

MANUKAU REPORT



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**REPORT OF
THE WAITANGI TRIBUNAL
ON
THE MANUKAU CLAIM
(WAI-8)**

**WAITANGI TRIBUNAL
DEPARTMENT OF JUSTICE
WELLINGTON
NEW ZEALAND**

July 1985

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

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WAI-8

IN THE MATTER of a Treaty of
Waitangi Act 1975

IN THE MATTER of a claim by
NGANEKO MINHINNICK and Te
Puaha ki Manuka concerning
Manukau Harbour and environs

FINDING OF THE WAITANGI TRIBUNAL ON THE MANUKAU CLAIM

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Hon K T Wetere
Minister of Maori Affairs
Parliament Buildings
Wellington

Dear Mr Wetere

The Manukau Harbour is not merely a public utility for Auckland. It is part of the homeland of the northern Tainui tribes, a heritage that they would share, in the way that they know best, with the people of Auckland.

The decisions we have to make are not simply about the protection of the harbour. They are decisions about the place of the indigenous people in their own homeland.

There is an assumption that proper planning can protect this heritage and still accommodate more and more development. There is a feeling that with enough research and stronger conditions somehow all will be well. It is an assumption that can no longer be held. For the Manukau the critical questions are when is enough enough?—and what can we do now to repair the damage already done?

There is a view that Maori fishing interests can be protected as part of the general public interest in amateur fishing. This view reflects a refusal to take Maori values seriously or to come to grips with the promises our forefathers made in the Treaty of Waitangi. When European New Zealanders deny the Maori his 'treaty rights' with regard to the lands and waters they deny their own right to be here too. We must now face Maori demands for the exclusive use of traditional fisheries in accordance with a literal interpretation of the Treaty. Yet separate and exclusive usage was not chiefly sought by them. The claimants sought recognition of their status. They want their own experience, traditions and values to occupy an honourable place in our society.

There is a myth that Maori values will unnecessarily impede progress. Maori values are no more inimical to progress than Western values. The Maoris are not seeking to entrench the past but to build on it. Their society is not static. They are developers too. Their plea is not to stop progress but to make better progress and to progress together. It is not that they would opt out of development in New Zealand. It is rather they need to know they have a proper place in it.

They need that assurance. The Tainui tribal authorities are actively promoting policies to improve the economic and social performance of their people and engender a better respect for the laws and institutions of the country. The profound question is whether they can succeed given the

enormous denigration their people have had to suffer and which influences their view of our current society in every way. The issue is not whether they can succeed, for they must. The issue is how we can help them succeed, for that question affects us all. It affects the hope implicit in the Treaty of our forebears that together we can build a better nation.

INTRODUCTION

This claim to the Manukau Harbour has raised many separate issues. It is important for the whole community not only because of its far-reaching nature but also because of the deep-seated sense of injustice that Maori people feel and which we have felt obliged to investigate.

As the finding shows, our researches reveal that the Manukau Maori people were attacked without just cause by British troops, their homes and villages ransacked and burned, their horses and cattle stolen. They were then forced to leave their lands and were treated as rebels, all their property being confiscated in punishment for a rebellion that never took place.

These events happened before our jurisdiction commenced in 1975 but we explored them because consequences have followed that still have their effects today.

We were also required to investigate the effects on the waters of the Manukau of the steel mill at Waiuku and the slurry pipe-line project which is about to be put into operation.

The liquigas terminal to be built in the Papakura inlet was another matter for investigation, and the operation of the Auckland Metropolitan Sewage Treatment Plant at Mangere was also the subject of complaint.

We have come to see all the matters raised by this claim as illustrating in various ways the powerful feeling among Maori New Zealanders that the Treaty of Waitangi is a contract made with European New Zealanders which the pakeha has failed to honour.

The Maori New Zealander points out, with justification, that at a time when his people outnumbered the European by over one hundred to one he agreed to allow the European to live and settle in New Zealand on terms and conditions solemnly agreed to in writing by both parties. He says that he has kept his side of the bargain throughout its existence.

The Manukau claim throws into relief the way in which it is said that the European New Zealander has failed to live up to his obligations.

Our task has been to examine these complaints and reach a conclusion within the limits of our statutory instructions and authority.

What follows is the result of our hearings, our researches and our most anxious consideration.

We recommend to all New Zealanders an equally careful consideration of the matters we have had to bring to the notice of the Crown.

1. THE NATURE OF THE CLAIM

The "Manukau claim" is the most wide-ranging claim that this Tribunal has had to consider. To consider it in any broad and co-ordinated way it could not be severed into the several claims that it really constitutes.

Basically the claim is about the despoliation of the Manukau Harbour and the loss of certain surrounding lands of the Manukau tribes. More potently underlying this claim is an enormous sense of grievance, injustice and outrage that continues to haunt the Manukau Maori and bedevil the prospect of harmony in greater Auckland.

This sense of grievance begins with the land confiscations of the 1860s. By confiscation the Manukau tribes lost most of their lands including their villages and sacred places. They live with this loss today.

We knew of the confiscations of 1863 but we were to learn also of the view, illustrated by many examples, that the confiscations never stopped in 1863. It is said they have continued, in one form or another, from then to the present day. In their view the pattern of unjust treatment continues still, and unless arrested, will yet continue until nothing is left but a deeply embittered people and the shreds of a worthless treaty.

We are seriously disturbed by what we heard of recent events affecting the Manukau Maori people. Our jurisdiction prevents us from investigating those events that occurred before 1975 but it is still necessary to consider them. The claim in respect of current concerns cannot be severed from the earlier events of the past. From their one time extensive lands, forests, estates and fisheries all that is left to the claimants is a few pockets of land, a severely restricted ability to enjoy traditional fisheries, and a legacy of their denigration as a people. If that which is left to them cannot be protected for their benefit, not as a consequence of a recent environmental awareness, but through a substantive recognition of their status as the indigenous people, then the pattern of the past, the plundering of the tribes for the common good, will simply be affirmed and continued.

We have examined the history of past events in that context. We present them in that form to you, so that the people's current concerns, and hope for a better future, can be assessed in terms of what has gone before.

We are frankly appalled by the events of the past and by the effect that they have had on the Manukau tribes. Unlike our jurisdiction, that of the Government is not constrained. We urge you to consider in more detail the events to which we will later refer. It may be practicable to provide a measure of relief at this stage. If it is at all practicable, we would urge that steps be taken now, for they are long overdue.

Our recommendations concerning those matters within our jurisdiction do not go as far as many of the claimants would have liked. Although many of those claims are well founded upon a strict interpretation of the Treaty, other circumstances of the case point to the impracticality of providing the relief sought by some. But we feel a great deal can be done to recognise the status of the Manukau tribes in the affairs of the region, and to implement the doctrine of aboriginal rights to which the Treaty of Waitangi gave expression. To achieve this in practical terms will depend not only upon the implementation of our recommendations, but upon the answers, if any, that you may find to rectify many of the earlier wrongs.

Nganeko Minhinnick is a member of the Waikato-Tainui group of tribes. She brought this claim on behalf of a section of that group, Te Puaha ki

Manuka, but it was soon apparent that the claim had the general support of the Waikato-Tainui people as a whole.

She did not presume her claim to cover all the concerns of her tribal group or that all members would agree with it. She did not presume to speak first but spoke last and called on the people to speak for themselves.

We were addressed by 38 of the Waikato-Tainui people in the presence of several times that number. The significance of the presence of Te Arikinui, Dame Te Ata-i-rangi Kaahu, was not lost upon us. Her presence was a public expression of the importance that her people placed on the claim. We were also addressed by Henare Tuwhangai, an elder spokesman for the Kingitanga, Robert Mahuta, spokesman for Nga Marae Toopu, and Hori Forbes, chairman of the Tainui Maori Trust Board.

We were told of a large number of instances by which it was alleged that traditional rights to the enjoyment of the land or waters of the Manukau had been limited or denied. The claims were wide-ranging and although some were outside our jurisdiction to determine, each illustrated a central theme, that the promise of undisturbed possession of the lands, homes and fisheries of the Maori people had not been and was still not being recognised in the Manukau and lower Waikato river areas.

It was claimed

1. That the Manukau and the lower Waikato are part of the tribal demesne of the Waikato-Tainui confederation of tribes.
2. That the tribes having the traditional right to use and occupy the land and waters of the Manukau area are various subtribes of Waikato-Tainui together with the Waiohua, Kawerau and Ngati Whatua people to whom they are closely related.
3. That those tribes have used and enjoyed the lands and waters of the Manukau and lower Waitako from early times to the present day. The river and harbour are as much their gardens as their cultivations on land.
4. That the use and enjoyment of their land has been severely limited by compulsory acquisitions, the effects of growth and development and a failure to recognise or give proper consideration to tribal occupational rights.
5. That the use and enjoyment of the waters has been severely limited by pollution from farm run off, sewage and industrial discharges, the effect of major works, commercial fishing and a failure to recognise or give proper thought to tribal fishing rights.
6. Particular respects in which it was claimed tribal interests in the waters are not recognised include
 - the granting of water rights with insufficient regard for tribal fishing practices and cultural values
 - inadequate policies for the protection of waters for fishing purposes
 - ineffective policies to prevent depletion of the fish resource
 - lack of recognition of tribal rights in respect of the harbour and river, and
 - the denial of access to certain parts of the harbour and to certain lakes at Awhitu.

7. Particular projects claimed to infringe tribal rights in respect of the waters include
 - the mining of ironsands at Maioro on the Waikato River
 - the proposed slurry pipeline of New Zealand Steel Limited and discharges to the harbour from Glenbrook Mill, and
 - the proposed siting of a liquified petroleum gas wharf terminal in Papakura channel.
8. Particular respects in which it was claimed tribal interests in the land are not recognised include
 - compulsory acquisition of certain lands
 - siting of major works on or near Maori lands so that land ownership is lost or land enjoyment limited
 - denial of access to the harbour, river and lakes, and
 - destruction or failure to protect sacred sites (wahi tapu).
9. It was claimed the promise in the Treaty of Waitangi to full exclusive and undisturbed possession of Maori lands, homes and fisheries had not been kept and is still ignored in current projects and policies.
10. Recognition of tribal fishing rights was sought but opinions varied on how recognition should be given. Some claimed the whole harbour belonged to the local tribes and ought to be vested in them. Others claimed representatives of the tribes ought to be appointed as Guardians of the harbour. Others asked for particular areas to be reserved for their use. Others asked simply that tribal fishing rights be recognised in fishing laws and planning policies and be given greater priority.

We interpreted the broad claim as having two aspects

- an allegation that the tribes are prejudiced by the omission of the Crown to recognise “treaty rights” (the comprehensive claim) and
- allegations that the tribes are prejudiced by particular acts, policies and practices adopted by or on behalf of the Crown (the specific claims).

With regard to the former it was said that the alleged omission of the Crown to recognise “treaty rights” is not new because the omissions of today are a continuation of a policy or practice that intensified with the land wars and has never really ended.

2. THE RECORD OF THE HEARING

Public Notice of the claim was given in the NZ Herald and Auckland Star on 30 June and 7 July 1984.

Individual notices of the claim were sent to

Auckland Regional Authority and Auckland Regional Water Board
Auckland Harbour Board and Auckland Maritime Harbour
Maritime Planning Authority
Waikato Valley Authority
Water Resources Council
National Water and Soil Conservation Organisation
Franklin County Council
Manukau City Council
Mount Roskill Borough Council
Onehunga Borough Council
Otahuhu Borough Council
Papakura City Council
Papatoetoe City Council
Waitemata City Council
Minister and Director-General, Agriculture and Fisheries
Minister and Secretary, Energy
Minister and Commissioner for the Environment
Minister and Director-General, Health
Minister and Secretary, Internal Affairs
Minister and Secretary, Maori Affairs
Secretary and Auckland Regional Secretary, Transport
Minister, Commissioner and Auckland District Commissioner,
Works and Development
Liquigas Ltd
New Zealand Steel Ltd
Shell (NZ) Holding Co Ltd
Auckland Inshore Commercial Fishermen's Assoc Inc
Environmental Defence Society
Auckland District Maori Council
Makarau Maori Committee
Pukaki Maori Committee
Tainui Maori Trust Board

The claim was heard at Makaurau Marae, Ihumatao, Manukau, Auckland

- (a) on 16 to 20 July 1984 for the purpose of hearing the claimants and defining the issues, and
- (b) on 20 to 24 August 1984 and
- (c) 19 to 23 November 1984 for the purpose of hearing responses to those issues and final submissions.

At the hearings Ms Sian Elias, Barrister of Auckland, represented *the claimants*. She was not brought into the proceedings until shortly before the first day and was not consulted when the claims were filed.

In accordance with Maori tradition and protocol we were addressed first by kaumatua and kuia (elders) of the Manukau. They spoke on the Manukau generally and made particular reference to concerns arising within the hapu or tribal areas they represented. Apart from the fact that many spoke more than once the order of speaking was as follows

Maurice Wilson for Makaurau and Pukaki
George Rawiri for Waikato-Te Awamarahi
George Tukua for Waikato-Oraeroa
Albert Wharepouri for Reretewhioi, Tahuna and Awhitu
Peter Wade for Makaurau
Hori Forbes for Kawhia
Te Kani-A-Takirau Wawatai for Whatapaka
Barney Kirkwood for Waikato-Whatapaka
Tu Kaihau for Tahuna and Awhitu
Joseph Wilson for Pukaki, Manuka and Makaurau
Henare Tuwhangai for Tainui
Dan Rawiri for Ngati Paoa and Kaiaua
Ben Hoete for Waikato-Oraeroa and Nga Tai e Rua
Hare Tawhai for Te Puea
Mere Taka for Te Pou o Mangatawhiri and Mangatangi
Tori Kirkwood for Manuka and Whatapaka
Iti Rawiri for Waikato-Te Awamarahi
Wheriko Kaihau for Tahuna, Huarau, Reretewhioi, Awhitu and Rangariri, and
Hapi Pihema for Ngati Whatua ki Tamaki Makaurau.

