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scheme, the proposal for the 40 acre native village was impractical as was the “model pa” proposal, the papakainga was a health hazard and housing was not the best way to utilise it because of the drainage problems. In short, the remaining Maori on what was left of the papakainga should go.

12.13.2 Judge Acheson’s views are perhaps encapsulated in the passage from his dissenting report which we have earlier cited (7.2). It reflects his concern with the broader issues of the Treaty and we believe merits repetition here as both an eloquent and perceptive statement of the Ngati Whatua claim to retain their papakainga in perpetuity. Judge Acheson comments on their rights thus

The rights of the Maoris, their land rights under the Treaty of Waitangi, their moral and legal rights as set out in the Court’s Report of 1930, their right to equality of treatment as promised by the Government, their pathetic clinging to the remnant of tribal lands, their right as fellow citizens to be treated with respect and consideration, their law-abiding habits, their past willingness to share in the defence of the Empire, their ability to retain dignity and cleanliness under conditions of direst poverty, their right to have one small portion of Auckland which they can call their own and where they can rebuild their ancient culture and maintain their tribal existence and honour the memory of their ancestors.

12.13.3 Some of the people were, by 1937, living on land partitioned out and owned by the Crown, and Government decided to evict them. In the same year the first state-houses erected on the Orakei Block were completed and the first occupants moved in. To leave the Ngati Whatua on their papakainga would “spoil” the development. But public spirited Auckland citizens took up the cause of Ngati Whatua, and in 1938 the Government relented and set up a further inquiry into the purchase of the papakainga.

## 12.14 The Kennedy Commission 1938–1939

12.14.1 We have earlier traversed the proceedings of this Commission which comprised Mr Justice Kennedy on his own (7.3). We here refer to the principal findings of the Commission in relation to the papakainga. We recall however the evidence of the Crown’s principal land purchase officer that no one was left landless in the papakainga because everyone’s shares were so trifling that they were already landless in terms of the Native Land Act 1909. This observation has caused us to think that if the Maori owners were technically landless after the farm sales, the farm sales must have been contrary to the 1909 Act by rendering them landless. The Kennedy Commission was not required to consider this question as its inquiry was restricted to the papakainga.

12.14.2 After finding that the Crown acquired a good title to the lands purchased in the papakainga the Commission next considered whether there was any provision in the then law which prevented the Native Land Purchase Board (through which the Crown made its purchases) from lawfully purchasing the land or interests in it or which rendered such purchases invalid. Under the Native Land Amendment Act 1913 the Board, before completing a purchase of the interest of a native owner in any land, was obliged to ascertain that such purchase would not render the seller landless within the meaning

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of the 1909 Act. The Board was required to obtain particulars of any other interests in land in which a seller was beneficially interested. A native whose total beneficial interests in Native freehold land were insufficient for his adequate maintenance would be a “landless Native”. But even if this duty was not discharged and the prohibition not complied with, the purchase was not invalidated.

*12.14.3* As we have shown, the Kennedy Commission considered that in many cases the duty to inquire had not been discharged, and in many cases Ngati Whatua people were certainly left landless, but also in many cases the owners had other land interests (often in distant places). In 24 of the 36 sales the sellers held less than half an acre in shares. They were not rendered landless as technically they were already landless.

*12.14.4* The Commission next considered whether there were any extra reasons why the Crown should have abstained from purchasing the interests of the owners who were willing to sell and did sell their interests to the Crown. Its formal answer was that in ‘certain’ circumstances the purchase would render the Natives landless and that was the reason why as the law stood the Crown should have abstained from purchasing the interests of certain native sellers. It considered there were no other valid reasons. In saying this the Commission made no reference to the Stout–Ngata Commission recommendation made only a few years before buying began, that none of the land should be sold. Nor, of course, was the Crown’s obligation under the Treaty considered. As to whether promises were made that the papakainga land would not be purchased, the Commission, after considering conflicting evidence, on balance concluded in the negative.

*12.14.5* Before the Crown had any opportunity to proceed with its eviction proposals the war intervened. No further action was taken; intermittent discussions took place and in 1943 Prime Minister Fraser announced a proposal to build houses for Ngati Whatua on the eastern plateau, to retain the marae area on the flat and to assist with the building of a new meeting house on the site of the old one. While welcoming the Government’s offer to assist with rebuilding the marae Ngati Whatua could not agree to relocate on the eastern plateau. And so the position remained stalemated until the Government changed late in 1949.

## 12.15 The Final Stage

*12.15.1* In 1951 the 10 acre ‘exchange block’ was compulsorily acquired for ‘housing purposes’. The 1 and 1.5 acres of the papakainga, (which included the marae) were compulsorily taken for the purposes of a recreation ground. Apart from the Okahu cemetery, Ngati Whatua of Orakei was now landless.

*12.15.2* It had taken some 40 years for the Crown to acquire the whole of the farm lands and the papakainga at Orakei. While Ngati Whatua succeeded in having three inquiries made into the Crown purchase of interests in the papakainga, no independent review was made of the acquisition of the farm lands. The Crown had made it clear in 1914 that it intended to acquire the Orakei Block and it took steps to ensure that no one else would be able to

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purchase any part of it from the Ngati Whatua people. The Crown was therefore in a position of ascendancy and greatly advantaged in its dealings with the Maori owners. In 6.2 and 6.3 we have related the complex and what must often have been totally bewildering techniques employed by the Crown's agents to secure the purchase of the whole of Ngati Whatua land. What real choice but to sell, did the owners of shares in a piece of land have once the Crown had purchased other shares in the same piece of land? The Crown knew this and the remaining owners were thereby subjected to pressure to sell which became increasingly difficult to withstand. Nor, in many cases, did the Crown comply with its statutory duty to inquire whether owners would be rendered landless and to refrain from purchasing if this would be the outcome. It is a melancholy story. Yet the Maori owners did not have the protection of the Native Land Court they would have enjoyed had they been selling to purchasers other than the Crown, no doubt for the reason, sadly misplaced, that the Crown would honour its statutory obligations.

*12.15.3* Nor had they the protection of their traditional tribal authority. It can never be said Ngati Whatua sold for of course the lands had been individualised, most of the individuals had been disinherited, and there never was a Ngati Whatua meeting to determine in the traditional way, whether the block should be sold. Clearly therefore, the sales offended the Treaty, for the customary owners, Ngati Whatua as a tribe, never freely and willingly agreed that they no longer wished to retain the block in their possession.

*12.15.4* Given however, that a number of individuals were in law possessed of different blocks at that time, we still question the propriety of the Crown treating separately with individuals within them. The law had been changed to permit the Crown to do this, only months before buying began and customary collective decision making was once more denied. As we noted however, the meeting of owners procedure was occasionally used. There, voting was conducted on a poll according to shareholding. Even non-Maori land cannot be sold in that way, but both the sales by individuals and those effected by a poll were inconsistent with the Treaty, for the Treaty was meant to uphold the mana of the people to deal with their lands and to make decisions affecting them, in their own way.

*12.15.5* In an earlier paragraph (12.9.3), we found, in relation to the policy and practice of the Crown in purchasing the bulk of the farm land in 1914 that the Crown was acting in breach of the Treaty. The purchase of the remaining farm land and the acquisition of the papakainga by purchase and compulsory taking was a continuation of that same policy and practice. In executing that policy it is clear that the Crown prejudicially affected

- (a) Those many Ngati Whatua owners, who were left landless by the acquisition of their interests at Orakei as a result of the Crown's failure to comply with its statutory obligations to ensure this would not happen. Such failure was a clear breach of the Crown's Treaty obligation to protect the rights and property of the Ngati Whatua owners and also of its obligation to ensure that the Ngati Whatua sold only those lands

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excessive to their needs and that they retained a sufficient endowment for themselves.

- (b) Those Ngati Whatua owners whose land was compulsorily acquired against their wish and without their consent and thereby acted inconsistently with the principles of the Treaty which guaranteed the Maori families and individuals the undisturbed possession of lands they wished to retain.

*12.15.6* These further two instances of specific breaches of the Crown's duty under the Treaty were an inevitable consequence of its wider policy to acquire the whole of the Ngati Whatua land at Orakei. Certainly Auckland City was steadily and irrevocably moving out to enclose the Ngati Whatua enclave at Orakei and pressures over which Ngati Whatua had no control were steadily transforming them from a rural to an urban-based people. These developments however do not excuse the Crown. The Crown, had it been conscious of its Treaty obligations, could reasonably have been expected to foresee the even more compelling need to ensure that its Ngati Whatua partners at Orakei were protected from becoming landless in their ancestral homeland. Statutes in force required no less.

*12.15.7* We are unable to avoid the conclusion that, throughout the period of some 40 years during which successive governments pursued a common policy of progressively acquiring the whole of Ngati Whatua's land at Orakei, the Crown appeared to be oblivious of its responsibilities under the Treaty. It reflects among other things a lack of appreciation of the crucial importance of land in Maori culture. By way of illustration Sir Ivor Richardson in his judgment in *New Zealand Maori Council v Attorney-General* (1987) 6 NZAR 353, 381 cited the following passage from the New Zealand Maori Council's paper *Kaupapa-Te Wahanga Tuatahi*

It [land] provides us with a sense of identity, belonging and continuity. It is proof of our continued existence not only as a people, but as the tangata whenua of this country. It is proof of our tribal and kin group ties. Maori land represents turangawaewae.

It is proof of our link with the ancestors of our past, and with the generations yet to come. It is an assurance that we shall forever exist as a people, for as long as the land shall last.

Nor did the Crown throughout this lengthy period appear to appreciate that it was required by the Treaty to play an active role in the protection of legitimate Ngati Whatua interests. That the Crown is under such an obligation is made clear by the President of the Court of Appeal, Sir Robin Cooke, in the *New Zealand Maori Council* case in the following passage (p370)

What has already been said amounts to acceptance of the submission for the applicants that the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's *Te Atiawa*, *Manukau* and *Te Reo Maori* reports which support that proposition and are undoubtedly well-founded. I take it as implicit in the proposition that, as usual, practicable means reasonably practicable.

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*12.15.8* A striking feature of the three hearings which this Tribunal conducted is that no appearance was made by the Crown in opposition to any of the claimants' claims. Before the final hearing the Crown had available to it a lengthy report giving the detailed history of the way in which Ngati Whatua became landless at Orakei the substance of which is reproduced in the first ten chapters of this Report. This was not challenged in any respect by or on behalf of the Crown. Mr Neil Cooper speaking on behalf of the Commissioner of Crown Lands told us that the Commissioner had read the draft report and did not wish to challenge any part of it. Specifically, no reason was given as to why the Crown chose not to implement the Stout–Ngata report in respect of Orakei. We have no reason to believe this could not have been done. Had it been the mana of Ngati Whatua over the land would have been preserved, the people would have had secured to them a permanent place on their ancestral land and, in addition, an endowment towards their support and maintenance. They would have had land available from which to benefit, as envisaged by Lord Normanby, as the value and utility of land generally increased.

*12.15.9* As with the acquisition of the farm lands in 1914 so the subsequent acquisition by the Crown of the remaining Ngati Whatua land needs to be assessed in the light of events from and including the first breach of the Treaty in 1869. Given the particular circumstances of Ngati Whatua of Orakei, including their fortuitous situation adjacent to, and in time, part of a great metropolis, we consider the Treaty, which their ancestor Te Kawau signed at Manuka (Manukau), obliged the Crown to take reasonable steps to protect them from becoming landless. This duty extended to ensuring, so far as was reasonably practicable, that they retained land on which to live as they wished at Orakei and sufficient land to afford them support and maintenance. The Crown failed to meet its Treaty obligation in this and the other respects we have earlier described. It has chosen not to advance any reasons for such failure or indeed to seek to justify in any respect the policies and practices which form the subject matter of the complaints before us. Is such apparent indifference consistent with the Treaty of partnership which the Crown was so anxious to enter into with the Maori in 1840?

## 12.16 The Orakei Church Site

*12.16.1* So far we have been concerned in this chapter with the disposition of the bulk of the farm lands and the papakainga at Orakei. We revert now to one of the first transactions relating to Ngati Whatua land at Orakei. It should be noted that it took place in 1858 at the initiative of Apihai Te Kawau and other leaders and at a time when the land was indisputably held on a tribal and customary basis. It concerns the gift of land at Orakei to the Anglican Church and its sale by the Church to the Crown nearly 70 years later. The complainants say that Ngati Whatua were prejudicially affected by the actions of the Crown in vesting part of the tribal land in the Anglican Bishop of Auckland without ensuring its return to them if it ceased to be used for the

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purpose for which it was given and then, in 1925, passing a law providing for its sale to the Crown.

12.16.2 We have earlier traversed the circumstances in which the Deed was made and the gift effected (4.3) and the subsequent acquisition of the church property by the Crown in 1926 (6.5). We here recapitulate the essential elements in the two transactions

- In or about 1837 a chapel was built at Orakei and by 1844 a school was operating under a native teacher. As was usual the chapel and school were built and staffed by local Maori under missionary supervision.
- The chapel and school were, in fact and in law, the chapel and school of the Ngati Whatua people.
- In 1858 Te Kawau and another Maori leader Keene executed a Deed of Gift pursuant to the New Zealand Native Reserves Act 1856 which enabled Maori land to be given for church purposes.
- The Deed of Conveyance to the Crown written in the Maori language, acknowledged the purpose of the gift, to provide for a chapel, a burial ground and *the* school (italicising here and below has been added). The official translation changed this to read “a site for a church, for a burial ground and for the endowment of a school.”
- When the land was conveyed by the Crown to the Church by Crown Grant No 14422 the land was vested in the Bishop of New Zealand “upon trust as a site for a Church and Burial Ground and as an Endowment *for schools for the benefit of the Aboriginal Inhabitants of the Colony of New Zealand*”.
- While the Grant followed the form of others made at that time it did not follow the pact with Te Kawau and Keene as evidenced by the Deed nor did it follow Maori custom.
- Under Maori custom the land would have been given to secure a church, burial ground and a school for the people, not a church, burial ground, and a school for the Church, and the people in this case being Ngati Whatua, not all Maori.

12.16.3 The question arises whether Ngati Whatua were prejudicially affected by the act of the Crown in conveying the land deeded to the Church in terms significantly different from that intended by the donors. The further question is whether in so doing the Crown acted inconsistently with the principles of the Treaty. Our short answer to each question is, Yes.

12.16.4 Under Maori customary law the Ngati Whatua people, in donating land for a church, burial ground and the school, did so in the expectation that the land would be so used; that the donee, the Church, would honour the mana of the giver by fulfilling the terms of the gift and, should that no longer be possible or appropriate, then the gift would terminate and the land return to the donor. See N Smith, (1960:102–103) where the ingredients necessary to constitute a complete gift of land according to Maori custom are stated

- (a) The donor must have sufficient right to make it;

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- (b) The gift must have been widely known and publicly assented to, or tacitly acquiesced in, by the tribe;
- (c) The donee or his direct descendants must have continued to occupy. Smith further states that where a donee died without leaving children, or having children, they or their descendants failed to occupy or perform any conditions attached to the gift, the land reverted to the donors. The failure by the Church to occupy and use the land for the purposes stipulated in the Deed of Conveyance to the Crown signed by the donors Te Kawau and Keene resulted therefore in an obligation on the Church to secure the return of the land to the donors, that is, to the Ngati Whatua people of Orakei.

*12.16.5* The Crown Grant to the Church was in terms quite different from Te Kawau's Deed. The land was to be an endowment for schools for all Maori not, as was clearly stated and intended, an endowment for a school for Ngati Whatua people only. The consequence was that whereas the terms on which the land was endowed were no longer honoured by the Church and hence the Ngati Whatua people could expect the land to be returned, the Church honoured the extended (but unwarranted) terms of the Crown Grant. This is clearly to the prejudice of Ngati Whatua.

*12.16.6* The Preamble to the Treaty speaks of the anxiety of the Crown to protect the just rights and property of the Maori people. Article 2 as we have seen guaranteed their mana over their lands in accordance with their traditions and customs. We believe the Maori custom in respect of gifts of land and its return in appropriate circumstances, falls within the broad ambit of this guarantee. The Crown failed to protect the interests of the Ngati Whatua by enlarging and significantly altering the terms of the Maori Deed in its grant of the land to the Church. In so doing it acted inconsistently with its obligation under the Treaty to protect the rights and property of Ngati Whatua and in particular failed to ensure that the Maori custom in respect to gifts was protected. The Crown had no legal or other justification for deviating so significantly from the terms of the Deed of Gift in its Grant to the Church.

*12.16.7* Early in 1920 the Crown, as part of its on-going programme to purchase the Orakei Block approached the Church with an offer to buy the 4 acres. Lengthy negotiations ensued. These were detailed in evidence before us by the Bishop of Auckland the Right Reverend Bruce Gilbert and Mr J E Towle, Chancellor of the Auckland Diocese. Mr Towle told us that initially the differences between the terms of the originating Deed in Maori and the terms of the Crown Grant were of no consequence. However, as years passed the land ceased to be used for a church or for a school. Instead, as we have earlier related (6.5) the land was occupied for many years down to the mid-1930's by several Maori families in houses and whare which they had erected on the land no doubt in the belief that the land had "returned" to them. Mr Towle informed us that from the time the Church was approached by the Crown in 1921 until the Crown actually acquired the land from the Church in 1926 and thereafter up until recently, the Church saw its responsibility with regard to the land and the trusts imposed upon it definitively and exclusively expressed

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in the Crown Grant. He told us that the Church at all times considered only its obligations under the law to deal with the land and to be responsible as trustee for it within the terms of the Crown Grant. No reference appeared to have been made to the narrower purposes set out in the English translation of the Maori Deed of Gift nor to the still narrower purposes of the Maori Deed of Gift. Mr Towle confirmed that the Church did not consult with Ngati Whatua on these issues. Without doubt, he said, they would have been opposed to the sale. He further told us that if the four acres were still under the control of the Church and the circumstances of use and occupancy were still the same as those pertaining in 1926, the Church would be seeking to change the terms of the Crown Grant in order to be able to make the land available in some form to Ngati Whatua since the original purpose of the gift had long gone. With the wisdom of hindsight Mr Towle said, the Church considers that it ought not to have sold the 4 acres to the Crown.

*12.16.8* But the Crown was anxious to acquire the land. It promoted a special legislative enactment (s7 Reserves and Other Lands Disposal and Public Bodies Empowering Act 1925) which expressly empowered the Church at Auckland to sell the land (4 acres 36 perches in all) to the Crown and to invest the proceeds in the same trusts as were contained in the Crown Grant. Dr David Williams submitted on behalf of the claimants that s7 of the 1925 Act was a form of “compulsory acquisition” which ruled out any consideration whatsoever of the terms of the original gift from Ngati Whatua to the Church from the Maori perspective of a continuing relationship between donor and donee which, if brought to an end, should precipitate a return of the gift. He claimed that the legislation prejudicially affected part of Ngati Whatua’s tribal endowment in Orakei.

*12.16.9* We have already found that the Crown, in enlarging the terms of the Trust without the consent of the Maori owners did so in a way which infringed the Treaty. In 1925 it promoted legislation to enable it to acquire the land from the Church apparently regardless of the terms on which it had been gifted to the Church. Both the Crown and the Church failed to consult with the Ngati Whatua people who, had they known of what was intended would have expected the land to be returned. We find that the passage of s7 and the subsequent acquisition of the land exacerbated the earlier breach and was inconsistent with the Crown’s Treaty obligations to protect Maori interests and to ensure return of the land to the Ngati Whatua people. The only consolation to the Ngati Whatua people is that some 130 years after Te Kawau’s Deed of Gift in 1858 a small part of the land, the urupa comprising 1120 square metres, has finally been returned to them (No 3 in appendix III).