With the authority of marae elders the rangatahi (next generation) addressed us. We heard submissions from

Toko Pompey of Waikato-Makaurau
Puoho Tomo of Waikato-Maniapoto ki roto o Tamaki Makaurau
Eva Rickard of Awhitu, Whaingaroa and Tainui Awhiro
Tehinu Rangimoewaka Carmen Kirkwood of Whatapaka and Waiohuria
Pat Hohepa of Waikato, Waiohuria and Tai Tokerau
Takatowai Gloria Hall of Waikato and Onehunga
Warena Taua of Kawerau Moke Toroa
Hariata Ewe of Kawerau Moke Toroa and Pukaki
Kamera Nepia of Manuka and Reretewhioi
Waatara Black of Awhitu and Rangariri
Jim Raumati of Manuka and Huarau
Moana Herewini of Maniapoto
Rena Kirkwood of Manuka and Whatapaka

Moeatoa Minhinnick of Tahuna and Moeatoa
Mahia Wilson of Pukaki and Manuka, and
Ben Ratu of Huarau and Maioro.

Finally we heard Nganeko Minhinnick of Huakina and Te Puaha ki Manuka.

Most of the Maori claimants addressed us in Maori. The *interpreter* followed the marae protocol of not interrupting a speaker so that translations were given at the end of each address. We recognise the skills of the interpreter, Ina Te Uira of Waikato and we wish to acknowledge the considerable assistance she gave to us.

In addition the Tumuaki or heads of local tribal and Maori authorities made submissions as follows

Dr R Walker, cultural anthropologist and lecturer University of Auckland, spoke as chairman of the *Auckland District Maori Council* on matters of local tribal history, cultural concerns relevant to the harbour, modern disturbances to the fisheries, legal processes affecting Maori people and the Treaty of Waitangi.

G H T Forbes spoke for the *Tainui Maori Trust Board* of which he is chairman. He placed the Manukau claim in the context of other related Tainui claims, negotiations and developments.

R T Mahuta, member of the Kahui Ariki of Tainui and Director for the Centre of Maori Studies and Research, University of Waikato, spoke for *Nga Marae Topu*. He presented very extensive submissions covering many aspects of the claim, outlining the nature and structure of the local tribal authorities, recent growth and development, and strategies for tribal development. He called in aid:

E M K Douglas, sociologist and demographer University of Waikato and a consultant to the Tainui Trust Board, who outlined the current resources and position of the people, and

Professor J E Ritchie, Professor of Psychology and former Dean of Social Sciences, University of Waikato and a consultant to the Board. In his capacity as a social anthropologist he reviewed the recognition of cultural and spiritual values in legislation and policy in New Zealand and abroad.

Dr S F Penny of Auckland, a private consultant specialising in fresh water ecology and the biological assessment of water pollution, was called by the claimants to provide a scientific basis to Maori observations on the Manukau Harbour. She noted a paucity of documented information on the condition of the harbour against which overall long term effects could be assessed.

P Hanley, Planning Consultant with Canadian and New Zealand experience, was called to illustrate the impact of major developments on Canadian Indians, and the substantial Resource Development Impact Fund provided by the Canadian Government enabling a review of major developments in the context of aboriginal rights.

R Brabant, Director of the *Environmental Defence Society*, made an independent appearance in support of the claimants. He reviewed recent planning hearings and spoke of the difficulties facing private individuals when appearing without scientific assistance. He told us of the various discharges that now occur in the Manukau Harbour.

J McCaffery spoke for the *Manukau Harbour Protection Society*, generally supporting the claimants and describing the extent and effect of pollution and development in the area.

In further support of the claimants D V Williams (now Dr D V Williams), senior lecturer in law University of Auckland, produced evidence of Maori claims to the Manukau last century. He made submissions on matters of case law, interpretation and application of the Treaty and the Treaty of Waitangi Act, and customary law as applied or considered in New Zealand and Australia.

In addition to making legal submissions C N Northover, Office Solicitor for the *Commissioner for the Environment*, called the Commissioner, K W Piddington, who reviewed a number of matters including the place of Maori values, the effect of the treaty and alternatives for dealing with existing problems.

H S Gajadhar, Office Solicitor for *Ministry of Agriculture and Fisheries*, made submissions on the current fisheries legislation. He also called from the Ministry:

R D Cooper, Senior Fisheries Scientist, to speak on Fisheries Management Plans

C Handford, Fisheries Management Scientist, to speak on the application of those plans to the Manukau and Lower Waikato areas and on recent trends

R W Little, Senior Fisheries Scientist, to review environmental and commercial factors affecting the Manukau fisheries resource. He made particular reference to marine farming proposals in the West Coast Harbours, to the recognition given Maori oyster reserves and fisheries, and made further submissions on certain of the issues raised.

O E Smuts-Kennedy, Office Solicitor for the *Department of Health*, covered her Department's areas of concern and called:

A L Cowan, Medical Officer of Health for South Auckland, to draw particular attention to investigations in the Waiuku and Pukaki areas.

J C M Hood, Land Officer, Head Office, *New Zealand Forest Service*, responded to claims about the Waiuku State Forest. He called:

W L Nickles, staff surveyor, Auckland

D A Black, Assistant Conservator (Planning) Auckland Conservancy

I J Currie, Ranger Officer-in-Charge

I R Hunter, Scientist, Forest Research Institute, Rotorua, and

I Lawlor, Archaeologist, Auckland Conservancy.

They covered a range of matters relating to the arrangement of the forest, the identification and protection of sacred sites, and the acquisition of lands for the forest. We were considerably assisted by the extensive research provided by I. Lawlor as to certain areas of particular concern to the claimants. We were impressed by the subsequent efforts of the Forest Service to resolve a matter of potential conflict between the Crown and the claimants relating to the compulsory acquisition of Maori land for the Waiuku State Forest.

M G Strachan appeared on the opening day for the Ministry of Energy but made no submissions.

R J Sutherland, District Solicitor for *Ministry of Works and Development*, appeared with B A Curtis and M C Strang. He reviewed many matters relating to the Town and Country Planning Act 1977, and Water and Soil Conservation Act 1967 and the acquisition of land for the Waiuku State Forest. His submissions were particularly helpful. A statement of evidence from B W Putt, Senior Planner for the Ministry at Auckland, was also read and covered planning controls and procedures affecting the Auckland International Airport.

D J Angus, Regional Solicitor for the *Ministry of Transport*, made general submissions and called B. A. Ranger, Senior Executive Officer Harbours and Foreshores Section, to review existing legislative and policy controls affecting the Ministry's responsibilities with regard to harbours

C W Latham, Regional Director Airways Operations for the Northern Region who covered the Ministry's responsibilities and developments at Auckland International Airport, and

A R Wigram, Senior Planning Officer (Aerodromes), Planning Branch, Civil Aviation Division, who explained certain controls at the airport and the selection of the Mangere site.

Two District Solicitors of Auckland and Hamilton, J Paki and W A Archibald, represented the *Department of Maori Affairs*. They were assisted by M Maniapoto, Deputy Registrar, Maori Land Court, Hamilton, and M R Litchfield, research officer in the Head Office. The main submission was given by B S Robinson, Maori Trustee and Deputy Secretary, in answer to our questions concerning the acquisition of Maori land in Waiuku State Forest.

B H Giles, Solicitor of Auckland, and with him N E Dolan, represented the *Auckland Harbour Board and Manukau Harbour Maritime Planning Authority*. He outlined the history of the Board, the discharge of its planning responsibilities and made submissions on particular claims and matters of jurisdiction. He called R S Gee, Chief Planning Officer, to the Board, to depose as to the manner in which the Board has discharged its responsibilities. We wish to make special acknowledgement for the care and thoroughness with which these submissions were presented to us.

P T Cavanagh, Barrister of Auckland, presented extensive and very helpful submissions for the *Auckland Regional Authority, Regional Planning Authority and Auckland Regional Board*.

A F Thomas, Chairman of the Authority, opened the Authority's case with policy commitments in answer to particular concerns raised by the claimants. Mr Cavanagh then called:

D S Grove, Manager of the Planning Division, who provided a broad overview and a detailed analysis of particular matters relevant to planning

N T Harper, Chief Engineer of the Drainage Division, who referred particularly to the Mangere sewage purification works and harbour water quality

A E Taylor, the Authority's Trades Waste Officer, who covered the effect of trade waste controls on current water quality

A Haughey, Chief Chemist, who analysed the nature and effect of pollutants in the harbour and described existing monitoring and studies. He informed us of the high cost of a fully comprehensive survey

In addition a submission was read from Dr K A Johnson, Special Investigative Scientist, which described the growth and potential of *gracilaria* seaweed

For the Regional Water Board, Mr Cavanagh called A G Dibble, the Board Manager, who outlined the general statutory framework, the practical administration of responsibilities and the Board's enforcement role, and C Hatton, Water Control Scientist, who described his studies and researches in the harbour

As to the Auckland Regional Authority's responsibilities with Auckland International Airport, Mr Cavanagh called A P Gysberts, the Development Officer, who outlined the importance of the operation, its impact on the area and the effect on Pukaki marae.

Deputy Chairman N R McLarin appeared for the *Franklin County Council* to support the status quo.

G M Jones, Solicitor and company secretary for *NZ Steel Limited*, appeared for that company and *NZ Steel Development Limited*. He presented legal submissions and submissions on facts, and called

G Hanley, Personnel Manager, to cover the structure, history and concerns of the company, and

A G Stirrat, a director of *NZ Steel Developments Ltd*, to answer particular questions raised by the claimants.

B Bornholdt, Solicitor of Wellington, appeared for *Liquigas Limited* together with F J A Easter, the general manager. He outlined in particular the works associated with the LPG terminal and wharf in the Papakura channel and the matters considered and debated before planning consents were given.

Submissions were received without appearance from:

Manukau City Council outlining the Council's interest

Mt Roskill Borough Council outlining the Council's interest

Onehunga Borough Council outlining the Council's interest

C Chamber for Epicentre (Inc) (Environment and Peace Information Centre) supporting the claimant's claim to custody of the harbour

M P Ashby, chairman, Auckland Inshore Commercial Fishermen's Association Inc, expressing opposition to the LPG wharf terminal as harmful to fisheries

P J Stevens for the New Zealand Federation of Commercial Fishermen supporting the claimant's opposition to the continuing discharge of pollutants to the harbour

P Horsley, lecturer in law, Massey University, on whether customary fishing rights have been extinguished

E Locke, historian, Christchurch, claiming that the harbour was in the possession of the Tainui and Ngati Whatua tribes and supporting from historical researches the Tainui claim to the mana of the harbour, and

D McMaster of Auckland, opposing the claim on the grounds that the parties to the Treaty were no longer living and on other grounds.

We record the considerable assistance and co-operation that we received from all parties to facilitate the conduct of our inquiries. We express our thanks also for the generous hospitality given to us and to all those who attended by the people of Makaurau Marae.

3. TE KAITIAKI WHANAU O MANUKAU (THE GUARDIAN FAMILIES OF MANUKAU)

The claim that those having customary rights in respect of the Manukau are the local sub-tribes of Waikato-Tainui together with the related people of Waiohūa, Kawerau and Ngāti Whatua, was not disputed.

3.1 NGA IWI (THE FIRST INHABITANTS)

In the beginning, we were advised, the original inhabitants, Tamaki and Maruiwi, settled along the northern shores of the Manukau Harbour in about 900 AD. Toi Kai Rakau and his people arrived later, about 950 AD, and intermarried with them. From there the *Kawerau* people formed to take the north-eastern area from the Manukau Heads to Karangahape, and *Waiohūa* formed to take the area around Tamaki.

3.2 TE HEKENGAI MAI O TAINUI (THE ARRIVAL OF TAINUI)

The Tainui canoe arrived later (according to tribal history in about 1350 AD). The canoe came into the Waitemata Harbour and was hauled across Tamaki isthmus to Manukau Harbour where it stayed for a while before moving south to Paraninihi at Taranaki and thence to Kawhia. Some of the crew intermarried with the original inhabitants and their descendants are included in the Waikato-Tainui subtribes that occupy the Manukau area today.

For the Ngāti Tamaoho people of Whatapaka marae on the eastern shores of the Manukau there is a special relationship with the harbour. They claim descent from Papaka, who is depicted on the maihi of their meeting house. Papaka, it is said, was put off the Tainui in the middle of the Manukau Harbour. He swam to the sand bar in the interior of the waters where he survived on the kai-moana or sea food of the harbour. In time Papaka became half man and half crab. His children left the waters in the form of man and intermarried with the local people. Thus it was claimed

“The Manukau not only belongs to us but we to it. We are a people begotten from within the depths of its waters.” (Carmen Kirkwood)

3.3 TE HEKENGAI MAI O NGATI WHATUA (THE ARRIVAL OF NGATI WHATUA)

For many years the *Nga Iwi-Tainui* people lived peacefully on the Manukau shores with relative freedom from outside aggression. Through them the related tribes of Waikato that were subsequently established in the south also enjoyed access to the harbour. The locality became noted for its rich supply of fish and fowl, and Tamaki in particular for its bountiful gardens.

Perhaps the area became too well known for its resources. Tamaki was soon to acquire its extended name—
Tamaki-makau-rau (Tamaki, the bride sought by a hundred lovers) and other groups were to move to the area.

In the mid-eighteenth century *Te Taou*, a sub-tribe of Ngāti Whatua of the Kaipara district, moved to occupy Tamaki and parts of the Manukau.

Their occupation was subsequently cemented by intermarriage. We were advised of particular marriages that are referred to today as securing a lasting bond. We were also told of the assistance given to Ngati Whatua by the Waikato people during the Nga Puhi invasions. We were told of an agreement in 1834 whereby the people returned to their homes after the invasions under the protection of the Waikato confederation, Te Taou of Ngati Whatua giving lands at Awhitu and Mangere to Ngati Mahuta of central Waikato to secure their presence and protection.

3.4 TE RIRI A TE PU (THE ANGER OF THE MUSKET)

In November 1822 a *Nga Puhi* war expedition led by Hongi, Rewa and Patuone came down from the north and conquered the Te Taou people at Tamaki, and also the *Ngati Paoa* of the Tainui group from Hauraki who had by then occupied the Auckland lands at Mokoia. (The devastation was so complete the *Ngati Paoa* regarded the area as tapu or sacred and subsequently would not re-occupy it. Later, they readily sold their area to European settlers.)

Nga Puhi did not follow up their conquests by long term occupation. After a long sojourn at the Waikato, the conquered tribes returned to resume their traditional occupancies.

3.5 TE TAHERE WAKA NUI O TAINUI (THE UNITY OF TAINUI)

The claim that the Manukau (and lower Waikato) are part of the tribal demesne of the Waikato-Tainui confederation was not disputed.

We have seen that various subtribes of Waikato occupied the Manukau shores along with the related Kawerau, Waiohau and Ngati Whatua tribes. The inland Waikato tribes also enjoyed the resources of the Manukau and reciprocal rights and obligations have been established between the closely related groups. We have also seen that the *Nga Puhi* invasion that followed the introduction of the musket was a temporary aberration in tribal affairs and was not perfected by the long term occupation necessary to constitute a permanent change in tribal suzerainty in accordance with customary law. The invasion did have one long term effect however. It brought the Manukau tribes closer together to re-affirm by marriage and treaty the overall suzerainty of the Tainui-Waikato confederation.

Accordingly there was no dispute when Henare Tuwhangai recited the tribal saying that encapsulates the Tainui tribal boundaries by figurative references to the canoe.

“The stern” he said “is at Manukau where Potatau presided, the prow at Mokau where Wetini sat, and in the middle is Maungatoatoa where Rewi Maniapoto stood”.

Tuwhangai made other references to tribal sayings that define the Tainui territory and these were not disputed either. He referred to the decision of Te Wherowhero (later King Potatau) at the request of Governor Grey to station himself at Mangere on the shores of the Manukau to protect the settlers in Auckland. He referred to Te Wherowhero’s warning to Hone Heke in the north with the words

“Kia tupato ki te remu o taku kahu”
(Beware the hem of my cloak)

We are satisfied that as at 1840 the protective influence of the pan-tribal Tainui confederation was important for the Manukau tribes.

Since then Tainui unity has strengthened through the influence of the Kingitanga. Carmen Kirkwood saw it this way

“The Kawa of the Manukau is the Kingitanga; the essence of the people, our life force, is the Kingitanga, hand in hand with the Manukau waters”.

Edward Douglas, consultant to the Tainui Trust Board, described loyalty to the Kingitanga as the binding force of the Tainui people in a diverse, heavily populated and well developed area.

“The status of the Kingitanga” he said “determines the status of the individual, and this loyalty determines in great measure their social orientation, organisation and political unity”.

Henare Tuwhangai summed up the sentiments expressed in these words

“E kore e ngaro—he tahere waka nui”

(We will never be lost—we are the hull of a great canoe)

Today when we talk of Tainui we talk in particular of those bodies that administer the affairs of the Tainui people as a whole. It was explained to us that under the mantle of the Kingitanga, represented in Te Arikinui, Dame Te Ata i Rangi Kaahu and her Council of Elders and Advisers, tribal administration is entrusted to two bodies operating in tandem.

The Tainui Trust Board, which administers the assets of the people, and

Nga Marae Topu, a body representing the collective voice of 120 of the Tainui marae. The marae are grouped according to districts, and the Huakina Development Trust, of which Nganeko Minihinnick is the co-ordinator, administers 20 marae of the Manukau and lower Waikato areas.

It was therefore apparent that although the local Manukau tribes could claim customary use rights in respect of the Manukau, we had also to listen to the Kingitanga and the authorities that represent Waikato-Tainui as a whole. Robert Mahuta for Nga Marae Topu had the last say at our hearings. He reminded us that the local claimants do not stand alone but have the support of the whole confederation.

For our part we need only note the actual occupancy of the Manukau by the Waikato, Kawerau, Waiohau and Ngati Whatua tribes at 1840, the relationship that each of those tribes had to central Tainui, and the continuation of that relationship after 1840. We note also that representatives for each of those tribes, and for Ngati Paoa of the Tainui-Hauraki sector, acknowledged that the Manukau is to be regarded as part of the Waikato-Tainui territory.

3.6 TE HEKENG MAI O NGATI MA (THE ARRIVAL OF THE EUROPEANS)

When the Europeans arrived to settle at Auckland all augured well. The Maori people would protect the Europeans against invasions from the north and the Europeans would affirm the traditional Maori occupancies.

Te Wherowhero at that time lived alternately at Awhitu, Ihumatao and Pukekawa (the site of the present Auckland Domain). Governor Grey was concerned to retain Te Wherowhero's presence near to Auckland as a

protection for Auckland settlers against a further invasion from *Nga Puhi* which again seemed imminent. Land at Mangere (on part of which Te Puea marae near the Mangere bridge now stands) had earlier been acquired by the Crown and was given by Grey to Te Wherowhero as a base for him and eighty of his best warriors and their families, in return for the protection of Auckland settlers. For his part Te Wherowhero secured a finally lasting peace with the northern tribes by an arranged marriage between Kati of *Ngati Mahuta*, and Matire Toha, a daughter of Rewa and a niece of Heke. The inheritors of the Mangere marae are their issue.

The Europeans also brought schools and trade. Much land was gifted by the Waikato people for the endowment of missionary schools. Large areas of Waikato were cultivated for wheat, potatoes, maize and kumara. With missionary help the Waikato Maoris built and operated several flour mills. It is recorded that in 1858 in the Port of Auckland 53 small vessels were registered as being in native ownership and the annual total of native canoes entering the harbour was more than 1,700. At about that time the Waikato Maoris established their own trading bank.

This was the golden age of Maori agriculture and growth. Peace and prosperity seemed assured. In fact it was short lived.

4. THE LAND WARS : TE RIRI PAKEHA OR 'THE WHITE MAN'S ANGER'

Through the Land Wars, and although they never rebelled against the authority of the Queen, the Manukau people lost the greater part of their land, over 146 thousand acres.

Trouble arose with the continual arrival of more settlers, the demand for more land, and a growing Maori awareness of the effect of land sales. The Tainui tribes were determined to take a stand against sales of further land and to this end re-asserted the traditional concept of tribal authority according to traditional canoe areas. For the Waikato people the authority of the Tainui tribal confederation was symbolised by the election of Te Wherowhero as King Potatau in 1858. Thus began the Kingitanga.

The Kingitanga's stand against further sales of tribal land brought them into open conflict with settlers and the Crown. War was threatened and eventually began in 1863.

The Manukau tribes were faced with a decision on whether or not to join their kinfolk at Waikato and, take up arms against what they called 'te riri Pakeha' or the white man's anger. The Manukau people had been warned by Governor Grey not to join with them.

In the story as vividly told to us, their decision was precipitated by the arrival of two gun boats at the Manukau heads. Soldiers were disembarked from one of them under orders to destroy every canoe they could find. They succeeded and all but one was destroyed by explosives, along with some of the villages. (We are told that one canoe, Te Toki-a-Tapiri, was saved by being buried in the mud of an estuary at Rangariri and that it is now in the Auckland War Memorial Museum).

We were also told that these things happened before the people could hold a meeting to decide what to do in response to the plea for help from the Waikato. But after their water transport had been destroyed they had no choice. The majority of the people trekked overland to Waikato for protection.

We have made enquiries to see whether this narrative can be corroborated and our researches led us to examine the report of the Royal Commission to Inquire into Confiscation of Native Lands (1926-1928) which is contained in Vol 29 of the Appendix to the Journal of the House of Representatives. (The members of the Commission were the Hon Sir William Sim, a Supreme Court Judge, the Hon V H Reed MLC and Mr William Cooper. We refer to the report as "the Sim Report".)

The Sim Report dealt first with the Taranaki Land Wars in 1861 ("the Waitara Rising") and after examining the history of the matter reached the conclusion that

"...When martial law was proclaimed in Taranaki, and the Natives informed that military operations were to be undertaken against them, Wiremu Kingi and his people were not in rebellion against the Queen's sovereignty; and when they were driven from the land, their pas destroyed, their houses set fire to, and their cultivations laid waste they were not rebels, and they had not committed any crime. The Natives were treated as rebels and war declared against them before they had engaged in rebellion of any kind, and in the circumstances they had no alternative but to fight in self-defence. In their eyes the fight was not against the Queen's sovereignty, but a struggle for house and home ..." (p11)

The events in Taranaki were well known in the Waikato where the policy of refusing to sell tribal land to white settlers had led to the establishment of tribal land-leagues and later the King Movement itself.

Sir George Grey had been recalled to New Zealand towards the end of 1861 to quell rising hostility between the Maoris and the settlers. The Sim Report quoted the history of events in the Waikato by citing a passage from "The Long White Cloud" by Reeves

"... In the Waikato relations with the King's tribes were drifting from bad to worse. Grey had been called in too late. His mana was no longer the influence it had been ten years before ...

The Government pushed on a military road from Auckland to the Waikato frontier—a doubtful piece of policy, as it irritated the Natives, and the Waikato country, as experience afterwards showed could best be invaded by river steamers ...

It was now clear that war was coming ... In July the invasion of the Waikato was ordered ... " (p15)

The history of the war need not be repeated here. It is necessary only to remark that this was the background to the narrative given to us by those who live in the Mangere, Ihumatao and Pukaki districts today.

The Royal Commission reported on these particular localities specifically, speaking of the confiscations that took place after the war. The Sim Report says

"... This history of the Natives occupying the (Mangere Ihumatao and Pukaki) blocks is given by Sir John Gorst in his book 'The Maori King' and we quote the following passages from it

'There were several Maori villages near Auckland—viz. Mangere, Pukaki, Ihumatao and others—inhabited by relations of the Waikato tribes. A large proportion of these people were old and infirm ... Yet our arrangements for governing Native settlements, even close to our own doors, were so defective that the instant war broke out we found it dangerous, though we had ten thousand men in the field, to allow these poor creatures to remain in their homes. Twenty Maori policemen could have quelled the whole of them even if in actual revolt, but the Government had not a single Maori policeman on whose obedience they could depend. It was therefore resolved to drive these poor men and women from their homes and confiscate their lands. There was no difficulty in finding a pretext. They were Maoris and relatives of Potatau. Underlings of the Native Office were despatched in haste to call upon them to give up their weapons and take the oath of allegiance to the Queen or in default, to retire beyond Manga Tawhiri under pain of ejection. The first native to whom this cruel decree was made known was Tamati Ngapora, the uncle of the Maori King ... Tamati and the other Mangere Natives quite understood the alternatives. They must submit to what they regarded as an ignominious test or lose the whole of their property and yet, to their honour be it said, they did not hesitate for a moment. They all thanked the pakeha for this last act of kindness in giving them timely warning of the evil that was to come upon Waikato and an opportunity of themselves escaping; but they could not forget that they were part of the Waikato and they must go and die with their fathers and friends. The same

answer was returned at Pukaki and Ihumatao . . . The fugitives were, of course, unable to carry all their goods with them. What remained behind was looted by the colonial forces and the neighbouring settlers. Canoes were broken to pieces and burnt, cattle seized, houses ransacked, and horses brought to Auckland and sold by the spoilers in the public market. Such robbery was, of course, unsanctioned by the Government but the authorities were unable to check the greediness of the settlers . . . ' ' (p16)

The Report of the Royal Commission then goes on to comment as follows

" . . . The accuracy of Sir John Gorst's account of the transaction has not been questioned in any way. If it be accepted as correct, as we think it ought to be, then it is clear that a grave injustice was done to the Natives in question by forcing them into the position of rebels, and afterwards confiscating their lands . . . " (p17)

[Mr J C Gorst was the first Resident Magistrate in the Waikato from 1861 to 1863. He returned to England and published "The Maori King" in 1864. He later became the Right Honourable Sir John Gorst.]

We are not concerned with these confiscations nor the adequacy or inadequacy of the amends that were later offered in recompense. We have sought only to find some confirmation of this part of the background story told by the claimants. In the Sim Report we believe we have found it.