## 12.17 The Battery Reserve

*12.17.1* The claimants have complained of the taking by the Crown of parts of Ngati Whatua land for defence reserves and of the failure of the Crown to return them when they were no longer needed for defence purposes. The land in question is in two parts. One being land acquired by the Crown for a battery reserve at Bastion Point; the other at Takaparawha Point also acquired



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for defence purposes. The circumstances surrounding the acquisition of these two pieces of land, and the Kohimarama Rock, are detailed earlier in this Report (4.4). It is convenient to consider each in turn. We consider first the Bastion Point land taken for defence.

12.17.2 By Proclamation dated 26 August 1886 the Crown took some 5.27 ha for defence purposes

- The land so taken was situated on the headland at Orakei known at the time as Kohimarama Point but later as Bastion Point.
- At the time it was taken the land was in the name of Paora Tuhaere as trustee in terms of the Orakei Native Reserves Act 1882 for the 13 beneficiaries and their successors.
- On 5 August 1889 compensation amounting to \$3000 was awarded for the taking of the land.
- The compensation moneys were largely absorbed by survey costs in an earlier survey of the land.
- The defence status of the land was revoked in 1941 and the area handed to the Auckland City Council to administer as a reserve.

12.17.3 The land was taken compulsorily by the Crown in 1886. Paora Tuhaere, as we have related (4.4), had promoted a Bill in the House of Representatives which would have enabled him to subdivide and lease the resulting sections for housing. On the face of it the Crown's action in compulsorily taking this land appears to be in clear breach of Article 2 of the Treaty which requires the consent of the Maori proprietors to any disposition of land. At the same time the Preamble to the Treaty speaks of the anxiety of the Crown not only to protect the just rights and property of the Maori but also to secure peace and good order. It is arguable that the sovereign act of the Crown in taking land for defence purposes with a view to securing peace and good order is acting for the benefit of all citizens, Maori and European alike, and is not inconsistent with the principles of the Treaty. For reasons which follow we do not find it necessary to decide this issue. It may be that, should a similar need arise today, having regard to Maori sensibilities to the involuntary loss of their land, the Crown might seek to lease rather than acquire ownership of the land. Any such lease could be for the estimated time of the works with a right of renewal for the full term of the works relating to defence.

12.17.4 In this case, as we have seen (9.5), the Battery reserve land at Bastion Point was, along with other land, the subject of negotiations between representatives of Ngati Whatua at Orakei and the Crown which led to the settlement incorporated in the Orakei Block (Vesting And Use) Act 1978. The other land in question was the 10 acre exchange block which was compulsorily acquired by the Crown under the Public Works Act 1950. The exchange block owners' claim was based on the principle that land compulsorily taken, and not used for the purpose taken, should be returned. While the owners could not point to any specific statutory authority which required the return of such land, s436 of the Maori Affairs Act 1953 had long provided a

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mechanism whereby Maori land so taken and no longer needed, could be returned to the descendants of previous owners. (The exchange owners, it will be recalled, sought the return of the ten acre block not to themselves but to all the Ngati Whatua people of Orakei). Moreover, in 1975 the statutory provision was strengthened; land, “no longer required for any public work” being changed to land “no longer required for the public work, or other public purpose for which it was required or is held.”

*12.17.5* It was considered that the same principle applied to the Battery Reserve land taken by the Crown in 1886. This too, it was claimed, should have been returned. However a significant part of this land was now the site of the M J Savage Memorial. It was thought inappropriate to claim that land. Instead other land was sought in lieu of the Battery Reserve land by way of equivalence. The Crown agreed to this.

*12.17.6* We have expressed reservations as to whether compulsory acquisition by the Crown of Maori land is, in all circumstances, inconsistent with the principle of the Treaty of Waitangi which envisages the disposition of such land only with the consent of the owners. We are mindful of the fact that in relation to the Battery Reserve land of 5.27 ha, a settlement was reached with the Crown in 1978 and other land vested in the Crown was made available to Ngati Whatua. In all the circumstances we do not propose to recommend that the Battery Reserve land of 5.27 ha should now be returned to Ngati Whatua. In coming to this view we are mindful that the land returned by the Crown in lieu of the Battery Reserve land, was land which came into the hands of the Crown through a series of breaches of the Treaty commencing with that associated with the enactment of the Native Lands Acts of 1865 and 1867. It was tainted land.

## 12.18 The Acquisition of Takaparawha Point

*12.18.1* We have described (4.4) how in 1859 the Port of Auckland was thought to be in imminent danger of an invasion by Russian forces and how Apihai and others agreed to give to the Crown for defence purposes some 9 acres at Takaparawha Point. The gift was expressly made on the basis that the land would revert to the Ngati Whatua if it were no longer required for defence. In the event a battery was built closer to the city and the land was not at that time taken up by the Crown. It was included in the 1869 Orakei Block award. Not until the First World War did the Crown again become interested in the land for defence purposes. It was purchased for this purposes in 1916.

*12.18.2* The purchase by the Crown resulted from a meeting of assembled owners. Votes were counted according to shareholding. Eleven owners voted for sale, fourteen against but as the sellers held a majority of shares their will prevailed over the majority who opposed the sale. At 6.2 we explained how the land of two leading non-sellers became sold—Otene Paora and Te Hira Pateoro. Otene had fewer shares than he would have held had Uruamo not been excluded by Chief Judge Fenton’s order of 1869. Had Uruamo not been

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excluded the vote would have been different and the sale would not have happened.

*12.18.3* The procedure for the sale of land by assembled owners was authorised by Part XVIII of the Native Land Act 1909. It was developed to facilitate the sale of land owned jointly by a number of Maori. It necessarily meant that a minority of shareholders, if opposed to a sale favoured by the majority with a majority shareholding, would be deprived of their land without their consent. Even a majority of shareholders opposed to a sale if, as was here the case, they did not own a majority of shares would find their interest in the land sold without their consent. This unwilling and involuntary disposition of shareholders' interests in their land is clearly inconsistent with the protection afforded by Article 2 of the Treaty.

*12.18.4* In this particular case, with New Zealand being heavily involved in the First World War, it is very probable, had a majority in value of interests declined to sell, that the Crown would have taken the land compulsorily for defence purposes as it had the Battery Reserve at Bastion Point. Had it been so taken it would no doubt have been the subject of a claim in 1978 along with the Battery Reserve land which the Crown had failed to return after it was no longer needed.

*12.18.5* Underlying any consideration of the acquisition of this land by the Crown is the shadow that lies over the title of the owners who did agree to sell. We have given an instance of this (12.18.2). But not only Uruamo was excluded for this was part of the land the subject of Chief Judge Fenton's 1869 Order. We have earlier found (12.2.7) that the omission of the Government of the day to take prompt remedial action left the Judge free to act in a way which deprived the great majority of the Ngati Whatua people of their interest in the Orakei land involuntarily and without their consent, this being in clear breach of the Treaty. And so, in 1916, we find a majority of those members of Ngati Whatua who did succeed to interest in the land, again being deprived of their land without their consent.

*12.18.6* The claimants say that, given the reasons for the acquisition of the land at Takaparawha Point, the Crown was in any event under an obligation to return the land to the Ngati Whatua people when some 30 years later in 1946 it found it no longer needed the land for defence purposes. Instead, it vested the land in the Auckland City Council as a reserve. We believe the cumulative effect of the various considerations we have enumerated is such that the Crown should have returned the land at Takaparawha Point. But in so finding we must bear in mind that the Crown did pay for the land in 1916.

## 12.19 The Failure to Secure a Marae Site

12.19.1 Under this heading we consider two related claims by the claimants. They relate to alleged policies and practices of the Crown of

- Failing to secure land for us as a marae, and giving land proposed for us as a marae, to other persons, for a national marae;

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—Failing to heed our numerous petitions to spare our papakainga from the buying, to reserve us land for a papakainga, and to reserve land for our marae.

We will also consider the claim that the Orakei Marae should now be vested in the Ngati Whatua Trust Board.

12.19.2 We consider first the provision of a new marae site. We have related (8.4) how, when the marae buildings on the papakainga at Okahu Bay were demolished, the Crown, late in 1952, offered a new site for a marae at Bastion Point behind what is now Kitemoana Street. And we explained why the people refused it. At the risk of over-simplifying the involved and confusing legal and related developments, we attempt here to summarise the essential elements in the events leading to the creation of a new marae at Orakei.

12.19.3 (a) The Crown offered land as a site for a new marae on Bastion Point.

- (b) Ngati Whatua people refused it. The sanctity of the old site made it irreplaceable.
- (c) The Crown nevertheless persisted and in 1954 one acre 19 perches was set apart “as a reserve for the use and benefit of Maoris” under the Land Act 1948.
- (d) There is no significance in the fact that the gazette notice referred to “Maoris” and not “Ngati Whatua”. This was standard drafting to conform with the Maori Affairs Act. It is left to the Maori Land Court to define with more particularity the precise Maori entitled after being informed of the Crown’s intent. There is no room for doubt that the Crown, having expelled Ngati Whatua from their former marae, intended to provide an alternative site for them. This is confirmed by the action of the Crown in applying for an order under s437 of the Maori Affairs Act. This section provides a mechanism to divest the Crown of land held for Maori in a way which leaves to the Maori Land Court the responsibility for selecting owners and representatives or trustees. If the Crown had intended a multi-cultural marae in public ownership and control it would not have used s437 but alternative provisions in the Reserves and Domains Act 1953.
- (e) The Crown’s application was first heard in 1955. We would have expected the representative of the Minister of Lands to have advised the Court that the land was for Ngati Whatua of Orakei. Instead, the Court was advised some matters had still to be settled and the matter was adjourned.
- (f) Meanwhile, pressure had developed from various quarters, including other Maori, Polynesians, Europeans, and local authorities for a marae for “all Maori” and for “Auckland”. A pan-tribal and multi-cultural marae was proposed for the Orakei site but the acquiescence of Ngati Whatua, as the tangata whenua, was needed.
- (g) Eventually, Ngati Whatua gave way. Notwithstanding the newly emerging groups, and their new activities, there remained traditional obligations on Ngati Whatua as tangata whenua. These obligations they were

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in no position to meet. Not only were they struggling for their own survival, but they had no marae from which they could perform their customary duties or maintain their customary mana and nor were they in a position to build one. To extricate themselves from an embarrassing situation, they became compelled to accept the proposals.

(h) At a resumed Court hearing in 1959 the Court was advised that a multi-cultural marae for Auckland was proposed, to be funded by joint Maori and European endeavour and that the people of Orakei had “resented the proposals at first” but had recently agreed to “other Maori” coming into the trusteeship. It was thought Ngati Whatua would still retain the “natural control”. In the event the Court appointed fifteen trustees representing various interests, including four from Ngati Whatua to hold the land for the benefit of “Maoris”. The question of which Maori was left unanswered.

(i) In 1974 and 1978 the marae site was extended. For reasons which we have already stated (8.4), there is now confusion

—the original area is held “for Maoris” but the additional lands are held for “all Maoris”.

—the original area is vested in individual trustees; the additional lands are vested in a non-existent Board in respect of a ‘Reserve’ which is not a Reserve.

However the Minister of Lands has accepted that all the land is Maori land. It now forms one marae complex.

(j) Subsequently a new marae was built, not by Ngati Whatua but with the help of some of its members (see 8.6). To Ngati Whatua humiliation it became known as “the Pakeha marae”, administered largely by outsiders but by virtue of location clearly associated with them. From the naming of the building for the Ngati Whatua ancestor, that association was confirmed and Ngati Whatua of Orakei could no longer have a commitment to any other site.

12.19.4 It is clear to us the Crown did not reserve the land for a multicultural marae for all people. It specifically declined to make that averment in Court when challenged to state for whom the land was reserved. It is abundantly clear the marae site, when it was first reserved in 1954, was meant for Ngati Whatua to replace the old site at Okahu Bay. We are of opinion that if in 1959 it was convenient to change that intention and create a multicultural marae for all people, then it would have been necessary to cancel the 1954 designation and create another type of reserve under the Reserves and Domains Act 1953 without the involvement of the Maori Land Court. The failure to adopt that course is not a mere procedural technicality. It would have brought to a head the issue as it stood in the 1950s. The avoidance of that issue by a specious argument that ‘Maoris’ meant ‘all Maoris’, the extension of that to mean ‘all people’ and the unfulfilled promise that the ‘natural control’ would remain with the local people, was to deny Ngati Whatua its proper entitlement. The vesting of the initial area in ‘Maoris’, does not determine the

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question of 'which Maoris', and since the question must be determined by reference to the intention of the Crown in 1954, when the area was gazetted, the reserve ought properly to have been vested in trustees exclusively for Ngati Whatua. The 'added' areas, being intended for the same persons as held the initial area, ought also to have been vested in trustees exclusively for Ngati Whatua.

*12.19.5* We must now consider whether, as the claimants say, the Crown acted contrary to the principles of the Treaty of Waitangi, by adopting policies and practices which failed to secure for Ngati Whatua a marae at Orakei and in giving land proposed for them as a marae to other persons for a 'national marae'. At the outset we should record that Ngati Whatua resisted to the end the taking by the Crown of their marae at Okahu Bay which they held sacred and inviolable. It was situated on part of the papakainga on an area of 1.5 acres in multiple ownership. It was taken by the Crown against the wishes of Ngati Whatua by proclamation in 1951 for the purposes of a 'recreation ground'. It was nearby the ancient burial ground which, along with the Church, alone was spared by the Crown.

*12.19.6* It could be argued on behalf of the Crown (although no such argument was in fact made to us) that Ngati Whatua chose not to accept the alternative marae site offered it by the Crown and having so elected cannot now be heard to complain that it came to be developed as a multi-cultural marae. It is perhaps not surprising that no such argument was put to us for the Crown's action in clearing the traditional marae site against the wishes of the people reflected a degree of insensitivity to traditional Maori values and to the deeply held reverence for and commitment to the marae at Okahu Bay that, 30 years later, is difficult to comprehend. Such action was incompatible with the obligations of the Crown under the Treaty of Waitangi. We believe the Ngati Whatua people should not now be prejudiced because they resisted to the end the taking of their marae and for some years after the event continued, vainly, to hope for its return. Their refusal of the alternative site and their protracted reluctance to cooperate in the development of a multi-cultural marae was not merely understandable; given the depth of their feelings it was inevitable.

*12.19.7* The only objections to the transfer of the control of the marae to Ngati Whatua, and to the Ngati Whatua Board, came from P Rikys, former Director for the Education Centre and member of the Marae Development Council, M C Boyce, a member of the Marae trustees and Education Centre, and others of the Education Centre. Apart from P Rikys and M C Boyce the others seemed primarily concerned that whatever happened, co-operation between the Board and the Centre should be maintained and that the Centre should continue to have an association with the marae. Rikys and Boyce were the principal objectors and were mainly concerned with the public subscription of funds to the buildings. M C Boyce submitted that for that reason, the 1959 'constitution' should be maintained. P Rikys contended a change to the 'constitution' would represent a fraud on the public that gave. There were no other objectors despite the public and individual notices given including notices to the members of the marae trustees and former members of the

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Development Council who represented various civic interests. Several spoke in support of the transfer of the marae to Ngati Whatua including the chairman of the marae trustees.

*12.19.8* We consider a change to the current constitution would not represent a fraud on the general public that gave—rather, the reverse applies, the failure to accept Ngati Whatua control more likely represents a fraud on Ngati Whatua. For the general public gave for a marae, and as I H Kawharu said “a marae is a marae is a marae”. It is a place where matters are ordered on Maori terms, and a marae at this locality could be ordered on no other terms than those of Ngati Whatua. The trouble was that this marae, developed to further cultural understandings we were told, was putting down the very cultural understandings it was meant to maintain.

*12.19.9* Certainly it was also said, in the Development Council’s publicity material of the time that the marae was held “for the benefit of the entire Auckland community and for all Maoris in New Zealand (Maori Land Court Order 1959)”. That was not said by Ngati Whatua, and was a blatant misrepresentation of fact. But even were it true, Auckland benefits from its tangata whenua having a proper marae of their own so that they as founding partners of the city can contribute to civic occasions. So also all the Maori in New Zealand benefit for it is important that in visiting Auckland they should acknowledge first the marae of the tangata whenua.

*12.19.10* Closer to the point was another message in the public brochure that the marae would be a place where Ngati Whatua “could act fully in their host capacity”. The trouble was that that message was nearly forgotten in the take-over of Ngati Whatua culture that followed.

*12.19.11* Several kaumatua of Ngati Whatua spoke on the significance of a marae in their culture. We will endeavour to summarise what was said, drawing in particular from the eloquent address of Rev Maori Marsden. He described the marae as the focal point of every Maori village. Village customs and traditions are rootless and meaningless without a marae, for while Westerners are accustomed to the severance of civic activities to a variety of buildings, for the Maori the marae was at once his Parliament, Church, reception centre, theatre, school, business house and community hall. Hapi Pihema added

The marae is the repository of my kawa (procedural rules), history, legends, art, culture—my very Maoritanga. It is not just a carved house.

*12.19.12* The marae illustrates a customary predilection for belonging as distinct from owning. In olden times a Maori did not own land, but belonged to it. In similar vein he belonged to a family that belonged to a hapu that belonged to a tribe that belonged to the marae. Complementing the marae is the meeting house usually named for an ancestor common to all the villagers. He is usually depicted on the gable of the roof. In the Maori world where things unseen are as real as those seen and symbols maintain an interaction between the living and dead, the meeting house is the living body of the ancestor. The ridge pole (tahuhu) is his backbone, the rafters (heke) his ribs.

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One enters into the bosom of the ancestor through his mouth (kuwaha or door) and sees out through his eyes (matapihi or window).

*12.19.13* In this way the sense of belonging, perfected in the ancestral house, is carried beyond the world of the living to the spirit world that pervades the Maori past, present and future. For the Maori it is important that funeral rites (tangi) are conducted at ancestral marae for there the tribal living and dead meet to greet and care for each other.

*12.19.14* It does not follow that those not linked to the common ancestor have no place on a marae. The carved wallposts (poupou) of meeting houses depict ancestors of other tribes enabling those from a distance to be at home. Visitors may prefer to sit or sleep beneath their own ancestral wallpost. Here it is necessary to distinguish visitors and those who have come to live or work amongst the villagers. The latter, in the good course of time, may become 'adopted' into the tribe. Some may be asked to sit on the marae paepae, or seat of authority, in order to welcome visitors. It is usual they do not ask for that right, but that it comes about, if that seems appropriate, in the good course of time.

*12.19.15* Visitors are accorded a special place. The locals are known as tangata whenua (those of the land) and have turangawaewae (a right to stand). Visitors are known as waewae tapu (those whose feet are sacred) and are received according to a particular ritual. There is one paepae (speaking place and seat of authority) for the local people and another for the tangata heke, or visitors. Inside the house there is a place for hosts and a separate place for guests, at least until the formalities are over.

*12.19.16* The sameness of the 'one people' syndrome is not presumed. The presumption is the other way round. The distinction between tangata whenua and others is maintained and people are expected to know their different places and roles. In Maori thinking it does not follow that divisions result. Everyone is welcome on a marae but in pragmatic terms, everyone is thought to belong to someone. It would be presumptuous to think otherwise. It is not just the individual visitor who is respected and welcomed, be he Maori or European, but the visitor's family, tribe or people, whether they are with him or not. Conceptually, in the Maori view, unity is sought by respecting differences, and the separate mana (status) of those different groups or families to which we individually belong. It is seen as more important to respect differences and negotiate the bonds that bridge them. The protocol of a marae is directed to that end.