The causes of the outbreak of war in Taranaki are discussed in great detail by Professor Keith Sinclair in his work on the subject of "The Origins of the Maori Wars", in which he says

" . . . In Taranaki the 'forces' making war likely were, in their crudest form, the desire of the Maoris to hold their best land and in the desire of the settlers to acquire it. Circumstances had made (Wiremu) Kingi the protagonist of Maori rights and consequently most of the settlers hated and feared him. It is apparent that a major source of the emotion of the Governor and his assistants at the time of the purchase were also antagonism to Kingi, and the fact that each of them for different reasons, wanted to buy the Waitara (block). . . " (pp 205-6 1959 ed)

The Taranaki rising has relevance for us only to the extent that it was intimately connected with the causes of the Waikato war into which the Tainui tribes were drawn, resulting in the confiscation of their lands.

Speaking of this Professor Sinclair says

" . . . In Auckland the attitude of the majority of the settlers was nearly as threatening. The best land in the Province was in the valleys of the Waikato and Waipa (rivers) . . . It was early realised that the prosperity of the town was linked with the opening up of those rich lands for settlement for which Auckland would be the port and commercial centre . . . but the Waikato tribes were refusing to sell . . . " (p254)

On the political level he goes on to make these observations based on official records of the time

"... The rich were in a position to secure many of their aims, and to do so with public support. The land speculators a handful of professional men, merchants and shopkeepers influenced the press, controlled the Provincial Government and dominated Auckland society. From them came the demand for free trade in Maori land, and for the abolition of restrictions on the arms traffic. Their plural votes were the bulwark of their privilege and, since they elected one another to the Assembly, the instrument by which they achieved their objects. The Domett Ministry and its successor in 1863, the Whitaker-Fox Ministry were dominated by their Auckland members, Whitaker and Russell, legal partners in a firm with extensive speculative and mercantile interests ... These Ministries abolished the Crown Monopoly of Maori land purchase (and) formulated a policy of confiscating huge areas of Maori land thus blatantly demonstrating what the war was about ... all of which measures were of enormous benefit to themselves ..." (p 256)

As to the commencement of hostilities Sinclair is almost laconic in his description. After referring to a dispatch recording that General Cameron even in 1861 (two years before) "was keen to attack and complaining about the waste of time" (p234), he speaks of Sir George Grey's decision in this way

"... If the (Waikato) Maoris had taken the offensive it would have been a direct result of Grey's actions in Taranaki. However though the King Maoris had often debated doing so, they did not attack and the Europeans attacked them ..." (p268 and p269)

"... The opposition of the moderate (Maoris) had prevented Rewi (Maniapoto) from attacking while most of the troops were in Taranaki ... Grey acted to forestall what was merely being considered and drove the moderates into Rewi's camp, thus uniting the King party as almost nothing else could have done, at a time when the most desirable policy was to encourage the moderates. It seems fair to conclude that the significant thing about Grey's invasion of the Waikato was not that it was 'defensive aggression' or a punitive expedition, for it had been planned ... when there was no serious danger of a Waikato revolt, but that it was the result of Grey's decision to enforce his will on the disaffected Maoris since they would not bow to his prestige ..." (p269)

Sinclair's account has been confirmed and developed in further research by Dalton 1967, Ward 1973, Belich 1981, Sorrenson 1981 and Orange 1984. At the time of the attack the supporters of peace within the King movement had gained predominance, but according to recent studies, the option of peace was not given and the Waikato tribes were forced to a defensive war.

We need not delve into the contemporary analyses. It can simply be said that from the contemporary record of Sir John Gorst in 1864, from the Report of the Royal Commission sixty years after that, and from historical research almost a century removed from the event, all sources agree that the Tainui people of the Waikato never rebelled but were attacked by British troops in direct violation of Article II of the Treaty of Waitangi.

Following the defeat of Waikato and a period of exile in the King Country the Manukau people returned in the 1870's to find the bulk of their remaining lands had been confiscated (pursuant to the New Zealand Land Settlements Act 1863).

We were informed that the Manukau Maoris lost

701 acres at Patamahoe
6514 acres at Pukekohe
19,000 acres at Pokeno
10,920 acres at Tuakau
27,350 acres at North Waiuku
15,500 acres at South Waiuku
640 acres at Paemata
58,000 acres at Wairoa East
1133 acres at Pukekohe West
2730 acres at Kiriki
1300 acres at Mangere
1300 acres at Pukaki, and
1100 acres at Ihumatao

Later, small parts were returned as Native Reserves by Deeds of Grant under the New Zealand Settlements Act 1863. These were predominantly in the eastern and southern areas of the Manukau and it was there that the people settled.

The last three confiscations in this list totalling 3700 acres were taken from the people living on the three marae mentioned by Sir John Gorst. It was on one of these very marae, at Ihumatao, that the Tribunal held its sittings. It seems that not only were the inhabitants attacked, their homes and property destroyed and their cattle and horses stolen, but then they were punished by confiscation of their lands for a rebellion that never took place.

In 1932, as recorded in an Appendix to the House of Representatives of that year, G 10, p 10, Sir Apirana Ngata referred to the Waikato area as follows

“Tribally this was the ancestral territory of the descendants of the crew of the Tainui canoe which formed the most numerous and most powerful confederation of tribes in the country. The history of the trouble and war in the Waikato, which led to the confiscation of a great part of the tribal lands is one of the dark pages in the record of New Zealand.”

5. TE RIRI TURE (THE ANGER OF THE LAW)

Defeated and dispirited, the Manukau Maoris were unable to prevent the “anger of the law” that was to deprive them of most of their remaining land. A new attitude can be detected in both legislation and judicial decisions after the ferocity of the land wars.

5.1 THE LOSS OF CUSTOMARY LAND OWNERSHIP

Despite pleas that remaining Native Reserves should be held by tribes as a whole, in accordance with Maori custom, the Maori Land Court was established and directed by Parliament to convert tribal titles to titles held in individual ownership and this was duly done. In accordance with the same laws, lands that were owned by large numbers were vested by the Court in ten or fewer persons to facilitate the issuing of Crown Grants. These people, being recorded on the titles without reference to any trust, came to be regarded as absolute owners and disposed of the land as such, or were succeeded by their children so as to defeat the inheritance of the majority. Tribal control was thereby lost, and with pressure from the growth of Auckland, further lands were sold.

For example, by the Waiuku Native Grants Act 1876 sixteen grants of land covering 5707 acres were cancelled and the Governor was authorised to issue other grants in their place. The registered owners of the land were described in the preamble to the Act as being “trustees for their tribes and hapus”. These trustees had not divided the various blocks among their tribespeople but had kept them intact (in accordance with custom). The statute empowered the Governor to break up the blocks into individual titles.

5.2 WHAKARONGO AT AWHITU

Whakarongo at Awhitu was referred to as an example of how the law continues to defeat Maoris in the ownership of land. In 1896 two Crown grants were given by mistake to the wrong Maori persons of Ngati Te Ata in respect of two separate blocks, and one of the grants was further wrong in that the land had already been Crown granted. In the result two titles were to issue for the same 100-acre block. By the 1970s a European farmer was claiming title by prescription on one of the titles while the Maori Land Court was making Maori succession orders in respect of the other. Both sides claimed ownership. After proceedings in the Maori Land Court and Maori Appellate Court (in which the Appellate Court held it lacked jurisdiction to consider the claims) the matter went to the High Court—and a group of Ngati Te Ata camped on the land. At this point the Crown intervened to settle the matter, buying the land from the farmer for transfer to the descendants of the Maori grantee.

Those who appeared before us referred briefly to this as fortifying their view that the law is against them. They are not enamoured of legal talk of title guarantees or the sanctity of contracts. For many years the people never really knew whether there was any Maori land left on the peninsula or how they had lost their land and the Paraerae marae of Ngati Te Ata. For our part we think the circumstances were truly exceptional. We (and no doubt Ngati Te Ata) would commend the Crown for its eventual intervention. A bill for the return of the land is now before the House.

5.3 MOEATOA MARAE

Moeatoa Marae of the Ngati Te Ata people once stood on a promontory overlooking a narrowing of the Waiuku isthmus known today as "The Needles" on the bank opposite NZ Steel Mill. It was here the first mission station in Franklin District was established. As is not uncommon, title to the marae and papakainga was in the name of one person. Nganeko Minhinnick told us that in the 1920s the land was sold by a public administrator of his estate who treated the deceased as owners of the land instead of as a trustee. She claimed that 96 families were forced to leave, and those who did not were imprisoned, "without ever knowing why". In keeping with Maori respect for forebears, Princess Te Puea exhumed and carried away the remains of the dead.

The incident is not forgotten. Nganeko claimed the wailings of the children can still be heard across the estuary. While the last person who lived at Moeatoa died in 1962, Moeatoa lives on in the minds of succeeding generations. Moeatoa Minhinnick, who appeared before us, carries the name of the marae.

5.4 COMPULSORY ACQUISITIONS IN THE WAIUKU FOREST

The Waiuku State Forest of 3,725 acres is at the north head of the Waikato River. It originally formed part of the Waiuku Block of 43,700 acres extending from the Waikato River mouth in the south to the Manukau Harbour entrance in the north. The block was confiscated in 1864 following the land wars but certain parts of it were returned to local Maoris in 1865, including the following four areas

- Te Papawhero of 509 acres

- Waiaraponia of 30 acres

- Te Kuo of 123 acres, and

- Tangitanginga of 63 acres

These were areas of early Maori habitation occupied until the 1870s but as sand swept across the headland the Maori occupants shifted north to other settlements, and habitation and burial sites became obscured.

In 1932 the Public Works Department planted marram grass and lupin to arrest further sand encroachment. In 1935 pine planting began in the north to progress south and east as a further protection to adjacent farms. Lands planted included the Maori lands.

Te Papawhero was the first block taken. It was taken by the Crown for sand dune reclamation purposes in 1939.

In 1952 the New Zealand Forest Service took over the management of the forest. By the mid 1950s the whole or greater parts of the remaining Maori lands had been planted in pine.

In September 1959 Waiaraponia, Te Kuo and Tangitanginga were taken under the Public Works Act "for State Forest purposes" except for 14 acres being Te Kuo urupa (burial ground) and 5 acres being a narrow frontage to the Waikato River on the Tangitanginga block described at that time as a fishing reserve.

The blocks taken are now being used or are proposed to be used for ironsands mining.

There were strong suggestions at our hearing that the lands taken for forestry in 1959 were in fact intended for ironsands mining. Counsel for the claimants referred to a statement in a White Paper on the New Zealand Steel Expansion Project referring to a renewed interest in the ironsands from "the late 1950s". She referred to scientific assessments of 1955, the establishment of an Interdepartmental Committee in 1958, and reports urging "the necessity to acquire land titles and other rights and to secure occupancy" (3 February 1959), the prevention of "private interests speculation" (19 February 1959) and to set up a Company with a major Government shareholding (19 February 1959).

The Iron and Steel Industry Act was passed in 1959, the wholly Government owned New Zealand Steel Investigating Company was set up in 1960, and New Zealand Steel Limited was incorporated in 1965. Waiaraporia, Te Kuo and Tangitangia blocks were gazetted on 7 July 1966 as set aside "for the purposes of the Iron and Steel Industry Act 1959", and on 11 July 1966 the Crown granted a mining licence in respect of the land to New Zealand Steel Limited. The licence is for a 100-year term commencing 1966. A small royalty is paid to the Mines Department on behalf of the Crown on an extracted ore tonnage basis. It was not disputed that the royalty of 5c per tonne represents a substantial concession rate to aid the establishment of a steel industry.

Mining operations began on the land in 1969. Today there are mining operations in progress on Tangitangia. Waiaraporia and Te Kuo are earmarked for future mining.

The charge that the land was taken for forestry when it was really intended for mining is not proven on the evidence. There is evidence that the Forest Service sought to acquire the land as early as 1952 when it first took over management of the Forest and that in 1952 it consulted with the Department of Maori Affairs.

On the other hand it is clear that if, at 1959, the officers of Forests and Works involved in the taking were unaware of the ironsands interest, other officers of the Crown in other branches were very much aware of it. If we regard the Crown as vicariously responsible through its several agencies, the Crown must be taken to have been aware of the intention to mine ironsands when the Maori land was taken.

But there is further concern as to the manner in which the Maoris were dispossessed of their remaining lands at the Northhead. We learnt as follows

- (a) The four blocks were first granted to Maori individuals in trust for their tribes. The Waiuku Native Grants Act 1876 changed this to make the trustees absolute owners. The change was resented by many.
- (b) From that time until the takings in 1959 only one person claimed the right to succeed to any of the "owners".
- (c) At the time of the takings in 1959 there were no living owners on whom notices could be served. Notice was served on the Registrar of the Maori Land Court at Hamilton. Although the Maori Land Court has a facility to seek out putative successors that was not done, and no persons affected by the takings were formally notified.

A field supervisor of the Department of Maori Affairs did contact five persons whom he thought to be successors. He reported that they did not object to the taking so long as the Kuo urupa and an

area along the river to provide access to fishing grounds were kept back.

At that time there was no legal obligation to notify any owners of Maori land of a proposed intention to take where the title was not registered in the Land Transfer Office. In this case the titles were not registered. (Most Maori land titles were not registered in those days and most are still not.)

- (d) In 1959 no attempt was made to settle compensation. There was no legal obligation on anyone to ensure compensation was paid. It was up to any owners interested to make a claim but there was no provision to ensure that any owners or descendants knew of the taking.
- (e) In 1971 Nganeko Minhinnick enquired about other lands at the Maori Land Court offices in Hamilton. Her enquiry was mistakenly interpreted as a complaint about the Waiuku lands. In the result and although he had no legal obligation to do so, the Maori Trustee approached the Ministry of Works about compensation. The latter, after noting that a compensation claim was then statute barred, agreed to an ex gratia payment on the basis of the Government Valuations existing at 1960 plus interest at 5% to the date of payment.
- (f) The compensation paid to the Maori Trustee in 1972 was for
Waiarapona—\$58.67 plus \$36.61 interest (for 30 acres)
Te Kuo—\$212.16 plus \$132.38 interest (for 123 acres) and
Tangitangina—\$129.17 plus \$80.60 interest (for 63 acres).
- (g) The compensation did not take into account any past use or occupation of the land by the Crown, the value of the timber then growing on it, or the value of any minerals (if claimable). It was based on a land value of \$40 per acre. Counsel for the claimants referred to a 1963 letter from the Ministry of Works to New Zealand Steel Limited assessing the land value without trees at \$200–\$260 per acre.
- (h) The compensation was received by the Maori Trustee without consultation with anyone (although consultation was not required by law).
- (i) In 1971 and subsequently “successions” were made to three of the original owners in respect of the monies held. After deduction of a 7½% tax on the interest, their proportionate shares of the compensation monies were credited to their accounts with the Maori Trustee. Few actually received cash as the successors were many and their shares small. The balance not ‘succeeded’ to (about three-quarters of the compensation) is still held by the Maori Trustee.
- (j) Many of the Maoris affected did not know their lands had been taken until it was raised at our hearings. If they were to claim the compensation monies now there would be so many successors that the claims would not be worth making. For most of them it is a case of no notice, no advice, and no money. But they do not want money. They want their land back.

The law on compulsory acquisition of Maori land prior to 1974 provided few safeguards for Maori people. The numerous deficiencies were substantially rectified in the Maori Affairs Amendment Act 1974, but there was (and still is) a provision in the Maori Affairs Act whereby the lands could

have been secured for forestry purposes without any loss of the Maori title. (It was said that the provision is "unused" but that does not alter the fact that it is there.) The hapu has good cause to brood over the manner in which they were dispossessed of their last lands and over the use to which those lands are now being put.

We were impressed by the initiative of the Forest Service to seek some settlement as soon as these concerns were raised. Those initiatives were taken without prejudice to the Forest Service and Ministry of Works claims that the matter is outside our jurisdiction as emanating from an act done prior to 1975. In rejoinder Counsel for the claimant argued that the matter is within our jurisdiction as the current use of the land in accordance with a current policy differs from the use for which the land was ostensibly taken, and upon a number of other grounds.

In the meantime the case is referred to now to illustrate yet another set of events from the recent past which influences the attitude of the claimants and explains the strong feelings behind their claims.

5.5 THE AUCKLAND INTERNATIONAL AIRPORT

The Auckland International Airport was cited as an example of the way recent major developments for Auckland have been proposed on or near to the last remaining pieces of Maori land. After hearing submissions on behalf of the Auckland Regional Authority and the Civil Aviation Division of the Ministry of Transport, we are satisfied that the Mangere site was not chosen, as some thought, because some of the affected lands were Maori land and therefore easy to acquire. It appears that a number of other factors influenced the site decision made by Cabinet in 1955. By the same token there was no indication that Maori land was involved. No consideration was given to the fact that Maoris ought to be protected in the ownership of their land. We were referred to only one factor seen as an obstacle, namely "that the area was high quality agricultural land (dairying)".

The Auckland International Airport and its future extensions occupy a total area of about 1285 ha including reclaimed land on what was once a fishing bank. It is to the effect of the airport on Maori fishing that we now refer.

Auckland International Airport is a joint undertaking between the Crown and local government (the Auckland Regional Authority), the partnership being formalised in a deed of arrangement of 1966. For the Crown, the Civil Aviation Division of the Ministry of Transport is responsible for such things as the operation and control of the runways.

270.2 hectares of harbour land were vested in the Auckland Regional Authority for airport purposes in 1975. In addition to foreshore actually reclaimed, airport operations have resulted in restrictions being imposed on anchoring and fishing in an area surrounding the existing runway covering approximately 950 hectares. This includes banks and creeks traditionally fished by people of nearby Makaurau and Pukaki marae.

Anchorage and fishing restrictions were introduced as a result of a bird hazard. We were informed of the enormous damage that can be sustained through bird strikes, the unusually high degree of bird activity in the area, and the measures taken to combat the problem. Acting on the advice of the Wildlife Service of Internal Affairs, the Civil Aviation Division requested the Auckland Harbour Board to establish an prohibited

anchorage zone in the harbour adjacent to the airport. By law 57 (a) was notified as a result in 1966. Further legislative action was seen to be necessary as fishermen continued to work the area although not anchoring. The Fisheries (General) Amendment Regulations of 1970 prohibited taking, possessing or conveying fish in the restricted area. This provision is now contained in the Fisheries (Manukau Harbour Prohibition) Notice 1983.

The Ministry of Transport regards the prohibition as an important aspect of its programme to reduce bird hazards. Fishing activity, and particularly gutting, attracts birds to the airport environs. In addition, the prohibition on public entry on the water provides a sufficient barrier to negate the need for extensive security fencing which would cost nearly \$0.5 million. It was pointed out that the prohibition restricts the activities of all members of the public within the specified area and not just the Maori people.

We could see immediately the need for stringent controls where lives and property are at risk. In formulating the policy, however, it was clear that no particular consideration had been given to the fact that the affected Karore and Oriori banks were old fishing grounds for the Makaurau and Pukaki people, that the prohibition on the conveyance of fish across the prohibited area prevented the Pukaki people from using their traditional access to the harbour along the Pukaki inlet for fishing, and that Maori people have their own prohibition on gutting fish at sea.

The airport brought with it its own special forms of pollution to what were once extensive fishing grounds for the Pukaki people in the Pukaki and Waiokauri creeks.

Five major stormwater drains discharge to the latter serving extensive areas collecting aviation fuel spills and cleaned by industrial detergents. A causeway and bridge across the mouth of the Pukaki creek, usually referred to as the crash-fire bridge, is alleged to have affected water flows causing siltation and a substantial fisheries loss. (There has been very little research on the hydrological impact of the causeway and the observations of the Maori witnesses were therefore uncontroverted.)

The crash-fire bridge is a Ministry of Transport (Civil Aviation Division) responsibility. It is used for light-weight maintenance and rescue-fire vehicles.

In 1980 a Royal Commission of Inquiry on Rescue and Fire Services recommended a new bridge to take larger vehicles and enable hovercraft to travel under it. This recommendation has not been proceeded with. The position is under review. One report recommends smaller rapid intervention vehicles.

In our opinion the review should consider also the practicality of a replacement structure that does not impede the water flow and restores harbour access and the use and enjoyment of fishing grounds for the Pukaki people.

5.6 MAKAUROU MARAE AND THE MANUKAU SEWAGE PURIFICATION WORKS

At about the same time as the International Airport was proposed the then Auckland Metropolitan Drainage Board announced proposals for the disposal of Auckland's sewage and trade wastes to the Manukau Harbour using comprehensive oxidation ponds built over a substantial area of the

harbour bed. This project was again to adjoin the little Maori land remaining in the area, this time adjacent to the Makaurau marae.

The Makaurau marae is situated inland a short distance along the Oruarangi Creek which extended for over a mile into the country. We were told the creek was noted for its clear wide waters and white sand. It provided access to the harbour and swimming and recreation. It was also a bountiful source of seafood and was renowned for pipi and mullet. The marae people were able to obtain all their seafood from this one creek. Other tribes from Te Atatu visited there to gather. In addition the creek led to oyster and scallop beds on the reefs around Puketutu island.

The sewage works and oxidation ponds were built across the oyster and scallop beds, the oxidation ponds extending to Puketutu island itself. The treatment plant works and oxidation ponds occupy an area of approximately 720 ha. Oruarangi and Waitamakoia Creeks were closed and are now dry land. The people lost the benefit of a beautiful creek adjoining their marae, access to the harbour and the whole of their traditional seafood resource. They had also to suffer stench and midge nuisances.

It was claimed that the people were orally offered quick connection to the sewage system, private access to the harbour, and compensation of \$8,000. Thirty years after the works were commissioned the marae houses have only just been connected to the sewage system. Makaurau was one of the last places in Auckland to be connected. Access is limited and compensation has not been paid.

The Auckland Regional Authority was unable to confirm or deny that the specific promises had been made. It referred to the notes of a meeting in 1956 between the then Auckland Metropolitan Drainage Board and the Maori people where questions of compensation were raised. There is no record of a specific promise. The Authority referred also to a boat ramp from the oxidation pond restricted to use by local European and Maori owners. The claimants contend that they did not have access to it until one of them, a works employee, happened to obtain a key to the gate. They claimed the gate was used mainly by commercial fishermen.

We made enquiries into the payment of compensation. In 1960 certain of the Makaurau people engaged a private legal firm to file a compensation claim in the Maori Land Court. A claim was lodged in 1961. In 1962 the Maori Land Court's jurisdiction to assess compensation was removed and the Maori Trustee was empowered to claim compensation on behalf of Maori owners, if asked. Thereafter the solicitors presumed that the Maori Trustee would pursue the matter. The Maori Trustee considered that he had not been formally approached and in any event, the Court still had jurisdiction in respect of claims filed before 1962. In the result no one did anything. In 1974 the Maori Land Court dismissed the 1961 application for want of prosecution.

We were told that the owners of European lands affected made compensation claims and that these were properly pursued and settled.

The Auckland Regional Authority has stated it will pay compensation provided there is some body properly able to settle the amount due. It would have no objection to the reinstatement of the claim in the Maori Land Court. For our part we do not consider settlement of compensation by the Maori Land Court would give any real satisfaction. In accordance with the legal scheme of things compensation is payable to the property owners who happen to adjoin the river or harbour for the losses sustained by them. There is no concept of providing compensation for a tribal or

communal loss or the loss of enjoyment of communal facilities. In addition the law has never admitted that a section of Maori people could own a seafood resource, and the loss of that resource is not legally compensatable.

The claimants do not want compensation. They want things restored to what they were. Regrettably, that is unrealistic.

5.7 TE PUEA MARAE

Te Puea Marae at Mangere is on the site of an old Pa. Te Wherowhero and Ngati Mahuta settled there in response to Governor Grey's request that protection be given to the Auckland settlers against imminent Maori raids from the northern tribes.

The marae was once on the edge of the Manukau Harbour. Today reclamations, roads and bridges have taken away that riparian aspect. The carved house, dining hall and marae area are bordered on one side by industrial factories and on another by the Onehunga-Mangere motorway. An industrial zoning has applied although the area has been gazetted as a marae reservation since 1933. The new motorway to the Mangere bridge, opened this year, cuts across the rear boundary bringing further noise and exposure. It also cuts off the marae from the houses in the residential area that once adjoined and although there is alternative access, there is no longer an easy pedestrian route.

In 1978 the Tainui Trust Board sought planning consent for the erection of 33 units on adjacent Maori land to provide houses for the elderly in proximity to the marae. At that time the land was zoned industrial B. Subsequently the local authority has authorised the erection of 25 units. But the people still ask what protection has the law given their marae from Auckland's growth, in return for the protection they once gave Auckland?

5.8 THE STORY OF PUKAKI

Pukaki is the principal marae of Ngati Te Akitai and Waiohewa. Before the land wars the main buildings were located on the southern headland of the confluence of Pukaki and Waiokauri creeks. Other buildings and the urupa (burial ground) were on the opposite bank overlooking Pukaki lagoon. The estuary and creek provided for the people's seafood needs. The estuary gave access to the Harbour and Pukaki lagoon gave shelter to canoes. The lagoon had additional significance as one of the sacred footsteps of Mataaho (Nga Tapuwae o Mataaho) the vulcan god whose footprints are evidenced by a series of depressions in the landscape starting from Lake Pupuke on Auckland's North Shore.

Pukaki is one of the marae referred to in the Sim Report cited earlier. Prior to the land wars the people were forced to leave and what was left behind was looted and destroyed.

Following the land wars the main marae area, urupa and 1300 acres surrounding were confiscated and occupied by settlers. Only 160 acres on the north bank remained. The people shifted there on their return from Waikato and a new marae was built in 1890. We were told that by the 1950s, there were 200 families at Pukaki. The marae buildings constituted a very large complex, the dining room being said to hold 1000 people at one sitting. Although the burial ground had been confiscated the people continued to use it. It is still used and is well maintained, but the Maoris do

not own the land. They use the burial ground at the sufferance of the private owner. They cross other land in private ownership in gain access.

Pukaki Lagoon (now dry land) comprises 33.6 hectares. In 1911 the Manukau Harbour Control Act vested the lagoon in the Auckland Harbour Board although the Maoris considered the lagoon was theirs. In 1925 the Board leased the lagoon under s. 147 of the Harbours Act 1908 which permitted mudflat areas to be reclaimed or impounded for pastoral or agricultural purposes. A stop bank was constructed to exclude tidal waters and the reclaimed land was drained and brought into agricultural use. In 1959 a lease in perpetuity was granted. Today the lessee owns the land surrounding the lagoon as well, including the urupa, except for an access strip to the lagoon from Pukaki Road, which is owned by the Board.