*12.19.17* Above all else it is the mana of the tangata whenua and the ancestor of the local people that must be respected. This is one place where the locals have standing as of right. Today it is even more important. Here the tangata whenua take a front place and matters are ordered on their terms. On a marae the tangata whenua cease to be a mere minority in a society predominantly European or confused by tribal mixing.

*12.19.18* That was the culture to which Aucklanders contributed. It is because the marae belongs or should belong to Ngati Whatua that it belongs in a sense to Auckland, that they might acknowledge the history, culture and traditions



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of the people who helped found a settlement on their lands. No one had the right to take that culture from Ngati Whatua or to presume to direct it. The culture, and tribal marae were guaranteed by the Treaty of Waitangi.

*12.19.19* We have no hesitation in recommending that the Orakei marae be now vested in the Ngati Whatua Board. We feel strongly that it would be grossly wrong not to do so. That change, we consider will be to the advantage of “all Maoris”, and the public of Auckland, in helping them to recognise the rightful place of Ngati Whatua in the city’s affairs. It should ultimately benefit the Education Centre too in our view, for it must recognise the full significance of both cultures to continue its otherwise well earned association with the marae.

## 12.20 Desecration of the Papakainga

*12.20.1* We consider now the complaint of the claimants that the alleged policies and practices of the Crown resulted in it “failing to prevent the desecration of our papakainga by enabling the use of the former papakainga as Domain without adequate safeguards as to how and by whom it shall be used.” The former papakainga is now part of the Orakei Domain, in grassed open space administered by the Auckland City Council under the Reserves Act 1977.

*12.20.2* Complaint was specifically made of the use of this land for a circus with temporary public urinals being placed immediately adjacent to the urupa. The Auckland City Council licensed its use for circus purposes without any liaison with the tangata whenua. Ngati Whatua were powerless to intervene despite their strong objection to the perceived desecration of their former papakainga.

*12.20.3* We have seen that the Crown acquired part of this land compulsorily and in breach of principles of the Treaty of Waitangi. Given the nature of the site and the veneration in which it was then and is still held by Ngati Whatua, the Crown might reasonably have been expected, in vesting its administration in the Auckland City Council, to have imposed some restrictions which would have recognised the special nature of the site and the mana of Ngata Whatua over it. It is not too late for remedial action to be taken.

## 12.21 State House Purchase Rights

*12.21.1* The claimants further complain of policies and practices of the Crown “requiring those of us provided with housing in Orakei to live as State tenants and not enabling us to obtain freehold titles (though permitting other State tenants in Orakei to do so)”. For reasons which we now give we are not satisfied that this complaint is made out.

*12.21.2* Information was supplied to us by the Housing Corporation of New Zealand. The following are the principal facts which emerge from the evidence we received:

- The purchase by State tenants of their homes was first introduced in 1950.

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- Since then the policy has operated “on and off” depending on the Government of the day.
- The houses subsequently vested in the Ngati Whatua of Orakei Maori Trust Board by the 1978 Act were available for sale at all times there was a sales policy in operation.
- Several Ngati Whatua tenants applied to purchase their respective State homes. Copies of applications and associated papers were produced by the Housing Corporation in respect of applications made in 1952, 1954, 1956, 1963, 1970 and 1973. Offers to sell the houses were made by the Housing Corporation in most cases; no sales were concluded for a variety of reasons (offers not accepted, offers lapsed, likely sale prices indicated that the purchasers would be unable to meet outgoings). We were informed, and we accept in absence of evidence to the contrary, that in no case was a sale declined because the houses in question were being dealt with on a basis different from state houses occupied by other tenants.
- For a time between 1974 and 1976 the Housing Corporation was not selling State houses, and it also considered the housing occupied by Ngati Whatua should be retained for Maori housing, which could not be guaranteed if existing Maori tenants purchased their houses and on-sold them to non-Maori. The earlier policy of sales to tenants was however resumed in 1976 following a change in government.

*12.21.3* We deduce from the evidence that in a number, if not most of the cases where tenants did not accept an offer to sell from the Housing Corporation, it was because the outgoings including the need to meet rates and repairs, were beyond the financial resources of the prospective purchasers. In the result, they along with other tenants, if they have remained in occupation over the past 30 or more years will, as the Housing Corporation indicated, have paid appreciably more by way of rent than they would have paid had they been able to afford to purchase their State homes. This will almost certainly be the case with some of the two hundred or so other tenants of state houses at Orakei who have not purchased their homes.

*12.21.4* We nonetheless appreciate the tenants’ concern to obtain some degree of ownership of ‘their’ homes and consider that may now be practicable. The properties are now vested in the Ngati Whatua Board which may lease but not sell. It is practicable for the Board to sell tenants ‘their’ buildings, converting tenancies to residential leaseholds, while existing restrictions on assignments, in the current Orakei Act, would continue to restrict user to within the tribe. The conversion of house rents to ground rents, the lessee’s paying maintenance and rates but owning their homes, is feasible, though current rents are so low that the result would represent an increased outgoing for the current occupiers, and satisfactory terms would need to be agreed.

## 12.22 The 1978 Settlement

*12.22.1* We come now to consider a further claim relating to alleged practices and policies of the Crown in “failing to give adequate recompense for our losses in the Orakei Block (Vesting and Use) Act 1978 or to make adequate enquiry into all the circumstances of our losses throughout Orakei Block having regard to the Treaty between our tipuna Apihai Te Kawau and the Crown in 1840.” The claim before us, the Orakei claim, effectively reviews the 1978 settlement in light of the principles of the Treaty. Accordingly we need not examine the specific claim, that the 1978 settlement was inadequate, at least in isolation. We consider instead two questions arising from it, whether those who were parties to it had authority to bind the tribe and whether the settlement was meant to be in full and final satisfaction of everything.

*12.22.2* In preceding chapters 8 and 9 we have detailed the events which culminated in the passage of the Orakei Block (Vesting and Use) Act 1978, here referred to as the 1978 Act. It is not possible to reach any view on the complainants’ grievance in respect of the 1978 Act without having regard to the complex often conflicting claims of the three principal parties involved namely, the Crown, the majority of the elders of Ngati Whatua at Orakei and the protestors led by the Orakei Maori Committee Action Group. Also involved were the Auckland City Council, environmental groups and other interested citizens. The protest action had its genesis in an announcement on 19 November 1976 by the Minister of Lands of broad proposals for the use of the 60 acres of uncommitted Crown owned land at Orakei. It is useful here to recall the locality of this land which we referred to in 8.1. The Crown in 1951 after acquiring the 10 acre exchange block and the remaining papakainga land held some 174 acres of open space comprising

- Thirty seven acres of headland at Bastion Point which became consolidated as part of the Orakei Domain under the name of M J Savage Memorial Park (administered by the Auckland City Council) (Nos 19, 20 appendix III).
- Forty three acres of headland subsequently known as Takaparawha Park which became part of the Orakei Domain (administered by the Auckland City Council) (No 21, appendix III).
- Thirty four acres of land at Okahu Bay comprising the former papakainga and which became part of the Orakei Domain (administered by the Auckland City Council) (Nos 18, 23, 28).
- Sixty acres of uncommitted Crown lands in an elevated position behind the headland parks, much of it with commanding views of city and harbours (Nos 29–31, 103–113).

Much of the subsequent history of Orakei is concerned with the areas of uncommitted Crown owned land.

*12.22.3* We propose here briefly to recapitulate the principal events (earlier described in some detail in Chapters 8 and 9) which led up to the Act of 1978. Again, we incur the risk of over-simplification, and what we here record must be read in the light of our earlier detailed narrative:

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- On 19 November 1976 the Minister of Lands announced plans for the uncommitted 60 acres of Crown land; 17 acres was to be for private housing; 1 acre for a Youthline Hostel; 22.5 acres to be added to the Orakei Domain; the remaining 19 acres around Kitemoana Street to be the subject of further investigation.
- In February 1977 the Crown advised that of the 19 acres under investigation, 7 acres were to be for Maori housing and reserves; the remaining 12 acres would be added to the 17 acres earlier assigned for private housing making 29 acres (about half) available for private housing.
- Even before the February 1977 announcement there was widespread opposition to the Crown's proposals from a variety of sources including those who objected to the prospect of high cost private housing when the perceived need was for low-cost housing; from environmentalists who wished to preserve the existing open spaces; from local residents whose views and outlooks would be adversely affected.
- The Orakei Maori Committee was emphatic in its objections. It sought:
  - (i) The transfer of the Orakei Marae to Ngati Whatua control;
  - (ii) The uncommitted 60 acres and in addition, the parks within the Domain to pass to a Ngati Whatua Board but with the developed parks to be administered as public reserves;
  - (iii) The Maori State tenants to have title to their houses (as being already paid for in rents), and
  - (iv) The Youthline site to be used specifically for Maori youth.
- On 5 January 1977 an Action Group of the Maori Committee led by J P Hawke and J Rameka occupied the uncommitted Crown land and remained in occupation for some 506 days.
- On 14 January 1977, at the initiative of the former owners of the 10 acre exchange block, a claim was formulated which sought:
  - (i) The 10 acre exchange block which had been compulsorily acquired by the Crown "for housing purposes" but never built on by the Crown to be returned, not to its former owners, but to the Ngati Whatua people as a whole;
  - (ii) In exchange for the Battery reserve which had been compulsorily acquired for defence purposes but was no longer used for that purpose, the Crown to transfer to Ngati Whatua a roughly equivalent acreage in Kitemoana street;
  - (iii) Both pieces of land to be vested in a tribal trust to house Ngati Whatua at Orakei;
  - (iv) An adjustment be made between the value of the Bastion Point and Kitemoana sites with a compensating payment (in the event fixed at \$200,000) to be paid by Ngati Whatua to the Crown. The guiding principle was one of "equivalence".
  - (v) Although part of the papakainga site had also been taken compulsorily by the Crown no claim was made in respect of that land as it was

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thought the land was being used for the purpose for which it had been taken.

(vi) The claims were based on legal not moral grounds.

- At a meeting of the tribe on the evening of 14 January 1977 representatives of the Maori Committee Action Group strongly dissented from the exchange block owners' proposals. It was claimed (among other things) that by limiting the claim to land taken and not being used for the purpose it was taken, it discounted any claims in respect of anything else and ignored all moral obligations on the Crown to return other land to Ngati Whatua. In the result, while the exchange block owners' proposal was acceptable to most elders, conforming as it did to legal concepts without reliance on moral claims, and being consistent with working within the law, it was unacceptable to the Action Group.
- From January 1977 on until the settlement was reached with the Crown, the "moderates" were led by Piriniha Reweti. The Government was caught in the middle, accused of creating the division by dealing only with the moderates and yet faced with the moderates insistence that the Crown deal only with them.
- Negotiations ensued between representatives of the moderates and the Crown during 1977 and the Minister of Maori Affairs also met with the Action Group leaders at Orakei on 1 July. Seven days later, the Minister of Lands announced that civil proceedings had been filed in the Supreme Court to end the unlawful occupation of Crown land at Bastion Point.
- Following a report of a Joint Planning Study Group in November 1977 matters progressed. In December 1977, Piriniha Reweti sought a meeting with the Prime Minister and the Ministers of Lands and Maori Affairs. This took place in the Auckland Town Hall on 25 February 1978. Two days later the Minister of Lands, having in the meantime consulted with the Auckland City Council, announced a proposed settlement. With some minor variations this was subsequently incorporated in the 1978 Act.
- Most of the Ngati Whatua elders and some forty senior members of family groups were present by invitation at the meeting in the Town Hall. Those not invited included the Chairman of the Orakei Maori Committee, the Action Group and elders or senior members of the Hawke and Rameka families. It is said this was not a tribal meeting and nor was it held at the Marae.

12.22.4 The first question is whether the settlement which emerged at the meeting is binding on the Ngati Whatua people as a tribe. Further and more critical question is whether the meeting accepted the settlement in full and final satisfaction of all claims it might have in respect of the land at Orakei or whether it was a settlement only in respect of the 10 acre exchange block and the Battery Reserve.

12.22.5 We will consider the second more critical question first. Was the settlement arrived at as a result of the meeting on 25 February 1978 intended to be in full and final satisfaction of all claims by Ngati Whatua against the

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Crown in respect of the land at Orakei? In December 1977 Piriniha Reweti wrote to the Prime Minister, the Minister of Lands and the Minister of Maori Affairs a letter, details of which we have set out in 9.5. It is clear from this letter that the claim brought by those he represented.

- (a) Was limited to land taken from them by the Crown and not used for the purpose for which it was taken and
- (b) That there were a variety of grievances, some of which were referred to, for which no remedy was sought because they fell outside (a). The letter concluded with a disclaimer in the following terms

And finally, unless fresh evidence pertaining to the former Ngati Whatua ownership of the Orakei Block is unearthed and upheld in a New Zealand Court of Law we would forego any claims against the Crown at Orakei.

*12.22.6* We consider the following considerations are relevant to the question we have to answer

- (a) The claim was a limited one and related to a relatively small area of land.
- (b) That other grievances existed was made clear.
- (c) The disclaimer was qualified and recognised the possibility that further claims might subsequently be made if they could be legally sustainable in a “New Zealand Court of Law”.
- (d) At the time of the settlement (1978) claims made under the Treaty of Waitangi Act 1975 were limited to Acts or other statutory provisions and policies or practices of the Crown for the time being in force or any act of the Crown done or omitted after the commencement of the Act. The present ability to go back to the date of the signing of the Treaty (6 February 1840) came only in 1985 when the 1975 Act was amended.
- (e) Piriniha Reweti could have had no knowledge or expectation in 1978 that the Treaty of Waitangi Act 1975 would be so radically amended in 1985 by a new Government.
- (f) Neither the Minister’s press release of 27 February 1978 nor, more importantly, the lengthy preamble to, or the 1978 Act itself, claimed that the agreement between the representatives of the Ngati Whatua hapu and the Crown was conclusive of all grievances or intended to be in full and final satisfaction of such grievances.

*12.22.7* We conclude from the foregoing that Piriniha’s letter and undertakings do not preclude a claim being made under the Treaty of Waitangi Act 1975 as amended in 1985. While the Waitangi Tribunal is not a “Court of Law” it does have exclusive authority to determine claims brought under the Act. It would be contrary to equity and good conscience to rely on Piriniha’s undertakings as foreclosing the possibility of claims being made for the remedy of grievances for which no legal provision existed in 1978 but for which provision was later made in 1985. It is not surprising therefore that no such claim was made before us by or on behalf of the Crown.

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12.22.8 Professor Kawharu, a confidant of the elder in his lifetime, agreed Piriniha had not closed the door to a review provided it was under due process of law. The Ngati Whatua Board expressed a similar opinion in a letter to the Tribunal of March 1987 adding that our extended jurisdiction enabled old evidence to be reviewed afresh and in new light, the light of the Treaty of Waitangi.

12.22.9 Finally, on this question, we would emphasise that when considering the claims before us, regard should properly be given to the terms of the agreement evidenced by the 1978 Act, which was reached in good faith by the Crown with representatives of Ngati Whatua who were reasonably regarded as having authority to speak for Ngati Whatua.

12.22.10 In view of the conclusions we have expressed in the preceding paragraphs it is unnecessary for us to determine the remaining question of whether Piriniha Reweti and those he represented had full authority to bind the Ngati Whatua tribe at Orakei.

### 12.23 Status of Ngati Whatua of Orakei Maori Trust Board

12.23.1 The history of Orakei is the history of a people's persistent attempts to uphold the mana or status of a tribe by seeking on the one hand, the right to tribal ownership of its land and on the other, to speak and socially and economically advance through its own institutions. In 1978, tribal ownership was restored, at least for a small balance of the land, but at 10. 1 we asked, was tribal authority resurrected too on the creation of the Ngati Whatua Trust Board.

12.23.2 We think it was not. Though it was clear to us from the responses we received that the people expected the Board would become the modern embodiment of their traditional tribal authority, we find the authority of the Board is not in fact the full authority of the tribe, for it is severely constrained.

12.23.3 The Trust Board as we see it, is constituted as a Maori Trust Board and as such is simply the caretaker of the assets vested in it by its empowering Act, and the distributor of largesse to its beneficiaries from the resultant profit for the promotion of health, social and economic welfare, education and "such other or additional purposes as the Board from time to time determines". That means, by legal rules, other things of similar social type.

12.23.4 It is disconcerting to us that this should be so. The Board's beneficiaries include all of Ngati Whatua and are exclusive to them, putting paid to the problems associated with the previous statutory body, the Orakei Maori Committee. Only Ngati Whatua can elect Board members and, through an amendment to the Maori Trust Boards Act in 1983, only they can be members of the Board. Yet this Board has no legal standing to speak for Ngati Whatua on all issues. Its authority is limited to the administration of particular assets and profits. In that respect it is more limited than the Orakei Maori Committee.

12.23.5 It is also more limited than other Maori Trust Boards (which are in themselves limited enough). The other Boards can buy land but the Ngati

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Whatua Trust Board cannot (s7(2) Orakei Act). The other Boards can administer other Maori land (s240 Maori Trust Boards Act 1955) but not the Ngati Whatua Trust Board. The Ngati Whatua Trust Board is entirely a creature of statute with only those powers the statute gives it. In this case it has only those powers of other Trust Boards as are not inconsistent with its own Act, and its own Act limits its power to the land vested in it by that Act and to the provision of services and amenities on that land (s4 and s7 Orakei Act).

12.23.6 The Board's position is therefore analogous to that of a Maori Incorporation, the authority of which is also limited to the lands vested in it. That Maori Incorporations may not extend their brief to other interests or enterprises has been long held, as for example in *Proprietors of Taharoa 2C1 Inc* (1961) Wairoa MB Maori Land Court, *Proprietors of Waipiro A13 Inc* (1966) 8 Ruatoria 5B Maori Land Court and *Ngati Whakaue Tribal Lands Inc v Rotorua District Council* 17.2.82 High Court, Rotorua, 436/80. The practical results are, that save for an amendment to its Act

- the Board cannot represent Ngati Whatua on general issues not pertaining to the land vested in it
- it cannot acquire other land, it could not buy further homes at Orakei for example
- it cannot administer other lands, the marae or urupa for example
- it cannot establish and administer a work scheme, education scheme or some form of in-town industry, although it could make grants to others for those purposes.

12.23.7 It is not for us to determine that the Ngati Whatua Trust Board should be the embodiment of the tribal authority but we found no demurrer from the suggestion that it should be, and a great deal of support for that concept. Nor was any reason given to us as to why the Board should be prescriptively constrained. The Treaty of Waitangi requires in our view, that the tribes are entitled to develop their own tribal authorities without undue circumscription. We appreciate that several tribes do not see Trust Boards as the right vehicles for their overall development but we are dealing here with a compact tribe that appears to want that to happen in this case, and to have the Board care for a range of interests including even the administration of its marae, church and urupa. We consider that the Board's authority should not be restricted to the land vested in it by its Act, that it should be able to buy, borrow, lease, manage and the like and should be authorised to represent the tribe in public affairs on all issues arising. We will recommend that the authority of the Board should be re-defined, in its governing Act, in the manner outlined and with such particularity as may be settled in consultation with the Board.