In the 1970's a stock car track (now abandoned) was built around the lagoon. A part of the adjoining burial ground was bulldozed away and remains were exposed. The Maoris complained (to the Department of Health and the local authority) and claim they did not get replies until too late. In any event they no longer owned either the lagoon or the burial ground. It was further claimed that quarrying is now taking place on another part of the lagoon.

Auckland International Airport was opened in 1965 and adjoins the mouth of the Pukaki creek. A causeway and bridge built across the mouth for airport maintenance and rescue purposes is said to affect the flow of waters causing siltation of the creeks and depletion of the fishing. In addition, airport protection regulations restrict fishing or the passage of boats carrying fish in proximity to the airport. The people claim to have lost the greater part of their seafood resource and access to the harbour for fishing purposes.

Pukaki marae was also in the flight path of a projected second runway and restrictions were introduced on any development in the proposed path. It is claimed that these restrictions prevented the Pukaki marae from developing with the result that the people were "forced" to abandon the area.

At the time some of the buildings had become dilapidated. Some did not meet health requirements and the people sought to repair them. They were denied building and renovation permits, according to Joseph Wilson, from the early 1950s. Mahia Wilson claimed that it happened in the early 1960s. She said the people thought that if they co-operated and tidied up the place they would be favoured and allowed to rebuild. She said that the people pulled down the buildings themselves including the marae buildings (demolished in 1966) but then could not get permits to renovate or rebuild. Witnesses for the airport authority gave 8 May 1960 as the earliest date on which restrictions were introduced as a result of the airport. Joseph Wilson recalled 1953 as the year in which a permit to repair the marae was first refused because of the proposed airport.

In any event the people left their ancestral area to build elsewhere. We were told they left "in despair" because of restrictions of one sort or another over a long period.

The next step, and the source of considerable grievance today, was the sale of much of the remaining land and the mistaken inclusion of the marae itself in the sales.

With the abandonment of occupation, rating problems, and the people's need for money to build homes elsewhere, the land itself was at risk. In

the 1960's several owners sought to sell their properties. Initially negotiations to sell to the airport authority were proposed (as the body whose regulations had inhibited the use and enjoyment of the land), but most lands were eventually sold privately.

Throughout these sales the local people considered the marae itself, and an area for housing around it, would always be protected and held, even though planning restrictions might prevent the use of that land for communal living purposes. It was their understanding that a three acre marae area had been "cut out" and reserved, together with roadway access.

Then in 1974, the siting of the proposed second runway was shifted. Pukaki marae was no longer in the flight path. There was now a prospect that the marae and the surrounding Maori land held back from the sales could be used to support a small Maori village complex. On the review of the Manukau District Scheme in 1982 the people made submissions to the local authority seeking zoning for this to happen. By this time a new enlightenment had crept into Town Planning and marae papakainga (housing) zoning had been provided for in several district schemes. In response to the submissions the three acre marae area was zoned Residential 9 (Maori Purposes Zone).

Now yet another problem presented itself. Doubts arose as to whether the marae had in fact been protected and whether the Maori people still owned it. These doubts existed at the time of our hearing and we had to investigate the matter.

We learnt

- (a) That prior to the decision in 1955 to establish an airport at Mangere, Pukaki marae was part of the Maori land block known as Parish of Manurewa Allotment 156 of some 47 acres.
- (b) In 1947 the Maori Land Court was asked by the owners to set aside as a Maori Reservation that part of Allotment 156 containing 3 acres, already fenced, as would include the Pukaki marae, and a house (then occupied by Tame Wirihana) as a meeting house and papakainga reserve. The Court agreed. It was noted that the land was at the southeastern corner of the block with frontage to "the harbour". An order dated 6 March 1947 was duly sealed recommending that an Order in Council be gazetted to reserve the land accordingly.
- (c) The order was not in fact acted upon and the land was not in fact gazetted as a reserve.
- (d) On 30 January 1953 the Court was advised that the people had had the marae reserve surveyed (on a plan approved by the Chief Surveyor as ML Plan 13581), but that as the reserve was without access to Pukaki Road, the surveyor had provided for a private roadway over allotment 156 to serve the reserve. The Court made an order creating the roadway as a Maori Roadway and then minuted a direction "Recommendation for reserve to be sent forward with copy of approved plan". This meant that the recommendation had to be sent forward to the Head Office of the Department of Maori Affairs to have the reservation gazetted. Once gazetted the land would be inalienable.
- (e) Still the recommendation was not acted on. The land was not in fact gazetted as a reservation. The roadway order was not in fact registered against the Certificate of Title in the Land Transfer Office. The Chief Surveyor forwarded the plan to the District Land Registrar to

enable those things to be done, but they were not done because the gazette notice was never put through or actioned.

- (f) On 15 April 1953 and subsequently three other areas were cut out of allotment 156 for a total area of 7 acres 3 roods 14 perches. These are the areas surrounding the marae, the only areas that remain as Maori land today.
- (g) In 1969 an estate agent was engaged to negotiate the sale of the balance of the block to the airport authority. After some years the negotiations fell through when the principal owner died. By then there were 22 owners. On 15 August 1972 after hearing Counsel for the estate of the deceased owner, other owners, Counsel for the Manukau City Council and Counsel for the Auckland Regional Authority, the Maori Land Court appointed a real estate agent as trustee for the land (and two other blocks) "to negotiate or complete a sale of the above land to the Auckland Regional Authority for extensions to the Mangere International Airport". The A.R.A. offer of \$120,000 (for the three blocks) did not compare with the offer of \$252,000 from a private buyer and eventually the lands, including the residue of allotment 156, were sold by the trustee to the private purchaser (This was in fact contrary to the terms of the trust order which contemplated that the land was needed for airport purposes and restricted any sale to the A.R.A.)
- (h) But what was sold? Our enquiries reveal that the area sold in fact included the marae and roadway. The transfer was registered on 5 February 1982. The new title that then issued to the purchaser (CT 52D/518) depicts the part allotment 156 that was sold as being held in two parts, the area that we can identify as the marae and roadway part of 1.2141 ha, and the residue of 14.8118 ha but of course both parts are in the one title and stand vested in the purchaser.

It seems clear to us that this is so because the Chief Surveyor lodged the plan for the marae, but the recommendation that the marae be reserved was never gazetted or registered and the roadway order was never registered. It appears on our enquiries that a recommendation of the Maori Land Court that land be gazetted as a Maori Reservation is a matter to be followed through to gazettal by the Department of Maori Affairs as a simple administrative exercise. Further action on the part of the owners is unnecessary unless survey is required. In this case, survey was attended to in 1953 and the Court specifically directed in 1953 that the 1947 recommendation be sent forward for gazettal. It appears to us that in 1969 and 1972 both the owners and the Maori Land Court could reasonably have expected all necessary steps would have been taken to ensure that the marae was reserved and protected from the sale then proposed.

Pukaki illustrates the way in which Maori people have lost their lands, homes, sacred places and fisheries through insensitive and (to them) incomprehensive laws and regulations. We are aware of new laws, new policies and new attitudes that may prevent this sort of thing from happening again but we feel strongly that although there are currently limits on what we may recommend, the problem of Pukaki cannot be ignored. Witnesses cried openly as we were told the story of Pukaki. Many of the people shifted to the lands of their kin-folk at Makaurau only to be faced there with the closure of the Oruarangi creek, the loss of the Makaurau

seafood resource and the construction of the treatment plant. Today nothing remains of the Pukaki marae that supported some 200 families in the 1950s, apart from three houses on the remaining pockets of Maori land. We were told of how current hopes to rebuild the marae and re-establish homes continue to be thwarted. We were told that approaches have been made to Ministers of Maori Affairs and Registrars of the Maori Land Court, and of course to the landowners, but without success. The Auckland Regional Authority told us that it would lend what assistance it could to aid the return of lands and the re-establishment of the marae. We were told that if they could, the people would return. They return now only to bury their dead in the ancient burial ground that is no longer theirs.

5.9 THE AWHITU LAKES

Waatara Black referred to certain lakes on the Awhitu Peninsula said to be traditional fishing lakes of the local tribes. One of them, Parkinsons Lake, was unsuitable for use now because of the release of carp. Others had been affected by stock, farm use and farm run off but were still regarded as important for food gathering. She referred to Rotoiti, Whatihua, Pehiakura and Otamatearoa lakes which provided koura, tuna and native fish. She asked who owned the lakes, was it the Crown, the adjoining European farmers or the Maori people. She stated that irrespective of ownership her people had traditional use rights. Her complaint was that she and her people were now denied access as of right because the lakes were surrounded by European owned farms and she claimed that legal access ought to be provided. She was supported by others.

It happened that Waatara's belief that some of the lakes were Maori owned received corroboration in other evidence given in relation to another matter. It appears that after the Awhitu lands had been confiscated in 1864, some parts were handed back in 1865. Part of the returned lands were sold to the Crown and one sale of 1867 (*Turton's Deeds Deed 290*) provided "Otamatearoa Lagoon (eel fishing)" and Lake Whatihua are expressly excluded from the sale to remain as Maori reserves. We wondered whether other sales reserved other lakes, whether the lakes were still Maori land or whether the lakes are Crown lands.

We did not investigate these claims as there was no notice to those who might be affected. We understood the circumstances by which the ownership of the lakes and access to them was lost occurred prior to 1975.

5.10 RANGARIRI PAKAINGA

Rangariri is an old marae, papakainga and fishing village of Ngati Te Ata on the Awhitu Peninsula. Following an influenza epidemic and the loss of adjoining lands the village was vacated. Recently people sought to return there. To overcome restrictions on building in a rural area, a large haybarn was built to provide accommodation needs. There is some cropping and grazing. The building is also used by church groups and youth organisations as a rural retreat.

Rangariri is sited on two blocks of land. One of them, some 26 acres, has been designated as a bird sanctuary by the Regional Authority. We were told this was done without notice or consultation.

5.11 THE WORKINGS OF THE LAW

It was explained that until very recently official letters and notices sent to Maoris in the Manukau area have been mystifying. The processes of the law have been seen by the Maori people as something they do not understand. The force of the law has been with them for generations since the Land Wars, and they have for years come to accept what the law decrees with a sense of helplessness and hopelessness.

It is only recently that they have come to change their attitude, and now they seek to use the law and the legal process to protect themselves, and to assert their rights. Several officials in giving evidence said that their departments or local bodies did not know of Maori protestations until recently. That many well be so, but the Maori silence on many matters was not one of tacit acceptance; rather was it a position born of bewilderment and submission to Te Riri Ture—"the anger of the law"—which they had come to know all too well following the Waikato policy decision to keep their lands and not sell them to the Auckland settlers who coveted them.

5.12 THE EFFECT OF CONFISCATIONS AND MODERN LAWS

We have briefly reviewed the post-European past to explain the intense grief felt by the claimants which tended to pervade all aspects of the claim. For them it is as though the confiscations and dealings occurred yesterday.

We were referred to ancient and sacred spots, burial grounds and marae that had been included in the confiscations and desecrated in subsequent land developments.

Sir Apirana Ngata, reporting on Maori land developments in 1932 said:

"... in the aftermath of the Waikato War and resulting confiscation of Waikato lands successive Governments have found a real barrier to that goodwill and friendly co-operation without which no progress can be made, whether it be in education or hygiene or the cultivation of lands or other adjustment to the economic and social system of today. No earnest student of native affairs in this part of the Dominion can overlook this historical factor and the implications both material and psychological that flow from it. There is still bitterness and resentment; there is suspicion and distrust; there is an attitude of contemptuous scepticism towards law and government, which though not broken in the letter are avoided as things that formerly were associated with force and oppression." (1932 AJHR G10 p10)

In 1983 the Centre for Maori Studies and Research at Waikato University reported on a survey of the Tainui people. Entitled "*The Tainui Report*," it shows that attitudes have not significantly changed.

"For the Tainui the major loss was the confiscation of their lands following the Land Wars. This loss of land, land which is now some of the most economically productive in New Zealand, has led to an almost landless proletariat which still broods over the manner of their dispossession. The elders in particular give essence to this brooding when they argue that the Treaty of Waitangi, drawn up prior to the Land Wars should be interpreted accordingly to their rights and should be honoured with a restoration of their lands."

We witnessed for ourselves the extent to which land confiscations, and the loss of effective control over the little land remaining, continue to embitter the Manukau tribes of today. We cannot afford to recoil from seeking a happier base for the future co-existence of our races, a co-existence that was once the hope implicit in the Treaty of Waitangi. We cannot recoil from so doing even though the depth of grief that we witnessed made us wonder whether a happy co-existence could ever be possible.

We must begin. To begin with we must lay bare the truth of history, for he who does not know the past will never understand the present. In doing this we have had good reason to reflect upon the words of Sir Apirana Ngata during his speech to the House of Representatives on 28 September 1928 when the Report of the Royal Commission into the Confiscation of Native Lands was tabled

“... Naturally, when a body of men come to tackle a question over sixty years old, it requires a good deal of courage and that the men be imbued greatly with a sense of justice to overcome the hesitation of reversing to some extent the verdict of history. . . ”

6. THE WATERS OF MANUKAU (The comprehensive claim)

6.1 THE LOSS OF OWNERSHIP—A MAORI PERSPECTIVE

To the Maori, the waters of the sea and river are as much roads and gardens as roads and gardens on land. The harbour was as much owned and apportioned to the care and use of different tribes as the land was. To the local tribes the Manukau was their garden of the sea.

Accordingly, to them any loss of the use of the harbour is as much a loss as the loss of the land. The Maori presumption has always been that they own those harbours within their tribal territories which are essential to their spiritual and cultural needs. The Tainui people express their ownership of Whaingaroa and Kawhia harbours in these maxims

Ko Whaingaroa moana	(lit)	Whaingaroa the harbour
Ko Aotea whenua		Aotea the land
Ko Kawhia tangata		Kawhia the people
Nga tini o Kawhia	(lit)	The many of Kawhia
Nga mano o Waikato		The thousands of Waikato
Kawhia moana	(lit)	Kawhia the harbour
Kawhia kai		Kawhia the food
Kawhia tangata		Kawhia the people

Maori Customary Law is the antithesis of English Common Law which considers that harbours belong to the Crown. The Maori people believe the Treaty of Waitangi promised them that Maori Customary Law would prevail. King Tawhiao was of this view in the 1880's when he vigorously opposed the presence of Government vessels in Kawhia Harbour. When pressed to produce evidence of his title to the harbour he replied "I have a title—the Treaty of Waitangi".

Although neither Tawhiao's "title" nor the Treaty has been recognised in law, the claim to ownership has not changed. Some of those who appeared before us demanded the "return" of the Manukau. Carmen Kirkwood said

"We did not sell the Manukau Harbour. We did not gift it. We did not have the waters of the Manukau confiscated from us."

Others said the Manukau Harbour was "the greatest acreage" they had left. Others again pointed to their long association with the harbour and to the guardianship role they had undertaken to protect its natural resources. They called themselves Te Kaitiaki Whanau o Manukau (the Guardian Families of the Manukau). They questioned the fact that they had to appear before numerous bodies on proposals affecting the harbour. In their view those bodies should be approaching them. They had cared for the harbour in their time. It was the stewardship of "official bodies" that had to be questioned.

As a matter of law the local tribes do not own the harbour. The Crown owns the harbour as a matter of English common law. This presumption is evident in a large number of enactments from 1841 regulating the use of harbours. Subsequently the Manukau Harbour Control Act 1911 vested control and management of the harbour and the title to the whole of the tidal lands (the greater part of the harbour) in the Auckland Harbour Board. That is the legal position today. The tidal lands belong to the Board. Since 1967 the Board has had a Land Transfer Act title to the tidal land.

The remaining seabed is in the presumptive ownership of the Crown but was made the subject of a grant of control to the Board in 1982.

The Crown's "title" appears to have been affirmed by the Court in *Re the Ninety Mile Beach* [1963] NZLR 461 on the ground that sovereignty acquired through annexation prior to the Treaty brought the common law of England with it. The Territorial Sea and Exclusive Economic Zone Act 1977 affirmed the Crown's title and extended it to the 12 mile limit.

In the case of the Manukau Harbour, the tidal lands have been vested in the Auckland Harbour Board since the enactment of the Manukau Harbour Control Act in 1911. The definition of tidal lands in the 1911 Act is in fact unusually wide as it includes tidal areas covered at ordinary spring tides. The Act is commented on by AP King in *The Foreshore—Have the Public Any Rights over It?* 1968 NZLJ 254 as follows

"The vesting affected virtually all the tidal lands of the Manukau Harbour which is a shallow one with a gently sloping foreshore in most places. That piece of legislation was unheralded and the result was that owing to the considerable difference in most places between mean high-water mark at ordinary tides and mean high-water mark at spring tides, a very large area of privately owned land became vested in the Auckland Harbour Board without the knowledge until afterwards of the owners, and without compensation or redress. Many did not discover their loss until their land was being redefined by survey, or until they were stopped by the Harbour Board from selling sand and shell from what had been their property."

Of course the Maori people are unimpressed by the loss of their harbour as a matter of law. They see "the anger of the law" as something that merely deprives them of what is theirs. It is on the Treaty that they pin their hopes, and the hope that the Treaty will be upheld as the supreme law.

6.2 THE LOSS OF CUSTOMARY FISHING RIGHTS AND TRADITIONAL RESERVES

The real problem is not the failure of planners to provide for Maori fishing rights but the failure of the law to recognise them.

In the first fishing laws the Legislature was prepared to recognise that there could be a customary claim to fisheries, but no machinery was provided to convert those claims to defined rights. Section 8 of the Fish Protection Act 1877 provided.

"Nothing in this Act contained shall be deemed to repeal, alter or affect any of the provisions of the Treaty of Waitangi, or to take away, annul or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder"

The Sea Fisheries Act 1894 dropped this provision but the omission was partially remedied in 1903 by the Sea Fisheries Amendment Act of that year which provided that nothing in the part of the Act dealing with sea fisheries

"shall affect any existing Maori fishing rights"

the reference to the Treaty being omitted. The saving provision was carried through in that form as section 77 (2) of the Fisheries Act 1908.

Section 77 (2) was considered by the New Zealand Courts in *Waipapakura v Hempton* (1914) 33 NZLR 1065, *Inspector of Fisheries v Ihaia Weepu* [1956] NZLR 920 and *Keepa and Wiki v Inspector of Fisheries* [1965] NZLR 322. These cases decided that save for specific grants Maori customary fishing rights have been extinguished. Section 77 (2) was merely a saving clause to protect existing grants. It did not in itself confer any private rights. In *Waipapakura v Hempton* (supra) it was stated

“It may be, to put the case the strongest possible way for the Maoris, that the Treaty of Waitangi meant to give an exclusive right to the Maoris, but if it meant to do so no legislation has been passed conferring the right, and in the absence of such both *Wi Parata v The Bishop of Wellington* 3 NZ Jur NS SC 72 and *Nireaha Tamaki v Baker* [1901] AC 561 are authorities for saying that until given by statute no such right can be enforced”.

Accordingly it was considered

“Now, in English law—and the law of fishery is the same in New Zealand as in England, for we brought in the common law of England with us, except in so far as it has not in respect of sea-fisheries been altered by our statutes—there cannot be fisheries reserved for individuals in tidal waters or in the sea near the coast” (same case).

It was however added

“In the tidal waters . . . all can fish unless a specially defined right has been given to some of the King’s subjects which excludes others” (same case).

In a rare instance of a particular grant, the Whatapaka people were given an area of shellbank in the harbour near to their marae. They referred to Crown Grant 9G81 which records the granting of Karaka Lot 64 at Whatapaka to Maori people together with an adjacent shell-bank in the harbour, but the shell-bank is no longer recorded on the Certificate of Title (CT 341/88) as being in their ownership. We think the title is correct because the people have lost the shell-bank. Until 1878 (see section 147 of the Harbours Act 1878) the Maori Land Court could issue titles to tidal lands uncovered at low tide. The Whatapaka case is an example of that being done. The Crown Grant was issued pursuant to the Maori Land Court’s determination of 1867 and the shell-bank appeared on the provisional title that later issued. The effect of the Manukau Harbour Control Act 1911 was to vest all tidal land in the Harbour Board. This included all land previously granted, including the valuable shell-fish bed that the people of the Whatapaka marae had owned.

Titles have now issued to the Board for the tidal lands and the new title for the Whatapaka Grant, which issued in 1921, omits reference to the shell-bank on the grounds that the grant was superseded by the 1911 Act.

In *Keepa v Inspector of Fisheries* (supra) it was added that customary fishing rights may endure where Maori customary land adjoins the sea-shore. But we know of no Maori customary land left adjoining the sea-shore. Freehold orders have been made for nearly all the Maori land left in New Zealand.

Nonetheless section 77 (2) was debated when the current Fisheries Act 1983 was proposed to the House. The Bill proposed the clause

“Nothing in this Act . . . shall affect any Maori fishing rights given under any other enactments.”

After debate it was changed to read

“Nothing in this Act shall affect any Maori fishing rights.” (See now section 88 (2) of the Fisheries Act 1983.)

This does not alter the fact that the rights are not provided for. It begs the question, “are there any rights?”. At least it can be said that the section leaves open the prospect of claimants overturning the earlier decisions of the Courts on the basis of the arguments addressed to us by P G McHugh as referred to in our Kaituna Report (December 1984) and by D V Williams in this case. But as Counsel for the claimants pointed out, the guarantees of the Treaty should not have to depend on expensive appeals to the Court of Appeal or Privy Council with only the uncertain prospect of reversing the trend of numerous existing cases and of persuading the Courts to recognise the doctrine of aboriginal rights that the New Zealand Courts have declined to recognise since the land wars.

It was further claimed that there was no response to requests for the reservation of traditional fishing grounds under other laws that once provided for that.

The first legislative recognition of a tribal right to parts of the sea arose from an early concern with oysters. In the 1890's the depletion of oyster beds in various northern harbours resulted in the Oyster Fisheries Act 1892 enabling areas to be closed to oyster fishing. The Sea Fisheries Act 1894 enabled the leasing of oyster beds, and for beds near marae to be reserved for an exclusive Maori use. Eighteen oyster leases were issued for the Manukau Harbour in 1897. Maori oyster reserves were established (in 1901), one at the head of the Waiuku estuary and another at a place called the Needles opposite the site where Moeatoa Marae was standing at that time. We have seen that subsequently the Moeatoa Marae was lost. A report of 1945 suggests that the reserves were being lost too as the oysters were dying out, even then. A decision was made to retain only the Needles Reserve.

That is the only Maori oyster reserve existing in the Manukau today. It is provided for in The Fisheries (Maori Oyster Reserves) Notice 1983. There are doubts about the exact location of the reserve as the original map has been lost but the general area is in close proximity to the Southside outfall of the New Zealand Steel Mill on the bank opposite the old marae site. On our visit to the area we could find only dead oyster shells. There is evidence that the area is not the most suitable habitat for rock oysters quite apart from any implications of the current discharge. The reserve was located there because of the immediately adjoining Moeatoa Marae, but as noted earlier, the marae was “lost” some years ago.

In a period from 1903 to 1962 there were provisions for reserving other tribal fishing grounds—but none were. The Maori Councils Amendment Act 1903 provided for the gazetting of Maori fishing grounds ‘exclusively for the use of the Maoris of the locality or of such hapus or tribes as may be recommended’. The provision was re-enacted in section 33 of the Maori Social and Economic Advancement Act 1945 and (eventually repealed by the Maori Welfare Act 1962). We enquired why Maori fishing reserves were not created in the early 1900's. We were told that the creation of these reserves required the consent of the Minister of Fisheries but that the Minister was reluctant to give that consent. In the 1950's the NZ Maori Council urged the tribes throughout the country to list their important fishing areas and to seek their reservation. A number did so but the Minister declined to reserve them.

The Manukau people claimed that they did not know of the provision until the 1950's after one of their number returned from a New Zealand Maori Council meeting in Wellington. He had the impression that the Council was going to get all the Maori fishing grounds gazetted. A number of hui were called and the main tribal fishing grounds in the Manukau were drawn in on survey maps. The maps were sent 'to Wellington' and the people confidently awaited confirmation of the reserves. They did not get a reply. Not one fishing ground was ever in fact reserved. We recall hearing the same story from the Taranaki Maoris in respect of their reefs. It is referred to in our report on the Te Atiawa claim (March 1983).

For the Manukau people the law is as empty as the oyster shells on the Needles Reserves and we think they are justified in feeling that way. We were referred to section 89 (3) (b) of the Fisheries Act 1983 whereby regulations "may apply special conditions or confer special rights in relation to fishing by specified communities" and to section 89 (3) (c) whereby those regulations may have specific application to specific areas. Regulation 7 of the Fisheries (Amateur Fishing) Regulations 1983 provides

The Director-General may, by notice given in that behalf, confer on specified communities special rights or privileges or apply special conditions relating to boundaries, species, gear or methods, periods of time, quantities, or any other measures for the management or conservation of finfish, shellfish, or aquatic life in the area in which the specified community resides.

This appears to provide a doorway for the recognition of Maori fishing grounds but who has the key to the door? What is the password for entry and why is the legislation reluctant to refer to *Maori* fishing grounds or the Treaty of Waitangi? If the Ministry of Agriculture and Fisheries is to retain the key, past experience suggests that Maori fishing grounds will not be reserved. If the password is the policy outlined by officers of the Ministry, that fisheries belong to all and no one section of the community (apart from commercial fishermen) can have a preferred interest, Maori communities will face a closed door.

6.3 THE LOSS OF THE WATERS—A MAORI PERSPECTIVE

The Manukau is the second largest estuary on the West Coast of the North Island. It occupies about 375 square kilometres and has a coastline length of about 520 kilometres. It is more than three times the size of the Waitemata Harbour. To Maoris it is several times more important because its shallow nature provides a greater seafood resource.

The traditional use of the harbour and the very extensive food supply once obtained is detailed by Agnes Sullivan in a paper presented in 1984 to the Department of Anthropology, University of Auckland. This paper verifies by careful research and documentation a great deal that was put to us in more general terms.

Sullivan's paper stresses the traditional apportionment of the harbour to the various hapu and the relationship between the harbour and the tribes on its shores as evidenced by the large number of pa built for ready access.

Today the guardian families of the Manukau are represented in various marae all in close proximity to the shores. They are

Te Puea, near Mangere bridge

Makaurau at Ihumatao, Mangere

Pukaki at Pukaki, Mangere
Whatapaka near Clarkes Beach opposite Seagrove
Tahunakaitoto near Glenbrook, the oldest of the current marae
Reretewhioi on the Waiuku estuary
Rangariri on Awhitu Peninsula, and
Huarau near Maioro

Each of these marae once enjoyed easy access to the bounty of the harbour.