## 12.24 Arrests and convictions

12.24.1 The claimants seek recognition of the personal sacrifices made by the protesters "to highlight the grievances in relation to Orakei", free pardon for all convicted following the arrests of 1978 and 1982, a cessation of any further



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attempts to enforce payment of outstanding fines for trespass convictions and compensation (the amount was not specified) payable to the Orakei Maori Action Committee.

12.24.2 This supplication, more fully set out in Part II of the statement of claim (as printed in Appendix I) has caused us deep concern. The claimants maintain they were prejudicially affected by the injunction proceedings taken against them, the arrests and convictions all of which they consider were contrary to the principles of the Treaty of Waitangi. They said, and we agree, the stand at Bastion Point was the culmination of over 100 years of representations through every proper channel all to no avail. The protest was the course of last resort for a section of Ngati Whatua who were otherwise law abiding.

12.24.3 Before dealing with the main issues, as we see them, we refer to a comment from J P Hawke. He reminded us that in 1976 he was the first applicant to this Tribunal, shortly after it was formed, claiming that his prosecution for a breach of fishing regulations when fishing on Waitemata harbour was contrary to the Treaty. The Tribunal did not investigate the relevant regulations for compliance with the Treaty, but held simply that Hawke was not 'prejudicially affected' as required by the Treaty of Waitangi Act for he had not been convicted and fined but convicted and discharged (*Hawke Fisheries Report 1978*). Well now, he said, prejudice was proven for on the protests he had been convicted and fined! While we now resile from the opinion earlier given and would investigate a claim without any need for an arrest, conviction or sentence, we have nonetheless continued to tread carefully where criminal proceedings are involved. On another claim for example, we decided not to continue with a hearing while prosecutions remained extant in the District Court, though invited by that Court to proceed, lest we interfere with the determination of those proceedings in accordance with law (*Te Weehi Fishing Report 1986*).

12.24.4 We also note at this juncture, with regret, that we did not have full argument on the propriety of this Tribunal addressing the matter of pardons, the authority of the Attorney-General to propose any relief or of this Tribunal to make recommendations to him. We invited the Crown to make a submission on these matters but it did not. However, we did have a written submission from Dr DV Williams of Auckland University Law Faculty. He considered a stay of proceedings too late in the day and urged legislative intervention modelled on s7 of the Tauranga-Moana Maori Trust Board Act whereby "the character and reputation" of certain persons who fought at Gate Pa was made "the same as if a full pardon had been granted to them". The convictions he submitted, added insult to injury.

12.24.5 Some relevant factors we considered were not as clear cut as first appeared.

- (a) To the Crown's credit it sought the Supreme Court injunction only after it had concluded a settlement with certain of Ngati Whatua. From the Action Group perspective however, no settlement was sought with them or the Orakei Maori Committee. The latter had approved the

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protest and was a statutory body with authority to represent the Maori of the district.

(b) The Supreme Court, in a considered judgment determined that the claimants who were party to the proceedings were occupying Crown land without right, title or licence and that no grounds existed for withholding relief on equitable grounds. We incline to the opinion of Professor Brookfield however that the protest was

. . . the culmination of grievances caused by the policies of legislatures and governments, many of the grievances not justiciable and unlikely to have been concluded by a legal judgment which, however sympathetic, simply could not extend sufficiently to the issues of policy involved (Brookfield 1978:383).

In addition of course, the principles of the Treaty of Waitangi had no place in the law at that time, save for claims under the Treaty of Waitangi Act 1975.

*12.24.6* Our approach to this matter has been to consider first the Treaty of Waitangi in relation to Ngati Whatua. The Treaty with Ngati Whatua followed in the wake of the musket and the ‘trespass’ on Ngati Whatua lands, homes and people by certain more northerly tribes. Te Kawau, it will be recalled, sought to end this state of affairs through an alliance with the white settlers in the Treaty of Waitangi, and only months after, he sought the establishment of a township on his lands to the greater security and advantage of both partners. The Treaty itself spoke of peace, order and “the necessary laws and institutions”. In the factual matrix of its time, that reference had particular significance for Apihai Te Kawau and his people of Ngati Whatua.

*12.24.7* Indeed, Te Kawau appears to have appreciated that a pledge to uphold peace and good order sometimes requires adherence to even unpopular laws (at least until the law itself is put right), or a commitment, to borrow a phrase quoted later, “to superior loyalties”. Imprisonment for example, was barbaric to the Maori mind, and as we have seen (4.1) in 1841 Te Kawau was to shelter one of his tribe convicted of larceny; but he was also to relent, returning the offender to custody and calling on his people to accept the white-man’s law and learn more about it.

*12.24.8* That began a Ngati Whatua tribal policy to uphold the law and to work only through legal and proper channels. That policy, as we have seen, was to lead Ngati Whatua through a long series of Court actions and petitions in a bid to save the Orakei block. We need not review those actions again.

*12.24.9* It is sufficient to say here that the Ngati Whatua circumstance indicates the importance of the “necessary laws and institutions” (as so described in the Treaty of Waitangi), and the value placed upon those words by one group of Maori at that time.

*12.24.10* We come next to consider that the law denies no-one the right of protest, protest that is within the law—see for example the 1968 article, *The Right to Protest* (Keith 1968:49). With reference to the Maori protests of the following decades the late Professor RQ Quentin-Baxter was to add

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Protest is the yeast working in our society, in a world society, provided in either case that the protest is made with a framework of superior loyalties (Quentin-Baxter 1984:207).

Here, we are mainly concerned with the proviso. “If the proviso is disregarded” added Quentin-Baxter “and the protest amounts to outright rejection, it can only be a step on the road to anarchy”. That, we find, is a step away from what our forbears on both sides sought in the Treaty of Waitangi.

*12.24.11* The protests in this case we find were unlawful, unlawful because they each involved a trespass. We come therefore to the conclusion that while there is nothing inconsistent with the Treaty that the claimants, and others, should have demonstrated to protest the failure of the Government to redress Ngati Whatua losses, it is inconsistent with the Treaty that such demonstrations should have been made unlawful through acts of trespass. To put it in a nutshell

- (a) it was not the Crown that was in breach of the Treaty in taking steps to end or prevent illegal trespasses, but the protesters for effecting a trespass.
- (b) it is not the Crown that is bound to provide compensation for the convictions, but rather the protesters, ‘compensation’ in this case being represented in the fines imposed. We would therefore make no recommendations for pardons assuming we might appropriately do so.

*12.24.12* But we do not see that as the end of the matter. These things to us are clear and ought also to be brought into account -

- (a) The stand at Bastion Point was the culmination of over 100 years of continual representations made only through proper channels and a series of complicated inquiries and court actions. Those representations and actions were futile for Ngati Whatua, and yet there is a long history of clear breaches of the Treaty, breaches that turned a proud and loyal tribe into virtual refugees—a disillusioned, scattered and landless people. Any illegalities in the protest should be weighed with the enormity of the Ngati Whatua loss and the need, seen then as compelling, to call a stop to what was happening.
- (b) The protest was the course of last resort. There was at that time no Court or Tribunal that could fully research and hear argument on the background facts and make findings upon them, at least in the light of that which is the source of all law for Maori people, the Treaty of Waitangi. This Tribunal was at that time limited to matters post 1975.
- (c) Upon hearing the claimants, we find they held sincerely to the view, no matter how erroneous, that what they did was necessary and right. J P Hawke summed up their views as follows—“I went onto the Point” he said “not to invite an arrest but to arrest a wrong”. He thought it good to rely on the law provided the law is just, but in his view, a law where the Maori is always morally right but legally wrong is a law in disrepair, and protest was needed not to destroy but mend it. In that sense we discern a commitment to superior loyalties, Hawke adding that he had no wish to be a protester, but in his view, his people had no other option

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if they were to obtain substantial justice. It is therefore extremely important to him that his name should now be 'cleared'. Those factors weigh heavily in mitigation in our view.

*12.24.13* We have not researched the authority of the Attorney-General to recommend or grant any relief or the propriety of our own intervention, but with regard to the claim for pardons and compensation we conclude

- (a) the protests, in so far as they involved unlawful trespass, were inconsistent with the principles of the Treaty of Waitangi. We therefore decline the recommendations sought, but nonetheless
- (b) our findings on the background to the protests, and in particular the matters referred to in 12.24.12, should be conveyed to the Attorney-General for his consideration.

## Chapter 13

# Summary of Findings

### 13.1 General Findings

*13.1.1* It will be apparent from our discussion of the many issues raised by the claimants in this case that we consider the Crown at various times and in various ways has failed to meet its obligations to the Ngati Whatua people of Orakei under the Treaty of Waitangi. In some cases this has resulted from Acts assented to by the Crown; in others from policies or practices adopted by the Crown including positive acts done by or on behalf of the Crown; in yet others, by omissions by or on behalf of the Crown. All of these we have found to be inconsistent with the principles of the Treaty. That Ngati Whatua have been prejudicially affected is readily apparent. Indeed, the cumulative effect of the various breaches of the principles of the Treaty was to render Ngati Whatua of Orakei virtually landless and without standing in their own homeland.

*13.1.2* The critical damage was done as a result of the provisions of the Native Lands Acts of 1865 and 1867 and the 1869 order of the Native Land Court vesting the whole of the land then in communal ownership in thirteen members only of the tribe as legal and beneficial owners, to the complete exclusion of the great majority. This necessarily destroyed the mana or authority of the tribe in and over their land. Subsequent breaches of the Treaty built upon and reinforced these first critically destructive violations, especially the partitioning provisions of the Native Land Court Act 1894 which eroded the Orakei Native Reserves Act 1882, and laid the ground for the complete individualisation of the Orakei block and the Crown's planned programme for the acquisition of the whole of the land remaining. In implementing this programme, the Crown was greatly aided by the passage of s 109 of the Native Land Amendment Act 1913 which enabled it to buy the individual interests of owners in any blocks, no matter how many on the title, and without the necessity for a meeting (see 6.2). Nor, in many cases, did the Crown comply either with its statutory or Treaty obligations to ensure that Ngati Whatua owners would not be rendered landless. That Ngati Whatua were powerless to prevent the consummation of the Crown's objective of obtaining the whole of their land was finally demonstrated by the Public Works Act taking of the 10 acre exchange block and the papakainga accompanied by the ejection of all those living on there and, shortly thereafter, by the physical destruction of all housing and other buildings forming part of the marae, leaving only the Church and urupa intact.

*13.1.3* In the preceding Chapter 12 we have discussed at some length the multiplicity of claims which relate to the land at Orakei and associated concerns. It is desirable here to re-state our findings in summary form but in

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so doing we are again aware of the danger of over-simplification. Accordingly, we stress that the summary which follows needs to be considered in the context of our lengthy narrative of events over 147 years, as given in Part I; in the perspective of our discussion in Chapter 11 of the nature and scope of the Treaty and, finally, in the light of our examination of the various specific claims in Chapter 12.

### 13.2 Specific Findings

- (a) The 700 acre Orakei block ought to have been maintained as a Ngati Whatua tribal reserve, vested in the tribe as some form of corporate entity and protected from encroachment without tribal approval. Were all else equal Ngati Whatua would be rightly entitled to the whole of the Orakei block today (12.1.4, 12.1.5).
- (b) The provisions of the Native Lands Act 1865 which enabled tribal ownership of Maori land, on the application of any one member of the tribe, to be extinguished without the consent of the remainder of the tribe were inconsistent with the principles of the Treaty, whereby in recognising te tino rangatiratanga in and over their lands the Crown acknowledged the authority or mana of the Maori people for so long as they wished to hold their land in accordance with long-standing custom on a tribal and communal basis. As a result, the Ngati Whatua communal ownership of Orakei was extinguished and, further, all but thirteen of the tribe were dispossessed of their interest in the land without their consent. (12.2.5)
- (c) By enabling the vesting of both the legal and beneficial ownership in a few members only of the tribe to the exclusion of the great majority, as occurred with Ngati Whatua at Orakei, the Native Lands Act 1865 breached the principle of the Treaty which guaranteed to the Chiefs, Tribes and the respective families and individuals the full exclusive and undisturbed possession of their lands. (12.2.9)
- (d) The omission of the Crown to take timely and appropriate action to ensure that the provisions of s 17 of the Native Lands Act 1867 were not overstepped by the Native Land Court was inconsistent with its duty under the Treaty to protect tribal members from being dispossessed of their interest involuntarily and without their consent. (12.2.9)
- (e) The Native Land Court Act 1894 effectively negated the Orakei Native Reserves Act 1882 by facilitating the making of orders partitioning the Orakei Block thereby laying the ground for its complete individualisation and, subsequently, its alienation. The 1894 Act, following as it did the Native Lands Acts of 1865 and 1867, exacerbated the already severely adverse effects of those statutes by effectively destroying the mana of Ngati Whatua in and over their land at Orakei and confirmed the dispossession of the majority of the tribe of an interest in their land. The cumulative effect of the Acts of 1865, 1867 and 1894 was prejudicially to affect the Ngati Whatua people in the manner indicated and was accordingly inconsistent with the principles of the Treaty which

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Maori people. The Crown failed adequately to honour its obligations under the Treaty to protect the people at Orakei in the possession of their lands. (12.5.4)

- (f) The Crown, by omitting to act on the 1908 recommendations of the Stout–Ngata Commission under the legislative provisions then in force which made provision for their implementation, thereby failed to take the active steps necessary to restore to the Ngati Whatua people, in part at least, the lands of which the majority had been dispossessed in 1869 in breach of the Treaty of Waitangi. This omission of the Crown was inconsistent with the principles of the Treaty which obliged the Crown in these circumstances to protect the property of the Ngati Whatua and to restore the tribal mana over the papakainga of 85 acres and over the remaining area amounting to 558 acres approved by the Commission for leasing but not for sale. (12.6.8)
- (g) The cumulative effect of the foregoing breaches of its Treaty obligations was such that the Crown, by 1914, was under a heavy duty to make good its failure to protect the Ngati Whatua people. The only effective way it could redress the situation, as the Chief Justice Sir Robert Stout and Mr AT Ngata so clearly saw, was to provide a sufficient endowment for them at Orakei. It was even then, not too late to implement the Stout–Ngata findings. No less was required of the Crown as a Treaty partner acting, in the words of Sir Robin Cooke in the *New Zealand Maori Council* case (p 36) ‘towards the Maori partner in the utmost good faith which is the characteristic obligation of partnership’. Instead, the Crown being either indifferent to or oblivious of its obligation, embarked on a planned programme to acquire all Ngati Whatua property at Orakei which, in its first year of execution, 1914, resulted in the Crown acquiring the bulk of the farm lands at Orakei, and which, far from providing an endowment, would ensure that Ngati Whatua had none. In so doing we find that the Crown acted in breach of its obligations under the Treaty. (12.9.3)
- (h) The Crown, in authorising by special statute the sewage disposal scheme and in participating in the construction of the raised roadway (Tamaki Drive) along the foreshore of Okahu Bay, contributed to the desecration of the harbour and the flooding of the papakainga thereby significantly diminishing the people’s use and enjoyment of their marae, village and foreshore. In so doing the Crown failed to meet its Treaty obligation to protect the rights and property of its Treaty partner Ngati Whatua. (12.8.3)
- (i) The Crown refused to permit those Ngati Whatua owners who sold their interest in land at Orakei to the Crown and who wished to retain their house or a house site, to do so, whereas various European lessees of Ngati Whatua land were permitted to retain houses or house sites. This action of the Crown was inconsistent with the principles of the Treaty which obliged it to protect the rights of those Ngati Whatua who wished to retain part of their land to be able to do so. (12.10.3)

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- (j) The Crown, in executing its planned policy and practice of acquiring all land owned by Ngati Whatua at Orakei prejudicially affected
- (i) Those many Ngati Whatua owners who were rendered landless by the acquisition of their interests at Orakei as a result of the Crown's failure to comply with its statutory obligations to ensure this would not happen. Such failure was a clear breach of the Crown's Treaty obligations to protect the rights and property of the Ngati Whatua owners and also of its obligation to ensure that the Ngati Whatua sold only those lands excessive to their needs and that they retained a sufficient endowment for themselves; and
  - (ii) Those Maori owners whose land was compulsorily acquired against their wish and without their consent and thereby acted inconsistently with the principles of the Treaty which guaranteed the Maori families and individuals the undisturbed possession of lands they wished to retain; and
  - (iii) Those Maori, the majority, who were not owners, because ownership was denied them; and
  - (iv) Those Maori who by Parliamentary petition sought to upset the title of the owners, and whose case was never directly considered in any Court or on any Inquiry (12.15.5–12.15.8).
- (k) As with the bulk of the farm lands in 1914 so the subsequent acquisition by the Crown of the papakainga needs to be assessed in the light of events from and including the breaches of the Treaty in 1869. Given the particular circumstances of Ngati Whatua of Orakei including their fortuitous situation adjacent to and in time part of a great metropolis, we consider the Treaty obliged the Crown to take reasonable steps to protect them from becoming landless. This duty extended to ensuring, so far as was reasonably practicable, that they retained land on which to live as they wished at Orakei and sufficient land to afford them support and maintenance. The Crown failed to meet its Treaty obligation in this and the other respects we have earlier described. We note that the Crown has chosen not to advance any reasons to us for such failure or indeed to seek to justify in any respect the policies and practices which formed the subject matter of the complaints before us. (12.15.9)
- (l) Article 2, in the context described guaranteed the mana of Ngati Whatua over their lands in accordance with Maori traditions and customs. We believe the Maori custom in respect of gifts of land and its return in appropriate circumstances, falls within the broad ambit of this guarantee. The Crown failed to protect the interests of Ngati Whatua by enlarging and significantly altering the terms of the Maori Deed in its Grant of the land to the Church of England and in failing to give any regard to the Maori understanding of the transaction. In so doing the Crown acted inconsistently with its obligation under the Treaty to protect the rights and property of the Ngati Whatua and in particular failed to ensure that the Maori custom in respect to gifts was protected.



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- The Crown had no legal or other justification for deviating so significantly from the terms of the Deed of Gift in its Grant to the Church. (12.16.6)
- (m) In 1925 the Crown promoted legislation to enable it to acquire from the Church of England the land gifted by Ngati Whatua (referred to in the preceding paragraph 1) apparently regardless of the terms on which it had been gifted to the Church. Both the Crown and the Church failed to consult with the Ngati Whatua people who, had they known of what was intended would have expected the land to be returned. We find that the passage of special enabling legislation and the subsequent acquisition of the land by the Crown exacerbated the earlier breach and was inconsistent with the Crown's treaty obligations in these circumstances to protect Maori property and ensure its return to the Ngati Whatua people (12.16.9).
- (n) An area of 5.27 ha was taken by the Crown in 1886 for defence purposes. This land, known as the Battery Reserve at Bastion Point, was handed to the Auckland City Council following the revocation of its defence status in 1941. The claimants say that it should have been returned to Ngati Whatua. We have expressed reservations as to whether compulsory acquisition of Maori land by the Crown is in all circumstances inconsistent with the principle of the Treaty which envisages the disposition of such land only with the consent of the owners. In this particular instance we are mindful of the fact that a settlement was reached with the Crown in 1978 in relation to the Battery Reserve and other land vested in the Crown was instead made available to the Ngati Whatua people. In the circumstances it would be inappropriate for us to make a finding that the Battery Reserve land should now be returned. Indeed, Ngati Whatua have excluded from their claim that part of the land occupied by the Savage Memorial. (12.17.6)
- (o) In 1916 the Crown purchased some 9 acres at Takaparawha Point for defence purposes. The purchase was effected at a meeting of assembled owners. In this instance a majority of shareholders were opposed to the sale but a minority, who owned a majority of shares in the land, approved the sale. Accordingly the land was deemed to be sold notwithstanding the dissent of a majority of owners. We believe that the unwilling and involuntary disposition of the shareholders interests in their land to be inconsistent with the protection afforded by Article 2 of the Treaty (12.18.3). Given that the Crown no longer required the land for defence purposes in 1941 and given that the Crown had acquired the land without the consent of the majority of owners we find that the Crown should have offered to return the land at Takaparawha Point to Ngati Whatua (12.18.6).
- (p) In 1951 the Crown against the wishes of Ngati Whatua compulsorily acquired their marae at Okahu Bay. It was situated on the papakainga on an area of 1.5 acres in multiple ownership. The marae was held sacred and inviolable by Ngati Whatua. it was nearby the ancient burial ground which, along with the Church, alone was spared by the Crown.

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The Crown's action in taking and clearing the traditional marae site against the wishes of the Ngati Whatua people at Orakei reflected a degree of insensitivity to traditional Maori values and to the deeply held reverence for and commitment to the marae at Okahu Bay which, 30 years later, is difficult to comprehend. We have no hesitation in finding that such action was inconsistent with the principles of the Treaty of Waitangi. We consider the Ngati Whatua people should not now be prejudiced because they resisted to the end the taking of their marae and for some years thereafter continued, vainly, to hope for its return. Specifically, we find that their refusal of the alternative site and their protracted reluctance to co-operate in the development of a multi-cultural marae was not merely understandable; given the depth of their feelings it was inevitable (12.19.6).

- (q) The claimants claim that the Crown has failed to prevent the desecration of their papakainga and former marae site at Okahu Bay by enabling its use as a Domain without adequate safeguards as to how, and by whom it should be used. Specific complaint was made of the use of this land for a circus with temporary public urinals being placed immediately adjacent to the burial ground (urupa). Given the nature of the site and the veneration in which it continues to be held by Ngati Whatua the Crown might reasonably have been expected, in vesting its administration in the Auckland City Council, to have imposed some restrictions which would recognize the special nature of the site and the Ngati Whatua interest in it (12.20.3).
- (r) In 1954, the Crown, having expelled Ngati Whatua from their marae in Okahu Bay, set apart a site for a new marae for Ngati Whatua. This site came to be developed as a multi-cultural marae and the land came to be vested 'for Maoris' and additional lands subsequently added came to be vested for 'all Maoris'. It is clear that the marae site when it was first reserved in 1954 was meant for Ngati Whatua to replace the former site at Okahu Bay and we consider that the land might properly have been vested in trustees exclusively for Ngati Whatua as should the pieces of land added later. Subsequently a new house was built not by Ngati Whatua but with the help of some of its members. To Ngati Whatua humiliation it became known as a 'Pakeha marae' administered largely by outsiders. Without consultation with Ngati Whatua the new house was named for the Ngati Whatua ancestor and as a result Ngati Whatua could no longer have a commitment to any other site. As a consequence of the site being for 'all Maoris' and the extension of that to mean 'all people' there was a failure by the Crown to secure a marae site for Ngati Whatua and that failure was, in the circumstances of the original acquisition, contrary to the principles of the Treaty. The lack of Ngati Whatua control was a denigration of the Ngati Whatua mana that the Treaty was meant to uphold. It is now imperative that the mana of Ngati Whatua of Orakei be restored. Without a marae of their own this cannot be done. We consider there is an overwhelmingly strong case for the

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vesting of the marae in the Trust Board. This will be to the ultimate advantage of the Education Centre, 'all Maoris' and the public of Auckland (12.19).

- (s) The claimants complain of policies and practices of the Crown which required those Ngati Whatua provided with housing at Orakei to remain as State tenants and which prevented them from obtaining freehold titles although other State tenants at Orakei were permitted to buy their homes. The purchase by State tenants of their homes was first authorised in 1950. Since then the policy has operated 'on and off'. On the evidence before us we find that the Crown did not refuse sales of homes without good reason such as outgoings being beyond the tenants' means, offers to sell lapsing or not being accepted. We accept that in no case was a sale declined because the houses were occupied by Ngati Whatua although there was a period from 1974–1976 when as a consequence of Government policy the Housing Corporation was not selling State houses. At this time it was also considered advantageous to retain Ngati Whatua occupancy and prevent on-sales outside the tribe. We note that there are a great many other State tenants at Orakei who have not bought their homes, in many cases no doubt because they could not afford to do so. We find that the claimants have failed to establish their claim. We nonetheless appreciate the tenants' concern to obtain some degree of ownership of their homes and consider that may be practicable though there is now the need to keep ownership and occupation within the tribal group (12.2 1).
- (t) We conclude from the circumstances surrounding the agreement between Ngati Whatua elders and the Government which culminated in the passage of the Orakei Block (Vesting and Use) Act 1978 that Ngati Whatua are not precluded from making a claim under the Treaty of Waitangi. In particular, we believe it would be contrary to equity and good conscience for the Crown to rely on undertakings given at the time on behalf of the elders as foreclosing the possibility of claims being made for the remedy of grievances for which no legal provision existed in 1978 but for which provision was later made in 1985. It is not surprising therefore, that no such claim was made by or on behalf of the Crown. But we would emphasise that in considering claims before us, regard should properly be given to the terms of the agreement evidenced by the 1978 Act which was reached in good faith by the Crown with representatives of Ngati Whatua who were reasonably regarded as having authority to speak for Ngati Whatua. (12.22)
- (u) The evidence is that Ngati Whatua of Orakei look to their Trust Board as the modern embodiment of tribal authority. Tribal authority is guaranteed by the Treaty. The current limitations on the Trust Board are inconsistent with the full authority guaranteed by the Treaty (12.23).
- (v) There was nothing inconsistent with the Treaty that the claimants, and others, should demonstrate to protest the failure of the Government to redress Ngati Whatua losses at Orakei or to provide some forum for the

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issues to be fully researched, debated and determined. It was inconsistent with the Treaty however that the protest in this case was made unlawful through acts of trespass. We make no recommendations on the claim for pardons and compensation.

There were however extreme circumstances to goad the Maori Committee Action Group to break from the Ngati Whatua tradition of working only through official channels and legal forums. We find also the Action Group held sincerely to the view, no matter how erroneously, that what it was doing was right. Accordingly, we will report to the Attorney-General on the background circumstances to assist him in considering whether he should exercise any jurisdiction he may have to grant relief (12.24).

### 13.3 The Entitlement to Remedies

We find, as a consequence of the many breaches of the Treaty of Waitangi we have recorded, and the serious loss and deprivation which Ngati Whatua at Orakei have incurred as a result, that appropriate relief should be granted to them. No relief is sought for individual members of Ngati Whatua, rather for the tribal members as a whole through the agency of the Ngati Whatua of Orakei Maori Trust Board constituted under the Orakei Block (Vesting and Use) Act 1978. Given that some relief was granted to Ngati Whatua through the Trust Board under the 1978 Act we agree that unless otherwise indicated, this Board is the appropriate recipient for the further relief which we propose.

## Chapter 14

# Remedies

### 14.1 Principles to be applied

In considering remedies in this case some principles need first to be settled.

*14.1.1* There is in our view, no requirement that compensation should be scaled down to what is ‘practical’. The claimants state their first claim this way

As a result of the laws, policies and practices outlined in the preceding paragraph, and in spite of a partial settlement of our claims in 1978, we do not have today the tribal endowment which ought to have been our own inheritance and our provision both in material and spiritual terms for our descendants. Being cognizant of the Tribunal’s obligation to make recommendations on the practical application of the Treaty of Waitangi to our claim, we do not seek the return of the entire 700 acre Orakei Block to Ngati Whatua but we claim that the Tribunal should declare that we are rightly entitled to the whole of it.

Section 6(3) of the Treaty of Waitangi Act 1975, which enables us to make recommendations, does not use the word ‘practical’. It says

If the Tribunal finds that any claim submitted to it under this section is well founded, it may if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

‘Practical’ appears in the preamble and short title to the Act and relates to claims not recommendations. Thus

it is desirable that a Tribunal be established to make recommendations on claims relating to the practical application of the principles of the Treaty . . .

‘Practical’ in that context envisages claims in respect of circumstances not contemplated at 1840—see opinion of Chief Judge Durie (1987:Ch 8) *Waiheke Report* and compare the comments of Richardson J in *New Zealand Maori Council v Attorney General* supra

Whatever legal route is followed, the Treaty must be interpreted according to principles suitable to its particular character. Its history, its form and its place in our social order clearly require a broad interpretation and one which recognises that the Treaty must be capable of adaptation to new and changing circumstances as they arise (380).

and of Somers J in the same case

The principles of the Treaty must I think be the same today as they were when it was signed in 1840. What is changed are the circumstances to which those principles are to apply.

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Recommendations may be made in our opinion, for full and just compensation untempered by the convenience of the result. We depart in this respect from an earlier opinion of the Tribunal that it is obliged to make practical recommendations (*Manukau Report* 1985:8.1).

14.1.2 The effective settlement of many claims will often depend upon the willingness of parties to seek a reasonable compromise, but it follows that the mana to propose a compromise vests not in the Tribunal but the affected claimant tribes. In this case the claimants themselves have made several compromises. Their claim is limited to the Orakei block and does not challenge other land deals of questionable propriety as outlined in 4.6.

In addition they seek not the return of the whole Orakei block but only certain parts that remain in public ownership. They have not sought to upset private vested interests.

Further in seeking the 'public lands' the claimants do not necessarily intend the ousting of public user. They ask that any such lands restored be held rate free for so long as public user is maintained and that recreational areas remain subject to existing leases and licences.

Those substantial concessions, indicative of a reasonable approach, were made by the claimants in their form of claim. It may be in other cases, that this Tribunal should make findings of fact and interpretation, and adjourn for the tribe and Crown to mediate a settlement if possible. There is not the need to do that in this case, but the options for mediation and an 'out of Court' settlement must always remain open to claimants.

14.1.3 The principles of the Treaty are relevant to the consideration of remedies. The restoration of land taken may not be the necessary consequence of proof that it was taken wrongly. It may need to be asked for example, whether it is contrary to the principles of the Treaty to dispossess an innocent land holder who bought in good faith, for value and without notice that a claim might lie—see *Waikeke Report*, 1987:Ch 8 where it is said

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.

14.1.4 The Tribunal is not constrained to considering only the particular remedies suggested by claimants, orally or in their form of claim. Our function is to determine whether persons are prejudiced through Crown actions contrary to the Treaty and if so, the action that might be taken to compensate for or remove that prejudice. In that respect we have a statutory brief, akin to the terms of reference given a Commission of Inquiry, and are not limited by the pleadings of parties. The constraints upon us are procedural not substantive and come rather from the rules of natural justice which warn against a proposed remedy the prospect of which was not disclosed to a person likely to be adversely affected by it.

In this case we notified an intention to consider alternative remedies to those the claimants proposed, in *Directions* of the Chairman of 8 August 1986 and the accompanying report (p 203) circulated to parties well prior to final hearing.

The point is important for another reason in this case. Though the greater part of the relief claimed is sought for Ngati Whatua and not the claimants, the claimants are not representative of Ngati Whatua (see para 2.2). Though tribal support was eventually given to the claim (see para 10.4), it was not clear that the particular remedies the claimants proposed had similar tribal sanction.

## 14.2 Approaches to Reparation

14.2.1 There are at least three approaches to reparation in this case, as we intimated in our background report to parties.

- (a) That proposed by the claimants themselves, to 'return' lands still held in public ownership. There is room for conflict. They are mainly public parks and the public has considerable interest in keeping them.
- (b) An alternative approach is to quantify the loss of the Orakei block of 700 acres (283 ha) in monetary terms with damages for injuries, lost use and missed development opportunities. A host of variables confront the programming of a just calculation in a case such as this; and the assessment of 'what might have been' is highly subjective.
- (c) Another is to re-establish in modern context an objective in the Treaty appropriate to the case—in this case, surely, the duty on the Crown to ensure the retention of a proper tribal endowment. The rationale for this approach, which is directed more to tribal restoration than to reparation, is more fully explained in the *Waikeke Report* (1987:Ch 8).

14.2.2 The last approach commends itself to us in this case. It enables Ngati Whatua to pick up from where Tuhaere, one of the tribe's most prominent forbears left off—before public works and native land laws put paid to his tribal scheme. The worth of that scheme is proven in the results of the Anglican Church residential leasehold arrangements on nearby Church lands and which may have served as Tuhaere's model. Had Tuhaere's plans been allowed to work, without dismemberment of the capital asset, there is every prospect Ngati Whatua would be today a compact tribe, well provided for with homes, industries, community amenities and a continuing revenue for tribal programmes. In much the same way did the Church leaseholds fund church programmes and a theological college. We expect this approach to provide substantially less than reparation for the 700 acres (283 ha), but more than that which the claimants seek from the return of parklands, assuming the weight of public interest would deter any substantial development of them.

14.2.3 Any policy of tribal restoration must in our view be directed to assuring the tribe's continued presence on the land, the recovery of its status in the district and the recognition of its preferred forms of tribal authority. In particular, it must take into account in this case

- (a) That the tribal losses are substantial. We found, at 12.1.4, that were all else equal Ngati Whatua today would be rightly entitled to the whole of the Orakei block. We found too that Ngati Whatua as such never sold, for Ngati Whatua were denied the title that ought to have been guaranteed to the tribe.

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- (b) That but for the various breaches of the Treaty by the Crown, Ngati Whatua would likely have maintained a handsome endowment. By the 1860's many tribes had rallied in concerted opposition to further sales. At Orakei the evidence is clear of a strong pressure to maintain tribal control and of a viable endowment development plan.
- (c) That land loss was not all Ngati Whatua suffered. They suffered a continuing denigration of their identity as a tribe. Any policy for tribal restoration must consider not only land recovery but the the restoration of the tribe's status.
- (d) That there is a need to secure an adequate economic base for the tribe to ensure its continued presence. Had the block been retained they would have had that base today.
- (e) That regard must be had to the tribe's current resources, and whether those resources can meet reasonable tribal needs.

*14.2.4* We have also to consider in this case that the Crown did in fact make large payments to individual owners in the buying process, and that some reparation was made in the settlement of 1978.

*14.2.5* We find the tribe's current resource is woefully inadequate to achieve what is reasonably required. To assist our assessment we engaged Mr N Guscott, Economic Consultant of Auckland. The tribe's current assets derive entirely from the 1978 settlement. They are all vested in the Ngati Whatua Trust Board. They consist of the former state homes on 2.68 hectares (Nos 101, 104 appendix III), 5.54 hectares (Nos 103 and 109) for future housing and 4.18 hectares (No 108) that is not to be developed (in terms of the Act) but kept as private open space. The Board has no substantial cash assets. On the debit ledger is the 'equivalence debt' of \$200,000. We also include as a liability an inexperience in asset administration and investment. Such an experience would have developed had Tuhaere's scheme proceeded.

The former state homes Mr Guscott considers, are in a very poor state of repair and require urgent attention. Some need recladding. To upgrade the area berms and paths need attention too and trees and shrubs should be planted. As we have seen the Board, with good reason, 'cut the rents to the bone' and rental returns barely meet outgoings. The houses serve social ends not profit making. As the Ngati Whatua Board fully appreciates there is an urgent need for more housing. The dismemberment of Ngati Whatua began last century. The Board has evidence that many would, if they could, 'move home'. It has plans to develop thirty residential leasehold units (on area 103) but has no cash. In Mr Guscott's opinion a substantial cash contribution is required. The prospect of developing the further area (No 109) is even more remote.

The Board has no substantial revenue source to assist in housing or in other projects that are badly needed, marae maintenance and development, formation and maintenance of the marae roadway, maintenance of the church and urupa and development and maintenance of the private park. Investment in job creating enterprises is also required to re-establish the people.



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In brief, Ngati Whatua has insufficient land and cash with which to plan its proper restoration as a tribe.

With those matters in mind, and the principles considered in 14.1, we consider, first, the particular remedies the claimants proposed.

### 14.3 The Claimants' Proposals

The claimants seek to have vested in the Ngati Whatua Trust Board all land in the Orakei block at present vested in the Crown or in other bodies for some public use and which remains unused for housing or roading purposes, but excluding the MJ Savage memorial. The total area claimed is some 67.25 ha, comprising public parks on the Bastion Point headland (38.5 ha), public parks at Okahu Bay (about 15 ha), vacant lands earmarked for public housing, a community house and Youthline hostel (about 3 ha) and certain scattered parks, reserves and public sites (about 10.8 ha). We consider the affected areas in turn.

#### *14.3.1 The Bastion Point Headland*

(a) We here review the claim for the return of the Savage Memorial Park, Takaparawha Park, the open land to the south adjoining the Savage Memorial Park and the land above Kitemoana Street and adjoining the land vested in the Trust Board for housing purposes by the 1978 Act. These various pieces of land are numbered 20, 21, 22, 29 and 30 on the plan in appendix III. The total area is 38.5 ha. We will refer to this area compendiously as the Bastion Point headland. The whole of this land is owned by the Crown and administered by the Auckland City Council under the Reserves Act 1977. In November 1979 the Auckland City Council approved a final Management Plan for Bastion Point headland. Its management objectives are to maintain the reserve as a scenic focal point, to retain its predominantly open rural character, to encourage its use by the public for recreational pursuits which do not require buildings, pitches or other fixed facilities and to protect the natural features and landscape qualities of the reserve. The Auckland City Council in the period 1981–1986/87 has incurred expenditure totalling \$132,164 (including \$50,675 for the year 1986/87) for development and improvements to the Bastion Point headland reserve. This sum does not include the very substantial funds expended by the City Council for maintenance, development and improvements to the MJ Savage Memorial Gardens.

(b) Few, if any, would dispute the unique environmental and associated qualities of the Bastion Point headland reserve. It has been well described in the 1977 Report of the Joint Planning Study Group on land-use proposals for Bastion Point in the following terms:

In addition to its unique historical associations, Bastion Point is an important public vantage place and an urban open space of regional and national significance.

Of all the major parks and reserves in Auckland, it is the only large area, close to the inner city, fronting the Waitemata Harbour. Nowhere else in the whole of

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Auckland is there a park or reserve of this size so readily accessible, linking two beaches and intensive harbour recreation, offering uninterrupted panoramic views, containing secluded spaces and sheltered pockets, separated from motor traffic and so easily developed for a variety of leisure-time activities and recreational pursuits. Bastion Point is a magnificent natural grandstand from which every year thousands of spectators watch the Auckland Anniversary Day Regatta, reputed to be the largest one-day event of its kind in the world. The high ground of Takaparawha Park and the Savage Memorial also commands superb views of the city and harbour that extend westward to the inner city, northward to Rangitoto, and eastward to the Hauraki Gulf and the Coromandel Peninsula beyond. The Savage Memorial is also a popular attraction for tourists and visitors to Auckland as a place from which to view the eastern suburbs, the harbour bridge and the inner islands of the Hauraki Gulf

In environmental terms, Bastion Point is probably the most important open space in Auckland . . . (Report, 1977:14).

- (c) There is however no acknowledgement that this is also ancestral land, at least in other reports. The Study Group's report, made at the height of Maori protests, naturally referred to the Maori claim, but there is nothing in the Final Management Plan approved by the Council in November 1974, or in the signs about the Parks, that recognises Ngati Whatua's role as founding partners in the establishment of Auckland, or the significance of this area to Ngati Whatua as part of what should have been their permanent reserve.
- (d) Mr Hanna, Counsel for the Auckland City Council, suggested to us that the Committee of the Auckland City Council which has responsibility for the management of reserves might include representatives of Ngati Whatua. Section 104 of the Local Government Act 1974 makes provision for such a contingency. A Council Standing Committee or Special Committee may include persons who have a particular knowledge that will assist the Committee's work. Whether or not such a provision is made in any given case is, of course, entirely a matter for the local body concerned and no Council could bind its successors.

We will return to the issues affecting the Bastion Point headland shortly. For now it is convenient to consider certain other parks and reserves also the subject of claims.

*14.3.2 'Orakei Sports Domain'.* This area, which we have called 'Orakei Sports Domain', is part of the Orakei Domain comprising approximately 8 ha (No 18, appendix III). It is zoned Recreational D for active as opposed to passive recreational pursuits. The claimants seek in paragraph (a)(v) to have it vested in the Ngati Whatua Trust Board. The southern half is occupied by the Orakei Bowling Club and the northern half has three rugby fields in winter and is used for cricket in summer. There is a pavilion in this part of the reserve. The Auckland City Council maintains the reserve. For the period 1941–1985/86 it spent \$392,316 on the maintenance of the whole of the Orakei Domain at Okahu Bay and a further \$83,713 on improvements. Its estimated expenditure for 1986–87 is \$53,334. It has had no income from this land since the 1978/79 year.

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These recreational facilities are widely used by the general public and by Orakei residents in particular.

*14.3.3 'Okahu Park'* We use the term 'Okahu Park' to refer to that part of the Orakei Domain on the flats of Okahu Bay where the marae and the main part of the papakainga once stood. We have seen that the area was split by the construction of a sewer and later of Tamaki Drive. On the seaward side of Tamaki Drive is a long narrow beach front (No 28, appendix III) while the main area (No 23) adjoins the south side of Tamaki Drive. The total area 6.3 ha zoned Recreation B and administered as a Reserve by the Auckland City Council. It is a passive park, supporting a good arrangement of trees and lawns, ideal for picnics and relaxation.

*14.3.4 The main parks and reserves as a whole*

(a) Pitted against the claim to the parks is the public interest in maintaining the open space character of the point with public access, and in maintaining access to both Okahu Park (no 23) and the Orakei Sports Domain (no 18).

(b) Mr Hanna for the Auckland City Council emphasised the main parks should be seen as national assets not merely local reserves. We agree. We were initially concerned that the parks might represent a reasonable quid pro quo for the reserve contributions that would have been required had the the Orakei block been developed privately. Mr Miller, a surveyor for the Council, explained after a careful analysis . . . it may be reasonably assumed that if the development had been done privately, a level of reserve contribution of about 12 ha for the whole block would have been required and the reserves themselves would have vested in the Auckland City Council and not just the administrative control that the Council now has.

We find that the reserves pepper-potted through the housing estate by the Crown, with the addition of the Orakei Sports Domain, slightly exceeds the 12 ha required.

(c) We accept however that there has been a long record of complicated negotiations between the Council and the Crown for the creation of large reserves in the area, that the Council has spent substantial sums on improvement and maintenance and that the Council's resources will continue to be needed for maintenance and upgrading if the parks are to be retained.

(d) We feel we can also safely assume that many Orakei residents with freehold titles would have purchased in the reasonable expectation that the reserves shown on town plans would in fact be retained.

The maintenance of the open space character of the point and of the parks in Okahu Bay is not without advantage for the local residents of Ngati Whatua too.

(e) The other side of the coin of course is the Ngati Whatua search for land, a quite reasonable search in our view, in reparation for the loss of the whole block, their particular concern for Okahu Park which embraces

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the main part of their former papakainga, and the failure to recognise the particular status and interests of Ngati Whatua in the administration of the parks as a whole.

- (f) Our main concern with the restoration of the lands to Ngati Whatua is the potential for conflict that results. Development would almost certainly lead to public antagonism. Non-development, in a concession to public pressure, may equally lead to a disaffected future generation of Ngati Whatua, a feeling that their forbears in this claim 'won' not the substance of the land but just the shadow, something they cannot use.
- (g) Adhering to the recommended base for reparation (at 14.2), the restoration of the Ngati Whatua status and economic base, we consider both the public and tribal interests can be reconciled in the matter of the parks. Subject to the economic base being found in other areas, and that is a major qualification, we consider the parks serve best to re-establish the status of Ngati Whatua in Auckland. We propose that the Bastion Point Headland parks described in 14.3.1 and Okahu Park (Nos 23 and 28) be owned by the tribe in the name of the Ngati Whatua Board, but held as a park for the benefit of the tribe and of Auckland, the administration entrusted to a partnership of tribal and City Council representatives as more particularly set out in paragraph 14.4.2. We would exclude from that arrangement however the Orakei Sports Domain (no 18) (14.3.2). We think it should be seen as a part of the Crown's expected reserve contribution to the district. The Ngati Whatua residents of course, as residents, remain entitled to share in the sports facilities.

*14.3.5 Other Crown Land vested in the Council.* The following lands should for the same reason be unaffected by the claims in our view, as part of that which the Crown ought to have contributed as reserves. They are numbered from 9 to 17 and 25 to 27 on the plan in appendix III. All are subject to the Reserves Act 1977.

Area 9 is in Kepa Street being designated for a community centre—Orakei. A community centre was recently erected on this land by the Auckland City Council. It is a valuable community amenity available to an residents of Orakei. Area 10 comprises 4.15 ha and is the cliff face between Paritai Drive, Ngapipi Road and Tamaki Drive. We were advised by the Auckland City Council that the cliff face is unstable and needs careful attention to ensure the continued security of Paritai Drive. A portion of the cliff face has already been retained and further retaining is likely to be required in the future. Area 11 is zoned Recreation D, is leased to the Orakei Tennis Club and holds a number of courts and a club-house. It is a valuable community amenity.

Areas 12–17 are zoned Recreation B. Each is grassed open space. They are spread through the housing areas and have high amenity value.

Areas 25 and 27 comprise 2574 and 6927 m<sup>2</sup> respectively. They are Crown owned reserves zoned Recreation B. We were told by the Senior Land Surveyor of Auckland City Council which administers these reserves

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that both are unstable areas of land and unsuitable for housing. They are in the same category as Area 10.

Area 26 comprising 6070 m<sup>2</sup> has a small frontage to Ngapipi Road and adjoins Hobson Bay. The Auckland City Council which administers it, advised us that it was laid off as a foreshore reserve on subdivision of this area. They have very little information about it.

We come now to consider other lands considered in the claims that ought in our view to assist Ngati Whatua in finding the economic base, as already referred to.

*14.3.6 Land Vested in the Housing Corporation.* An area of some 1.79 ha was vested in the Housing Corporation for housing purposes by s 14 of the 1978 Act (No III, appendix III). It is immediately south of the land administered by the Auckland City Council under the 1978 Act as part of the Bastion Point headland reserve.

Geographically it is a separate entity, desirable land but located in a gully behind the headland plateau and without the latter's spectacular views. Because of its physical distinction, it was recommended in the 1977 Joint Planning Study Group Report (p 44) as land that should be available for low cost medium density housing through other than private interests.

The 1978 Act vested the land in the Housing Corporation, the Corporation being charged \$260,000 for it by the Lands and Survey Department.

Since acquiring the land the Corporation has undertaken preliminary subdivisional work at considerable cost. In 1982 it invited public tenders for the purchase and development of the land for housing purposes but there were public objections and no satisfactory tender was received. Since then the Corporation has had no further instructions as to the land's future use and disposal.

We were advised by the Corporation that the Government valuation of the land was \$1,100,000 as at 1 July 1985 and that as at November 1986 the valuation was estimated to be between \$1.7 and \$1.8m. We see no impediment to the passage of this land to Ngati Whatua in partial compensation and in terms of the claim. Though near to the marae and other Ngati Whatua land it is also physically apart, being on the opposite slope that runs from the dividing Takaparawha ridge. It has potential for either Ngati Whatua housing or for development through a leasehold residential scheme for general public occupation. The latter use would provide an endowment not unlike that once proposed for the headland by Paora Tuhaere.

It is, incidentally, of approximately the same area as the 4 acres 36 perches gifted to the Church of England by Ngati Whatua in 1859 and subsequently sold by the Church to the Crown in 1926 and later developed by the Crown for housing.

*14.3.7 Community House Reserve.* Immediately adjacent to the western boundary of the Housing Corporation land is an area of approximately 7798 m<sup>2</sup> (No 31, appendix III). It is described in the Second and Tenth schedules to the 1978 Act and is vested in the Auckland City Council as a local purpose

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(site for community facilities) reserve by s13 of that Act. We were informed by Mr Bradbourne, the Auckland City Council Director of Parks, that the Council has no proposals for the use of this land for community purposes. A community house, once proposed for this site, has now been built in the shopping area on Kepa Road at the southern end of the block (No 9, appendix III). We consider that this land too should pass to Ngati Whatua.

*14.3.8 Youthline House Trust Land.* Section 15 of the 1978 Act set aside 4304m<sup>2</sup> as a local purpose (community health) reserve and subsection (3) (as amended) appointed the trustees of the Youthline House Trust as the administering body for its control and management (No 110, appendix III). It is situated at the northern end of Kupe Street immediately adjacent to an area of 2.87 ha vested in the Ngati Whatua Trust Board for housing purposes and with which it naturally blends.

Notice of the claim was given to the Trust's Director. Though we received no response from the trustees, we were advised that the Youthline House Trustees no longer wish to be associated with this land. In these circumstances its present status is inappropriate. As land that might be vested in the Ngati Whatua Trust Board it would fit readily with the tribal housing scheme envisaged for the Board's adjoining land.

*14.3.9 Other lands included in the claim and which should also in our view pass to the Ngati Whatua Trust Board are as follows*

- (a) *The Marae.* (Nos 105, 106, 107, appendix III), as discussed at 12.19.
- (b) *The Church and Urupa at Okahu Bay.* Prior to the 1978 Act, the Orakei Maori reservation at Okahu Bay (No 114, appendix III) comprised land reserved as a Church site for the common use of Maori in and around Orakei and for the purposes of a burial ground for the former owners of the Orakei No 1 Reserve Block and their descendants pursuant to s 439 of the Maori Affairs Act 1953 (see s 11(2) of the 1978 Act). Section 11(l) of the 1978 Act vested an adjoining area (No 102, appendix III) of 2012 m<sup>2</sup> in the Trust Board to add to the existing Orakei Maori reservation. The claimants seek to have the two pieces of land amalgamated and the whole vested in the Ngati Whatua Trust Board as a Ngati Whatua reserve for a Church and burial ground. A tribal meeting of June 1984 resolved that this should be done and the surviving trustees for the main reservation have agreed.
- (c) *The Cemetery Reserve in Ruatara Street.* This small piece of land was part of the 4 acres gifted to the Anglican Church and later sold to the Crown. We find however that the Crown has since vested it in the Board.
- (d) *Access Strip.* A small area (112, appendix III) to provide access to the marae from Kupe street.

*14.3.10 The Trust Board Debt of \$200,000 to the Crown.*

One other item of relief was sought by the claimants. They ask that the liability of the Ngati Whatua Trust Board to pay \$200,000 to the Crown 'by way of equalisation' should be abrogated by the repeal of s16 of the 1978 Act. Following the 1978 Act the Board executed a mortgage for about \$200,000

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in favour of the Maori Trustee for a term of 40 years, principal and interest being repayable on a table basis by 40 annual payments of \$15,814. We have earlier described in 9.5 and 12.22.3 how this liability arose from an adjustment between the value of the Bastion Point and the 10 acre 'exchange block' sites compulsorily acquired by the Crown and not returned to Ngati Whatua, and land vested in the Trust Board in exchange. It will be recalled that this settlement resulted from a strictly limited claim based on legal not moral grounds. Nor was it a claim under the Treaty of Waitangi Act. We have already found that Ngati Whatua are not estopped by the 1978 settlement from advancing its present claims. While the obligation to pay the Crown \$200,000 resulted from the agreed principle of 'equivalence' that was in the context of a very limited claim. It is now superseded by the present proceeding brought on an entirely different basis. Given our opinion that much of the substantial Crown reserves land should remain as reserves we have no hesitation in recommending that the Board's statutory obligation under s16 of the 1978 Act to pay \$200,000 to the Crown should be repealed. The Crown should settle with the Maori Trustee, not just the balance outstanding on the mortgage, but the whole of the principal sum secured together with interest that the Board has paid. The Maori Trustee should make an appropriate refund to the Board.

#### 14.4 Remedies We Propose

We refer again to the objective in this case as introduced at 14.2, the restoration of Ngati Whatua through the affirmation of the tribe's status, provisions for homes, the establishment of an economic base and the recognition of tribal authority.

We refer also to our finding at 14.2.5 that Ngati Whatua lacks the necessary land and cash to undertake tribal restoration. The following remedies are based on the restoration of Ngati Whatua in terms of status, homes, investment and representation.

##### *Status*

*14.4.1* We have earlier recorded the depth of spiritual attachment of Ngati Whatua to their traditional papakainga (No 23, appendix III) and have said that, given the nature of the site and the veneration in which it was then and is still held by Ngati Whatua, the Crown might reasonably have been expected, in vesting its administration in the Auckland City Council, to have imposed some restrictions recognising the special nature of the site and the mana of Ngati Whatua over it. We consider, given the deep affinity of the tribe for their papakainga, that the whole of area No 23 should be vested in the Ngati Whatua Trust Board under the arrangement described below as an historic reserve and for passive recreation purposes, to the end and intent that public user will still be provided but Ngati Whatua will have total control over any special use. As indicated in 14.4.2 the City Council will continue to maintain the area in return for the public enjoyment of it. It may be that the Trust Board would wish to signify the historic and continuing importance of this land by re-

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naming it in a way which reflects its return to its traditional owner. While there is perhaps a less compelling case for vesting the seaward area (No 28), being the land severed from the papakainga by the sewer and later by Tamaki Drive, we believe it too should be vested in the Trust Board as a historic and recreational reserve but continue to be maintained by the Auckland City Council.

14.4.2 We would seek to affirm further the status of Ngati Whatua in Auckland and to recognise its traditional mana whenua and special place in Orakei by the establishment of a Ngati Whatua–Auckland City Council partnership regime for the administration of Okahu Park and the Bastion Point Headland reserves. We therefore propose

- (1) That Okahu Park and the Bastion Point headland reserves (excluding the MJ Savage Memorial) and being the areas marked 23, 28, 20, 21, 22, 29 and 30 on appendix III cease to be Crown land and be vested in the Ngati Whatua of Orakei Maori Trust Board as Maori land holding historical and spiritual significance for Ngati Whatua of Orakei and available as a park for the benefit of Ngati Whatua and the citizens of Auckland.
- (2) That administration of the lands be vested in a statutory Board called the Ngati Whatua of Orakei Reserves Board (or such other name as may be sought by the Ngati Whatua of Orakei Maori Trust Board).
- (3) That the function of the Reserves Board be the control and management of the reserves vested in it for the purpose of their classification under the Reserves Act 1977 in accordance with the appropriate provisions of that Act.
- (4) That membership of the Board comprise (say) six persons, three appointed by the Trust Board and three by the Auckland City Council, the chairperson to be elected by the Board members from among their number.
- (5) That the funds necessary for the management and control of the reserves continue to be provided by the Auckland City Council. We note that in their Counsel's submissions to us the City Council offered to continue to meet the cost of maintaining these reserves even though the title to all or some or them might be transferred from the Crown to particular Maori interests.
- (6) That provision be made for Ngati Whatua to hold community or cultural functions on the reserves at suitable times and places and to control attendance there. The provisions of s53(1)(e) of the Reserves Act and of s2 of the Auckland Domain Vesting Amendment Act 1986 may provide, with appropriate modifications, a suitable model.
- (7) That the Crown pay fees to Trust Board appointees in accordance with the Fees and Travelling Allowances Act.
- (8) That the land be exempt from payment of rates.
- (9) That provision be made that notwithstanding the Trust Board's role, the Reserves Board may lease parts of the reserves for tribal farming purposes.



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(10) That the reserves be re-named Ngati Whatua Park or such other name as the Trust Board may approve.

14.4.3 To affirm the mana of Ngati Whatua at Orakei (as well to repair a serious past mistake) we propose that the marae, Church and urupa, with the areas added to each, be vested by legislation in the Ngati Whatua Trust Board, freed from liability for all rates. To maintain marae access to Kupe Street we recommend the small area No 112 on appendix III be vested in the Board.

*Homes*

14.4.4 The area currently set aside for future housing is only marginally adequate for any substantial 'return home'. We would augment it by adding the Youthline Trust site. The added area, like the current housing estate, should be exempt from reserve contributions on any subdivision but it should also be freed from a liability for rates until development begins.

14.4.5 Only time will tell whether the then housing estate is adequate for current and future housing requirements and whether the Board will need to acquire, or assist its members to buy, other homes in the Orakei block. An open mind should also be kept on whether any part of the private park should later be available for homes.

14.4.6 A cash contribution is required for urgently needed new housing to begin. The amount is considered below. For now, and for the reasons given at 14.3.10 we recommend the refund of the \$200,000 debt.

*Investment*

14.4.7 An endowment is required for maintenance of tribal amenities, the marae, marae roading, church, urupa, private park and for general tribal programmes. An economic base is needed too for the inauguration of job creating industries whether 'in town' or on the tribe's own land, for the people would have that much at least had the original area been maintained.

14.4.8 To assist the establishment of an economic base and provide for an endowment fund on a scheme not dissimilar from that which Tuhaere began, we would vest in the Board the vacant Community House site and Housing Corporation land. Again, they adjoin substantial public reserves and should be exempt from reserve contributions. Ngati Whatua has virtually no cash assets and the land should also be rate free until development starts.

14.4.9 Mr Guscott was engaged to provide a succinct assessment of the minimum cash contribution required for housing and development projects to begin and to establish an appropriate economic base for the purposes described. That assessment had necessarily to be based on an assumed scenario. It is as follows

- (a) For reasons earlier explained, returns from the existing homes do not provide for development elsewhere.
- (b) The project for 30 units on area 103 needs to begin now, along lines proposed by the Board that is to say, with land development to be done by the Board and with unit development on residential leaseholds that

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enable members to own their own homes paying only a ground rent. Restrictions on lease transfers would keep ownership within the tribal group (though in some cases the Board may need to buy in when a sale is sought) but those same restrictions limit the availability of loans from the private sector. Those currently seeking homes in this development have existing equities and should on average contribute about one third of the estimated building costs. The land is prime residential land and development should be of relatively high standard.

Some members would be hard put to meet mortgage outgoings on standard State terms and concessionary provisions would be required with mortgage terms exceeding 30 years in some cases. Many would not meet State lending criteria and second mortgages would also be needed.

- (c) The second development stage (area 109) is much more costly. At current figures land development costs alone would exceed \$1,000,000. In addition the Board would need to build some homes of its own to house members lacking equity.
- (d) The present land development cost of area 103 is approximately \$600,000. Building costs for the reasonable standard required and after deducting a one third members contribution is approximately \$1.8 million, with that amount to be raised from loans. Concessionary loan terms are needed. To fund eventually the second housing stage and to provide the concessionary mortgage terms needed on stage one, where required, we consider the Board itself must be in a position to provide the cash necessary to make those mortgage advances. It would also need to meet development costs from its own resources and the Board would therefore require in all, an estimated \$2.5 million.
- (e) On this scenario, the development of area 109 is very much in the longer term and would be funded from outside borrowing and the accumulation and wise investment of ground rents and mortgage repayments from stage I. Properly, a further cash investment would need to be set aside now.
- (f) Sale of development rights of the 'endowment lands' for general public use—the community house site and Housing Corporation land—would provide the further investment necessary for the eventual stage II housing development. Continuing ground rents from the 'housing endowment' would contribute to the maintenance of the marae, marae road, church, urupa and private park.
- (g) Again, on this scenario, though it may be unacceptable to Ngati Whatua, some local industry would be engendered from developing the tourist potential of the marae. That would require an estimated \$0.5 million in completing urgent works, the upgrading of the Kitemoana Street homes, the approaches, the marae roads and the private park with any excess to be added to the provision of further facilities on the marae for tourist purposes. These improvements are urgent in any event.

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(h) On the scenario proposed any major investment in job generating industries for the people and the funding of educational and other general tribal programmes would be in the very long term indeed, but would come eventually from rentals accruing from the total housing estate.

*14.4.10* Accordingly, with Mr Guscott's assistance, we have estimated \$3 million as the minimum figure required for Ngati Whatua to begin its proper re-establishment. Mr Guscott was at pains to point out to us that his estimate was very general and a much more comprehensive study was properly called for, but he also stressed that on the basis of his estimates, \$3 million represented the absolute minimum that would reasonably be required.

*14.4.11* He also considered Ngati Whatua would require the services of a competent economic planner and adviser at least in the initial development stages.

*14.4.12* We recommend

- (a) payment to the Ngati Whatua Trust Board of \$3 million as a contribution to re-housing and endowment development programmes;
- (b) that such payment be made in cash, in one lump sum, but if paid over time that it be made inflation proof;
- (c) that the Crown meet the cost of an independent adviser and consultant on a four year contract to assist the Ngati Whatua Board.

*14.4.13* The scenario described would initially provide homes only for tribal members with reasonable equities. It is important to assure a wide spectrum of people by age and income in community rebuilding but the existing rental homes are insufficient for those without capital and the provision of other rental homes must come in the much longer term. We also recommend therefore a policy of preference for Ngati Whatua in the allocation of the many other State homes in the Orakei block, as they become vacant.

### *Representation*

*14.4.14* To recognise in modern form the traditional tribal authority of Ngati Whatua, we would vest the lands referred to in the Ngati Whatua Trust Board and would extend the rationale for the Boards existence, and its powers, in the manner contemplated at 12.23. The Board should also be recognised as a charity for the purposes of taxation.

### *General*

*14.4.15* The above proposals, we emphasise, do not give recompense for the loss of the Orakei block, but exceed the concessionary claims in this case.

*14.4.16* For reasons earlier given, we have declined to recommend that the whole of the park areas be vested in the Ngati Whatua Trust Board. We have upheld instead the public enjoyment of those areas under a partnership between Ngati Whatua and the Auckland City Council. Equity requires however that the Crown, in its capacity as a Treaty partner, should make a

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substantial cash contribution to the Ngati Whatua Trust Board to assist in tribal rehabilitation on the ancestral home lands. The sum of \$3 million with waiver of a past debt, is, we consider, the minimum we can recommend.

*14.4.17* We emphasise that our suggestions for the utilisation of lands and monies have been purely for the purpose of making an assessment. We do not presume to imply that Ngati Whatua should be committed to any development model we have suggested for how they finally deploy their own assets and revenues must be their business. That too is a matter of mana.

#### 14.5 Summary of Remedies Proposed

Ngati Whatua we find, are properly entitled to reparation for the loss of the Orakei block of 283 ha.

In 1978 the tribe received some 11.4 ha being 2.68 with existing homes, 4.54 ha for future housing and 4.18 ha as private open space, but subject to a debt of \$200,000.

The claimants sought recovery of 'public owned' lands not used for housing or roads. The area so claimed is approximately 67.25 ha.

Under the recommendations proposed the public would retain access to the whole 67.25 ha currently held as public parks and reserves but ownership of Okahu Park of some 6.3 ha (Nos 23 and 28), and of the headland parks of Bastion Point, 38.5 ha (Nos 20, 21, 22, 29, 30), would vest in the Ngati Whatua of Orakei Maori Trust Board, while their control and management would vest in a new Reserves Board comprising Ngati Whatua and Auckland City Council representatives.

Ngati Whatua, through its Trust Board, would additionally receive some 3 ha for such development as it sees fit, remission of the \$200,000 debt, and \$3,000,000 to inaugurate programmes necessary for the tribe's rehabilitation. The Ngati Whatua of Orakei Maori Trust Board would be reconstituted as a tribal authority and would have vested in it the Orakei marae, church and urupa.

## Chapter 15

# Recommendations

*WE RECOMMEND* to the Minister of Maori Affairs and to the Ministers of Housing, Lands, Local Government, Health and Finance—

### 1. *Okahu Park and the Bastion Point Headland Reserves*

- (a) That Okahu Park and the Bastion Point headland reserves (excluding the MJ Savage Memorial) and being the areas marked 20, 21, 22, 23, 28, 29 and 30 on appendix III cease to be Crown land and be vested in the Ngati Whatua of Orakei Maori Trust Board as Maori land holding historical and spiritual significance for Ngati Whatua of Orakei and available as a park for the benefit of Ngati Whatua and the citizens of Auckland.
- (b) That administration of the lands be vested in a statutory Board called the Ngati Whatua of Orakei Reserves Board (or such other name as may be sought by Ngati Whatua of Orakei Maori Trust Board).
- (c) That the Board comprise six members, or such other even number as may be agreed to, half to be appointed by the Ngati Whatua of Orakei Maori Trust Board, half by the Auckland City Council, the chairman to be elected by the Board members from among their number.
- (d) That the Reserves Board control and manage the reserves for the purpose of their classification under the Reserves Act 1977 in accordance with the appropriate provisions of that Act, at the cost of the Auckland City Council.
- (e) That notwithstanding the representation of the Trust Board on the Reserves Board, the Reserves Board may lease or give licences for parts of the reserve for Ngati Whatua farming or for tribal community or cultural functions to be held at suitable times and places.
- (f) That the Crown pay fees to the Trust Board appointees in accordance with the Fees and Travelling Allowances Act.
- (g) That the Reserves Board be exempt from the payment of rates.
- (h) That the reserves be renamed as Ngati Whatua Park or such other name as the Trust Board may approve. (refer 14.3.1, 14.3.3, 14.3.4, 14.4.1, 14.4.2)

### 2. *Orakei Marae, Church and Urupa*

That the Orakei Marae, Church and Urupa marked 105, 106, 107, 102, 114, and the access strip marked 112 on appendix III be vested in the

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Ngati Whatua of Orakei Maori Trust Board, freed from the payment of rates. (12.19, 14.3.9, 14.4.2)

*3. Kitemoana Street housing-mortgage*

- (a) That the liability of the Ngati Whatua of Orakei Maori Trust Board to pay \$200,000 to the Crown be abrogated by the repeal of s16 of the Orakei Block (Vesting and Use) Act 1978.
- (b) That the Crown settle with the Maori Trustee the principal sum on the Board's mortgage to the Maori Trustee with interest paid by the Board to the date of settlement; and that the Maori Trustee make appropriate refunds to the Board (14.3.10, 14.4.3).

*4. Youthline Trust site, Community site, Housing Corporation Land*

- (a) That the Crown vest in the Ngati Whatua of Orakei Maori Trust Board, without conditions as to user
  - (i) the land (No 110 appendix III) comprising 4303m<sup>2</sup> at the northern end of Kupe Street, Orakei and set aside as a local purpose (community health) reserve by s15 of the Orakei Block (Vesting and Use) Act 1978, the control and management of which was vested by the Act in the Youthline Trust (Incorporated).
  - (ii) the land (No 31 appendix III) comprising 7798m<sup>2</sup> at the northern end of Kupe Street, Orakei being all the land described in the second and tenth schedules to the 1978 Act, and which was vested in the Auckland City Council as a local purpose (site for community facilities) reserve by s13 of that Act.
  - (iii) the land (No 111 appendix III) comprising 1.7986 ha situated by the Bastion Point (Kohimarama) headland being the land described in the eleventh schedule to the 1978 Act and which was vested in the Housing Corporation of New Zealand by s14 of that Act.
- (b) That the Board be exempted from any reserve or reserve fund contribution requirements on any subdivision of the above lands and that they be held rate free for so long as they remain undeveloped.
- (c) That the Crown refund to the Youthline Trust (Inc) and Auckland City Council, any sums expended by them in respect of the lands described (14.3.6, 14.3.7, 14.3.8, 14.4.3, 14.4.5).

*5. Endowment Contribution*

- (a) That the Crown pay to the Ngati Whatua of Orakei Maori Trust Board the sum of \$3,000,000; and
- (b) That such sum be paid in cash, or made inflation proof if paid over time;
- (c) That the Crown meet the cost of an independent adviser and consultant on a four year contract to assist the Board. (14.2, 14.4.4, 14.4.5, 14.4.7, 14.4.12)

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*6. Recognition of tribal authority*

That the purposes and powers of the Ngati Whatua of Orakei Maori Trust Board be extended in the manner contemplated at 12.23 and 14.4.9.

*7. Legislation*

That the appropriate legislation to implement these recommendations be drafted in full consultation with the Ngati Whatua of Orakei Maori Trust Board and with such amendments or additions as the Board may agree to.

*8. State Housing*

That Housing Corporation be directed to provide a preferential policy for Ngati Whatua persons in the allocation of State homes in the Orakei block.

*WE REFER* to the Attorney-General the claim to pardons and a remission of outstanding fines, the background outlined in Part I of this report, and our findings and comments at para 12.24.

Those recommendations we make that the Crown may yet support its Treaty commitment to Ngati Whatua. For a tribe that initiated and aided substantially the establishment of Auckland on its land, that stood by the Crown in moments of great crises, that held fast to law and order despite every vicissitude put upon it, and which suffered the most dreadful consequences and then through no fault of its own—and great fault on the part of others—what we recommend is small recompense indeed. Yet it would be a major step to implementing the principles of the Treaty, that the tribal right long denied should now be re-affirmed in a realistic way and that the Crown should move in no unstinting manner to promote the re-establishment of the tribe it displaced.

Father Shirres we thought summed up the Ngati Whatua case with a quotation from *Pacem in Terris* (Peace on Earth), an encyclical letter of Pope John XXIII

One thing is clear beyond dispute; any attempt to check the vitality and growth of . . . racial minorities is a flagrant violation of justice; the more so if such exertions are aimed at their extinction. Indeed, the best interests of justice are served by those public authorities who do all they can to unprove the human conditions of the members of these minority groups, especially in what concerns their language, culture, ancient traditions and their economic activity and enterprise.

Dated at Wellington this fourth day of November 1987

ETJ Durie, Chief Judge, Chairman

G S Orr

MA Bennett,

MPK Sorrenson

ME Delamere

(Members)

Georgina Te Heuheu





## APPENDICES



## Appendix I

### The Claim

The Orakei claim, as filed on 7 April 1986, is as follows:

*WE, JOSEPH PARATA HAWKE*, of Ngati Whatua in Tamaki Makaurau, and twelve other persons whose names are set out below bring the following claim to the Waitangi Tribunal.

1. By a Statement of Claim dated the 15th day of February 1984, we invoked the jurisdiction of the Waitangi Tribunal in respect of matters pertaining to Orakei Block. Following hearings in May and July 1985 the proceedings were adjourned sine die. We now abandon the claim as formulated in 1984 and we bring the claim as set out hereunder before the Waitangi Tribunal as constituted by the Treaty of Waitangi Amendment Act 1985.

2. The claim is in two parts. In the first part we, *JOSEPH PARATA HAWKE, RENELILLIAN HAWKE, SHARON AROHA HAWKE, LANCE PARATA HAWKE and KELLY PENE* say that we are Maori, and that we and the tribe of Ngati Whatua of Orakei of which we are members are prejudicially affected by the policies and practices of the Crown whereby our Tribe was wrongly deprived of the 700 acre Orakei Block which ought to have been reserved for us and the Tribe as a whole in tribal ownership and control in accordance with our customs. We claim that those policies and practices that resulted in the loss of our land were contrary to the principles of the Treaty of Waitangi agreed to by our tupuna.

3. The particular policies and practices of the Crown complained of include:

- The vesting of part of our land in the Anglican Bishop of Auckland without ensuring its return to us if it ceased to be used for the purposes for which it was given and then in 1925 passing a law providing for its sale to the Crown;
- The taking of parts of our land for defence reserves and the failure to return them to us when they were no longer needed for defence purposes;
- The law that enabled our Block to be vested in some only of the tribe when it ought to have been clearly vested in or on behalf of the tribe as a whole, or, the law that failed to make it clear that those who took title to the land were trustees only for the whole tribe;
- The law that then enabled our land to be partitioned when it should not have been partitioned, and then leased when it ought not to have been leased without tribal approval;
- The taking of our lands for sewers and roads and the use of our harbour for sewer disposal with the consequent despoliation of our seafood resources;
- The swamping of our papakainga caused by works done without our consent;

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- The promotion of bills for the compulsory acquisition of our land when it was Crown granted to us as an inalienable reserve and when the Crown ought to have implemented policies to ensure that it stayed that way;
- The decision to buy our land though it was meant to be an inalienable reserve and though the Stout–Ngata Commission of Enquiry had recommended that it remain as a reserve for us;
- The failure to heed our petitions against the purchase of the land by the Crown or any other persons;
- The failure to properly consider our Petition that the land should have been held for the tribe as a whole;
- The buying up of individual interests in our land when that land was meant to be held for the whole tribe, and was land which the Crown ought not to have bought but ought to have protected for us;
- The failure to recognise our own customs by dealing with individuals and not with the assembled tribe as a whole or with tribal representatives properly appointed or recognised by the tribe;
- The application of undue pressure, trickery and unfair practices in the buying of interests in the names of individuals;
- The taking of remaining lands under the Public Works Act;
- The failure to return land taken under the Public Works Act for specific purposes and not used for those purposes;
- The combination of laws, policies and practices which rendered Ngati Whatua of Orakei totally landless (except for our church and its urupa);
- The destruction of our papakainga and marae and our eviction from the papakainga;
- Reserving lands in the Orakei Block for the former European lessees, but not reserving any land for members of Ngati Whatua;
- Requiring those of us provided with housing in Orakei to live as State tenants and not enabling us to obtain freehold titles (though permitting other State tenants in Orakei to do so);
- Failing to secure land for us as a marae, and giving land proposed for us as a marae to other persons, for a “national marae”;
- Failing to heed our numerous petitions to spare our papakainga from the buying, to reserve us land for a papakainga, and to reserve land for our marae;
- Failing to prevent the desecration of our papakainga by enabling the use of the former papakainga as a Domain without adequate safeguards as to how and by whom it should be used;
- Failing to provide us with any other legal means for the full, impartial and non-political enquiry into and determination of our grievances;
- Failing to give adequate recompense for our losses in the Orakei Block (Vesting and Use) Act 1978 or to make any adequate enquiry into all the

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circumstances of our losses throughout Orakei Block having regard to the Treaty between our tupuna Apihai Te Kawau and the Crown in 1840.

4. As a result of the laws, policies and practices outlined in the preceding paragraph, and in spite of a partial settlement of our claims in 1978, we do not have today the tribal endowment which ought to have been our inheritance and our provision both in material and spiritual terms for our descendants. Being cognizant of the Tribunal's obligation to make recommendations on the practical application of the Treaty of Waitangi to our claim, we do not seek the return of the entire 700 acre Orakei Block to Ngati Whatua but we claim that the Tribunal should declare that we are rightly entitled to the whole of it.

5. Now therefore, the remedies we seek in the first part of our claim are as follows:

(a) An amendment to the Orakei Block (Vesting and Use) Act 1978 so that any land in Orakei Block which is presently vested in the Crown or which has been vested by the Crown in other bodies, corporations or authorities, and which remains unused for housing or roading purposes, shall be vested in the Ngati Whatua of Orakei Maori Trust Board. In particular the following pieces of land shall be vested in the Board:

(i) All those pieces of land described in the schedules to the Act which are presently land held by the Crown under the Land Act 1948, and land subject to the Reserves Act 1977 (including those reserves administered by the Auckland City Council), and land vested in the Housing Corporation for housing purposes, and land set aside as a reserve to be administered by the Auckland City Council, and land set aside to be administered by the Youthline House Trust. The claim does not extend to the actual site of the Michael Joseph Savage cemetery and memorial;

(ii) All the land and buildings of the Orakei Marae;

(iii) The existing Orakei Maori reservation for the Church and urupa (which may conveniently be amalgamated with the additional land for church and burial ground presently vested in the Board);

(iv) The foreshore area of the Okahu Domain (including in particular the area of our former marae on our papakainga);

(v) The remainder of the Okahu Domain subject however to any existing leases and licences for sports and other facilities;

(vi) The land in Rautara Street comprised in Certificate of Title 22D/586 and vested in the Auckland City Council as a cemetery reserve.

(b) The \$200,000 payment by the Board to the Crown "by way of equalisation" should be abrogated by repeal of Section 16 of the 1978 Act and recommendations should be made to the Maori Trustee to restore the Board to the status quo ante prior to the implementation of section 16.

(c) All pieces of land currently subject to the Reserves Act 1977 shall upon being vested in the Board remain rate free so long as present or other

reserve type uses are maintained and reasonable access by the general public is permitted to continue.

6. In the second part, WE, THE CLAIMANTS AS A WHOLE say that we are Maoris and that we are members or supporters of the Orakei Maori Action Committee and that we have been prejudicially affected by the policies and practices of the Crown in actions taken against the Orakei Maori Action Committee including:

- intimidation and threats by members of various Government Departments including the Commissioner of Crown Land, his officers and members of the Police acting on his advice during the period that we occupied the tents, caravans and huts surrounding our meeting house, Arohanui, on the land at Takaparawha;
- the bringing of proceedings for an injunction in the High Court;
- the refusal of legal aid to permit us legal counsel to defend ourselves against the injunction;
- the arrest of 222 persons on 25 May 1978 by the Police assisted by the Armed Services;
- the destruction of our meeting house and other property on 25 May 1978;
- the discriminatory stay of prosecutions in respect of many of the 222 arrestees so that many arrested were convicted whereas others were not;
- the arrest on two occasions in 1982 of groups of members and supporters who were convicted and fined for “trespass” on Housing Corporation land;
- the failure of the then Government Ministers to in any way recognise or negotiate with members of the Action Committee from its inception in 1976 until the installation of the present Government in 1984;
- the attempts sporadically made by the Justice Department to enforce payment of fines for “trespass” convictions.

7. Now therefore, the remedies we seek in the second part of our claim are as follows:

- (a) Recognition of the personal sacrifices made by members of the Action Committee and their supporters to highlight the grievances in relation to Orakei Block;
- (b) A free pardon for all persons convicted of offences relating to the arrests in 1978 and 1982;
- (c) A cessation of any further attempts to enforce payment of outstanding fines for “trespass” convictions;
- (d) A suitable sum of compensation to be paid to the Orakei Maori Action Committee of such amount as the Tribunal thinks fit.

8. In respect of any matters arising under either part of the Claim the Tribunal should recommend such other and additional relief as to it seems just.

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9. We consider that notice of this statement of claim should be given to all bodies having interests in land vested pursuant to the Orakei Block (Vesting and Use) Act 1978, to all bodies and persons notified in respect of our 1984 Statement of Claim, to any other persons who made formal appearances at the 1985 hearings of the original claim, and to the Secretary for the Anglican Diocese of Auckland.

DATED this 3rd day of April 1986.

Joseph Parata Hawke

Hilda Halkyard Harawira

Rene Lillian Hawke

Grace Robertson

Sharon Aroha Hawke

Rebecca Margaret Evans

Lance Parata Hawke

Ana Meihana

Kelly Pene

Sophrenia Stockman

Gloria Abraham

Mere Taylor

Waatara Mihi





## Appendix II

# Record of Proceedings

Notice of intention to claim was filed on 10 May 1983. Further particulars were sought and a final claim was filed on 20 February 1984.

Public notice of the claim and of the first proposed hearing was given in *New Zealand Herald* and *Auckland Star* on 6 and 20 April 1984. Individual notices of the claim were sent on 20 February 1984 to the Secretary, Department of Maori Affairs, Director-General, Dept Lands & Survey, and on 22 February 1984 to Prof I H Kawharu, to the Director-General, Housing Corporation, Commissioner of Crown Lands, and to Secretary Ngati Whatua of Orakei Maori Trust Board.

The Tribunal was constituted to comprise Chief Judge Durie (Chairman), Sir Graham Latimer and P B Temm QC. The initial hearing was at Orakei Marae throughout the week commencing 6 May 1985. Persons who made submissions, in order of appearance, were

- Mr Joseph Parata Hawke, claimant (verbal with documents put in)
- Mr D Young, Department of Lands and Survey (verbal documents and maps)
- Dr D V Williams (verbal with six written submissions separately given and extensive documentation put in)
- Dr R Walker (verbal and written, personal and also as Chairman of both Auckland District Maori Council and Orakei Marae Trustees)
- Mr Hapi Pihema (verbal)
- Father T Dibble (verbal with written submissions for Joint Working Group on Bastion Point)
- Mr Alec Hawke (verbal)
- Mr Harawira Halkyard (verbal)
- Grace Robertson (verbal)
- Mr C B C Chittenden (verbal and written)
- Ms Ripeka M Evans (verbal)
- Mr Matawhero (verbal)
- Professor Ian Hugh Kawharu (verbal, documents put in)
- Mr E Rothwell, Auckland Branch Manager, Housing Corporation (verbal, documents put in)
- Mrs M C Boyce (verbal and documents put in)
- Mr Philip Hemara (verbal)
- Titirangi Bee Thompson (verbal)
- Mr Tozer (verbal)
- Mr Terry Hawke (verbal).
- Mrs M Mutu-Grigg (verbal) P J H Southorn (written, no appearance) M Fleming (written, no appearance) F Hackshaw (written, no appearance) G E Rowan, District Commissioner of Crown Lands (verbal) D D Millar,

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Chief Surveyor (verbal, documents put in) B Young, Maori Land Investigating Officer, Department Lands and Survey (verbal, documents put in) P E Phillips, Department Lands and Survey (verbal, documents put in)

Documents #1 to #18 were filed in evidence.

In the course of the first hearing it was apparent the claimants considered the ownership and control of Orakei Marae was in issue. The Tribunal considered that was not apparent in the claim as filed or the notices given and gave directions for further notices and hearings.

Public notice of the claim with a special reference to the marae question, and notice of the second proposed hearing was given in the *New Zealand Herald* and *Auckland Star* on 6 and 20 April 1985. Individual notices were sent on 6 June 1985 to

Solicitor-General

Secretary, Orakei Marae Committee

Secretary, Orakei Marae Trustees and to each trustee individually

Secretary, Orakei Marae Trust Board

Secretary, Orakei Marae Education Centre and five individual members of the Centre

Town Clerk, Auckland City Council

Director-General, Lands and Survey

Commissioner of Crown Lands

Director-General, Housing Corporation

Secretary for Maori Affairs

Rev F Donnelly, Director, Youthline House Trust

Joint Working Group on Bastion Point and to several individuals who had expressed an interest.

The Tribunal sat at Orakei Marae on 8 and 9 July 1985 to further consider the claim and including that part of it as related to the ownership and control of the marae.

Submissions were made by:

Mr T S P Cootes (verbal)

John Cootes (verbal and written, for Bastion Point Committee with documents put in)

Peter Rikys (verbal and documents put in)

Father Michael Shirres (verbal and written)

Mr Hone Harawira (verbal)

Mrs Ani Pihema (verbal, written and documents put in)

Mr Marcel Thompson (verbal)

Reverend Maori Marsden (verbal)

Dr David V Williams (verbal with written submissions)

Mike Rameka (verbal with written submissions for Okahu Church and Urupa Trustees)

Harry H Craig (verbal)

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Ms Emily Karaka (verbal)

Professor Ian Hugh Kawharu (verbal, documents put in)

Mr Hapi Pihema (verbal, written and documents put in)

Joseph Parata Hawke (verbal) W. Mihi (verbal) M Tarewa (verbal) A Te A Hawke (verbal and with written submissions for Tamaki Makaurau Work Trust)

The claimants were not represented by Counsel at either hearing. J Paki appeared for the Department of Maori Affairs (documents put in). V Norman was appointed interpreter.

Documents #19 to #27 were filed in evidence.

Following the hearing of 6 June the Tribunal was advised that subject to the enactment of the Treaty of Waitangi Amendment Bill then before Parliament, the claimants would abandon their claim and substitute another under the amended provisions.

The Bill became law and on 5 April 1986, the claimants formally abandoned the old claim, and filed another. This new claim is printed as appendix I.

Meanwhile the Tribunal had undertaken further research. Documents #28 to #35 were received. Based upon the earlier evidence and further research a Report was produced covering the history of Orakei in the context of the claim. On 8 August 1986 the Chairman issued directions for the dissemination of the Report, the issuing of further notices and the arrangements for further hearings.

Copies of the directions, Report and the new claim were sent on 13 August 1986 to

Dr D V Williams (authorised to receive for the claimants)

Chairman, Ngati Whatua of Orakei Maori Trust Board

Chairman, Orakei Marae Trustees

Chairman, Orakei Marae Centre for Education and Cultural Exchange Inc

Secretary for Maori Affairs

Auckland Director, Department of Maori Affairs

Maori Trustee

Auckland Branch Manager, Housing Corporation of New Zealand

Commissioner of Crown Lands, Auckland

Director-General, Department of Lands and Survey

The Mayor and Town Clerk, Auckland City Council

The Director, Youthline House Trust Inc

The Secretary, Anglican Diocese of Auckland.

The Tribunal reconstituted in 1986 to hear the new claim under the provisions of the Treaty of Waitangi Act 1975 as amended in 1985 comprised Chief Judge Durie (Chairman), Rt Rev M Bennett, Professor G S Off, Professor M P K Sorenson, Mrs G M Te Heuheu and Mr M Delamere.

Public notice of the new claim and of the proposed hearing date was given in the *New Zealand Herald* and *Auckland Star* on 22 October and 5 November 1986. Individual notices of the claim and hearing date were given to those

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abovenamed (to whom the directions and report had been sent) on 20 August 1986, together with: the individual members of the Ngati Whatua of Orakei Maori Trust Board, the individual members of of the Orakei Marae Reserve Trustees, the individual members of the Orakei Church and Urupa Reservation Trustees, the former members of the Orakei Marae Development Council, and other persons who had expressed an interest.

The claim was heard at Orakei Marae throughout the week commencing 17 November 1986.

Mr G A Howley was appointed as Counsel to assist the Tribunal. Ms Violet Norman was appointed as interpreter.

The claimants were not represented by Counsel.

Mr J Paki and Ms P Kingi appeared for the Department of Maori Affairs and the Maori Trustee, also Mr M Maniapoto, Chief Registrar, Maori Land Court and Mr P Park, Maori Affairs Department appeared.

Mr Hanna appeared for the Auckland City Council.

Submissions (verbal and written, or maps) were received from

Mr G Howley, Counsel assisting Waitangi Tribunal

Mr G P Hanna, Counsel appearing for Auckland City Council

Mr Carthy, Solicitor, Housing Corporation

Ms P Kingi, Solicitor, Department of Maori Affairs and Maori Trustee (documents put in)

The Rt Rev Bruce Gilberd, Bishop, Diocese of Auckland, Anglican Church

Mr J E Towle, Chancellor, Diocese of Auckland

Mr I Ralph, Standing Committee, Diocese of Auckland

Verbal submissions were made by Mr A Ralph, Rev M Marsden (with document), Rev T Marsden, Mr M Tarawa, Mr T Wikiriwhi, Mr P Hoet, Mrs Hobson, Father T Dibble (with written submissions for Joint Working Group on Bastion Point), Mr N Te Whata, Mr J M Rameka (with document), Mrs E Karaka, Mr D Tumahai (personal, and Deputy Chairman of Ngati Whatua of Orakei Maori Trust Board), Mr J P Hawke (with documents put in, and a waiata), Mrs P Te Herengi, Mr T Hawke, Ms S Hawke, (with documents), Mr P T Hawke Mr K Pene, Mr T Kirkwood, Mr R G Miller (Senior Land Surveyor, Auckland City Council) (with documents and maps), Mr J Hawke, Mr P Maihi, Mr J Betts (Divisional Planner, Auckland City Council) (verbal, and documents), Mr Bradbourne (Director of Parks, Auckland City Council) (verbal and documents), Mr H Pateoro, Dame Whina Cooper, Mr M Tarawa (with document), Mr G Tumahai (with document), Mrs M C Boyce (verbal and documents put in), Mr M Thompson, Mr H H Craig (with document), Mr Te Waru Hill (with document), Mr P Regan, Mrs R Grey (with document), Mr J M Mullane, Mr T Marsden, Mr F C Symes (Branch Manager Housing Corporation) (with documents), Mr J Broadbent, Mr G A Matthews (Assistant Manager Housing Corporation) (with document), Mrs T Cruikshank, Mr A Te A Hawke, Mr M Maihi, Mr W Pihema, Mr N Cooper, Mr P Bradley (with document), Miss A Pihema (with document), Mr T Watene.

Additional submissions were received from Sir Ralph Love (written,

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no appearance), Prof I H Kawharu (written, no appearance), Maori Trustee (written, no appearance), W Sutton (written, no appearance), Ngati Whatua of Orakei Maori Trust Board (written), Dr G Butterworth (written only).

Documents and maps #AI to #A51 were filed in evidence.



**Appendix III**

**Map of Orakei Block**





Land Information as at August 1987

Land vested in Ngati Whatua Trust Board under the Orakei Block (Vesting and Use) Act 1978.

Land recommended by The Waitangi Tribunal to be vested in Ngati Whatua Trust Board.

Land recommended by The Waitangi Tribunal to remain in Crown Title and administered by the Auckland City Council.

Land recommended by The Waitangi Tribunal to be vested in Ngati Whatua Trust Board for Public Parks (See para 15.1 of this Report.)

Urupa (Cemetery):  
Recently vested in Ngati Whatua Trust Board.

AREA SCHEDULE

Area Number	Hectare	Acre
1	0.1700	0.4
2	0.5176	1.2
3	0.1120	0.2
4	0.6326	1.5
5	0.1988	0.4
6	0.3417	0.8
7	0.4502	1.1
8	0.3187	0.7
9	0.1234	0.3
10	4.1500	10.2
11	1.0800	2.6
12	0.6819	1.6
13	0.8223	2.0
14	1.6200	4.0
15	0.1996	0.4
15A	0.0392	0.
16	0.0397	0.1
17	0.1060	0.2
18	8.0000*	19.7
19	6.4933	16.0
20	8.8763	21.9
21	16.5384	40.8
22	0.7900	1.9
23	5.7000*	14.0
24	0.0706	0.1
25	0.2574	0.6
26	0.6070	1.4
27	0.6927	1.7
28	0.5817	1.4
29	10.4700	25.8
30	1.8493	4.5
31	0.7798	1.9
101	0.3285	0.8
102	0.2012	0.5
103	1.1429	2.8
104	2.3531	5.8
105	0.4535	1.1
106	1.2157	3.0
107	0.1824	0.4
108	4.1817	10.3
109	3.2873	8.1
110	0.4304	1.0
111	1.7986	4.4
112	0.1904	0.4
113	0.1102	0.2
114	0.1644	0.4

Area numbers 1-31 are the same as the Auckland City Council's evidence.

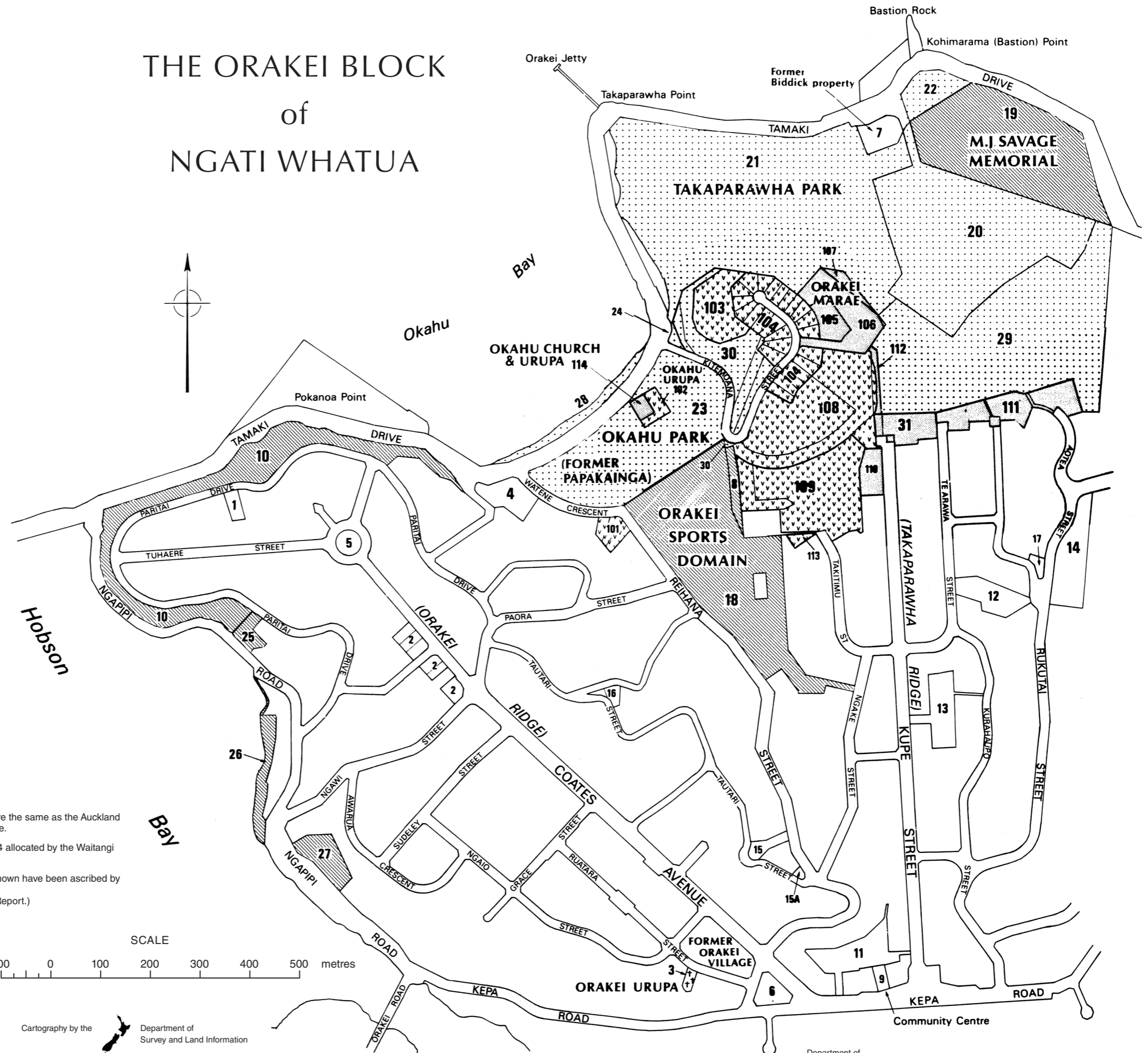
Area numbers 101-114 allocated by the Waitangi Tribunal.

Some of the names shown have been ascribed by the Waitangi Tribunal. (See para 2.5 of this Report.)

Note: 0.0001 hectare = 1 square metre

\* approximate only  
acres are approximate only.

# THE ORAKEI BLOCK of NGATI WHATUA



Cartography by the



Department of Survey and Land Information

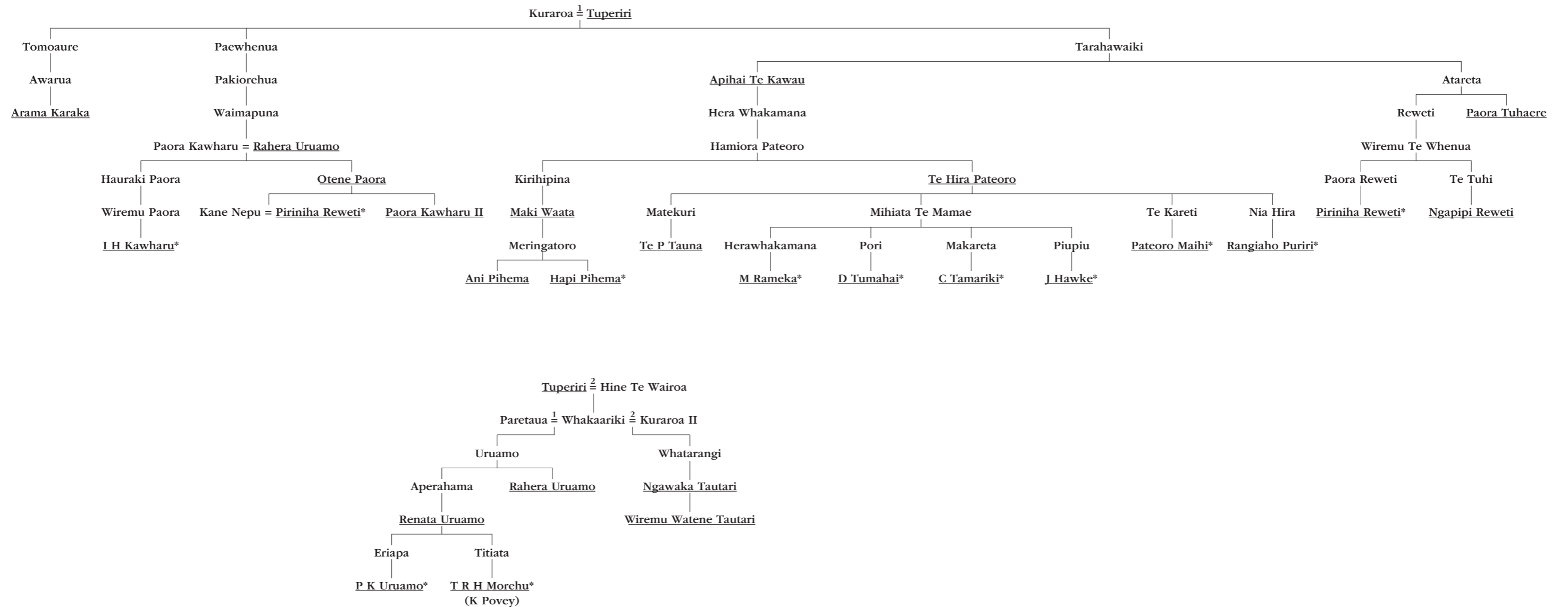
Department of Survey and Land Information Map Licence WN 1987/7: Crown Copyright Reserved



**Appendix IV**

**Whakapapa (Genealogical Table)**





Whakapapa showing relationship of Ngati Whatua mentioned in the text (names underlined)

\* Denotes present or former members of the Ngati Whatua of Orakei Maori Trust Board



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