Like *Sullivan's paper* several supplementary papers of the *Manukau Harbour Plan* (a document described in more detail later) traverse Maori customary beliefs and fishing practices in the Manukau. We commend a study of those papers. They adequately amplify evidence to us that often made only brief allusions to the subject.

Although there is some opinion that the Maori did not come to a full environmental awareness until several generations after his arrival in Aotearoa, it also seems clear that the Maori brought with him a magico-religious world-view of the environment that readily lent itself to the conservation of the earth's natural resources. The natural world of the Maori was not divided into seen and unseen parts, but the physical and spiritual dimensions formed an integral and indivisible entity. That perspective dominated from the beginning and provided the foundation for later environmental controls.

We were told how local tribes taught a respect for the sea, the sea gods and for Kaiwhare the guardian spirit of the Manukau who wreaked havoc on transgressors. We were told of the maintenance of the laws of the sea through tapu and rahui (with their self imposed punishments by whaka hawea and maori mate).

We were introduced to rules that compelled quietness at sea and prohibited food on the water, gutting fish at sea or opening shellfish, lighting fires or cooking on the shoreline. Bathing was prohibited in certain places at certain times and urinating in the water was prohibited at all times. We were told how the people used kits not sacks, never dragged the kits over shellfish beds, dug only with their hands, replaced upturned rocks, and never took more than their needs.

We were given brief references to incantations and rituals (still practised by many). The reading of signs was a specialised art, the reading being taken from wave patterns, fish breaking the waves, shellfish digging deeper into the bed, bird movements and the growth or blooms of trees. The appropriate places for collecting various fish or shellfish according to seasonal migratory, spawning and feeding habits were also described.

The Manukau Harbour Plan papers summarise the importance of the harbour to the claimant tribes as follows:

- “(a) For the Maori people the waters and their natural resources are the source of spiritual life. This spiritual importance of the Harbour is embodied in mythology and tradition. The belief in Kaiwhare, the guardian spirit of the Harbour is a tangible part of the spiritual relationship between the people and the Harbour.
- “(b) The Maori people have ancestral ties with the Harbour. The sub-tribes of the Waikato-Maniapoto Confederation of Tribes have occupied the environs to the Manukau Harbour for over 600 years and in

consequence, have a long association with the land and the Harbour.

- “(c) The Harbour is a major source of seafood for the Waikato people. Sea food is gathered from the Harbour to supply Waikato Maraes from the Mangere Marae on the northern boundary to Ngaruawahia, the marae of the Maori monarch. Many visiting dignitaries are welcomed here, and offered the food of the Manukau as part of traditional hospitality. Contributions of seafood at the same time symbolise loyalty to the Maori Queen. The mana (prestige) of the Maori is based, in part, on this ability to contribute and share.”

In the Maori perspective the Europeans are regarded as foolish or ignorant by some, and by others as simply “unschooled”. They fish anywhere at any time, make loud noises in the harbour, urinate and drop food in the water, gut fish in the sea or open shellfish on the shore, trample the shellfish beds or raid the sea to line their own pockets (without a thought for those who “own” and reply upon it). Worse, they treat a great food garden as a garbage can for unwanted waste.

6.3.1 The Loss of Water Quality and Fishing Grounds

Several witnesses referred to the harbour's once plentiful supply of flounder, mullet, pioke shark, skate, trevally, snapper, kahawai, kingfish, parore, tarakihi, moki, herring, stringray, lemonfish, hapuku, limpet, crayfish, toheroa, pipi, scallops, mussels, paua, kina, pupu, oysters, toitoi, karengo and sea fungus and to the eels, koura, trout, whitebait and watercress in the rivers and creeks. We were referred to various species of those fish, to the particular banks, inlets and bays where various types of those fish predominated, and to migratory and spawning habits gleaned from hundred of years of careful observation.

Those who appeared before us described the state of the harbour from the 1920's. They recalled how in numerous inlets and creeks finfish and shellfish abounded. They recalled catching large quantities of flounder with their feet and with spears, the large quantities of snapper and stingray and of collecting mussels and oysters without getting their feet wet. They recalled how the murky waters were once crystal clear and the thick mud once firm white sand. It was said that siltation was first noticed in the 1940s when a creeping black sand started moving across the harbour. (The Auckland Harbour Board challenged that view. It considered that there had been no marked sedimentation at least in the navigational channels and the selected banks that it had surveyed). People spoke of the extensive reliance of various tribes on the seafood resource, how Princess Te Puea and her workers relied on this resource while developing the Maori lands at Rere Te Whioi on the Awhitu side, and how the marae provided lavishly for their visitors with seafood. Today fish must be purchased for the major tribal gatherings.

Following the confiscations, the north shore area, from the North entrance across to Puponga Point at Karangahape, and thence to Te Whau and Onehunga was soon lost to an exclusive or even principal Maori use as settlements developed. Here the Wairopa channel, Te Tau Bank, the upper Mangere inlet and numerous coastal bays provided an abundant source of shellfish, mussels, rock oysters, limpet, crayfish, kina, hapuku, travelly, snapper and pioke shark. Later this area became the worst affected from the untreated discharge of trade waste sewers, from industrial growth and rubbish dumps, resulting in severe ecological damage. In the Mangere inlet opposite Te Puea marae the stench became so intense that

in 1955 a Commission of Inquiry was established to investigate the problem of "Noxious Fumes".

Maori fishing came to concentrate on other banks, creeks and inlets near to their other marae.

We consider them, moving clockwise around the harbour. Near Makaurau marae at Ihumatao there existed the oyster beds at Puketutu, the Oruarangi creek and the Karore and Oriori banks famed as fishing grounds particularly for scallops, stingray, mango and dogfish. These areas were seriously affected by urban and industrial development and farm run off. The Puketutu beds have been replaced by oxidation ponds and Oruarangi creek has been closed. The airport extends into Karore and Oriori Banks and fishing there has been prohibited. In any event the once clear water has gone and the shellfish beds on once firm sand have been covered by a deep black mud. (The coastline taken up by public utility works such as the Sewage Treatment Works and the airport, in the Manukau District alone, is approximately 50 kilometres). Fish are now obtained in more distant parts of the harbour and the deeper channels. The Papakura channel and Pahurehure Inlet extending up to Papakura provides shark, stingray, flounder, snapper, mullet, trevally, kahawai, kingfish and scallops but this inlet has also been affected by pollution, black mud and commercial fishing and there is now a danger from quicksand.

At Pukaki the seafood supply came from the Karore and Oriori banks (now not usable because of the airport) and the Pukaki and Waiokauri creeks. The latter were regarded as breeding grounds. The flow to the creeks has been affected by the airport causeway and bridge, the creeks have been further affected by the encroachment of black mud filling the creeks and covering shellfish beds, and the fish have been depleted through commercial fishing. The Pukaki people must also move further afield to fish.

Some indication of the extent and sources of pollution in the Pukaki and Waiokauri creeks and their related estuaries is apparent in the reports on an application for an oyster farm lease on 43 ha of tidal flat in the creeks in 1981. The proposal did not proceed. The Department of Health noted

"In the past the entire Manukau Harbour was considered unsuitable for this purpose and even although the area was not officially declared as such it was thought that nobody would contemplate (such) a proposal . . ."

It considered the proposal should be opposed on public health grounds and as being "quite unsafe". The Department of Health report noted that the Pukaki area was affected by nine emergency sewer overflow points ("of which several have operated in the past two years"), leachate from a refuse tip on an inlet reclamation and from an illegal rubbish dump, stormwater from residential and industrial properties, stormwater with some detergent and aviation fuel from the airport, and land wash from a number of dairy farms and market gardens using a wide range of fungicides, pesticides, fertilisers and weedkillers. It noted there were four commercial fishermen operating in the creeks with set nets catching mainly flounder, mullet and kahawai, and "a small Maori community in Pukaki Road who fish the area and collect wild oysters in the estuaries. There are several established oyster beds in both creeks which contain Pacific oysters".

The people of this area are also apprehensive about further proposed works for the creek—

- the AVTUR pipeline which is likely to cross it
- the SW sewer interceptor
- the possible relocation of the Auckland Gas Co gas pipe presently located on the crash-fire bridge
- the possible relocation of an electricity supply line presently located on the crash-fire bridge
- the possible relocation of a water main presently located on the crash-fire bridge, and
- a proposed new airport eastern road access planned to cross it.

The more southerly areas are not so seriously affected yet even there the Poutawa bank by Whatapaka marae is regarded as the only tidal flat of sufficient size that can be fished. The Hikihiki bank to the east is now too dangerous for shellfish gathering because of quicksand and treacherous tidal channels.

Whatapaka marae is at the mouth of what is now called Clarks creek. Here kahawai, snapper, mullet, shark and stingray once abounded and the shellfish banks provided mussels, pipi, pupu and oysters. We were told of the plentiful supply that existed until comparatively recent times. We heard complaints about pollution from farm run off, discharges from Kingseat hospital (now ceased) and from the use of shellfish beds along the Poutawa bank for airport construction and target practice. It was said that there was virtually no shellfish to be obtained along the Poutawa bank now from Whatapaka to Clarks Beach.

We were told that large quantities of fish and shellfish were also once found in the Waiuku Channel and inlet extending from the Glenbrook Steel Mill around the Awhitu Peninsula to the south head of the Manukau Harbour entrance. Several marae exist today along this strip. The area was particularly noted for lobsters, mussels, pipi, pupu and oyster beds. It was claimed that this area too suffers from the general pollution in the harbour, and that black mud or sand covers the shellfish beds in the Waiuku inlet killing off the shellfish. It was claimed that mussels could no longer be obtained at the Heads, and that the resource is further threatened by the large work force attracted to the NZ Steel Mill. There is a large slag-heap from the mill adjoining the estuary opposite Tahuna marae that was said to be leaching chemicals. The mill's outflows are also at about this point.

Also at this point is the Needles Oyster Reserve of the Ngati Te Ata people referred to at para 6.2. As we said earlier the oysters there are now dead.

6.3.2 The Loss to Commercial Fishing

Both Maori witnesses and witnesses for the Ministry of Agriculture and Fisheries were agreed that the Manukau is of prime importance as a breeding area, nursery area and migration route for a variety of fish, a number of which migrate to live as adults in coastal waters. It is a major fishery for a large part of the West Coast. The shallow sheltered nature of the harbour affords protection for young fish at a stage when they are particularly vulnerable. The richness and variety of fauna and flora provides an unparalleled diversity of food chains and life cycles so that it is of primary importance to maintain them in good heart. Spawning takes place in the channels, inlets or lower reaches of the streams according to the

type of fish. The inter-tidal zone is particularly ecologically sensitive and provides a nursery ground for young flatfish.

There was some variance between Maori opinion and that of marine researchers on whether spawning was principally throughout the harbour inlets or in the channels towards the harbour entrance. The Maori people claimed the Whatapaka and Pukaki inlets for example, were important breeding areas for a great variety of fish but that the officials took no notice of their claim. All were agreed that the whole harbour was important and was a major natural fishery for commercial and recreational fishing.

Maori witnesses claimed that commercial overfishing, "bang" fishing and unfair netting practices, had seriously depleted the catch for everyone. Alleged over-fishing of what was considered an important breeding ground was the main complaint of the people of Whatapaka marae. The marae documented its catches for hui for a period of 10 years to 1975 as follows:

	Shellfish	Wetfish
marae consumption	115,300	24,990
household consumption	30,000	14,000
contributions to other marae	100,000	5,000
Totals	245,300	43,990

Last year for the first time the Whatapaka marae had to purchase the seafood to entertain guests at the marae's annual poukai. These people can no longer maintain their traditional obligations to supply seafood to their related inland tribes or to provide their important guests, including the Maori Queen, with the seafood for which they were once renowned.

Witnesses for the Ministry were unable to be specific on the question of overfishing. They admitted to a paucity of reliable data. They considered that there had been overfishing generally in the country but guessed "that the primary cause of reduced fisheries in the Manukau is due to the physical deterioration of the harbour" (R W Little). Another witness for the Ministry advised

"Between 30 and 50 commercial fishermen regularly fish on the Manukau. A number of other fishermen are registered for the Manukau but have trailerborne vessels or dories and are highly mobile. These fishermen fish in a number of areas depending on the season and where the fish are most abundant. The number of fishing method permits and fishing vessels registered for the Manukau has dropped dramatically since 1983 when new licensing criteria were introduced to remove part time fishermen from the inshore fishery and any unused fishing method permits were cancelled. However, if anything, these measures have actually resulted in an increase in commercial fishing activity. Many of the remaining fishermen appear to be trying to improve their catching record so that they can keep their licence should even more stringent licensing criteria be introduced.

"In the Manukau Harbour, this increase in fishing activity is apparent from fishermen setting greater lengths of net, resulting in congestion on the fishing grounds and apparently decreases in fishermen's individual catches. Local fishermen also report that the introduction of a controlled fishery in the Hauraki Gulf in 1983 has resulted in the displacement of some dory fishermen into the Manukau, further increasing fishing pressure in the harbour."

Some witnesses said that specific areas ought to be reserved for the tribes, that tribal members should be given special fishing rights or that commercial fishing in the inlets should be prohibited.

The reservation of Maori fishing grounds in the harbour may not now be practicable as many of the traditional fishing grounds have been destroyed by pollution and the works referred to earlier. But the people in two Maori localities continue to urge the provision of reserves, the Whatapaka people in respect of the Whatapaka Inlet, and the people of Pukaki. The latter asked that the Pukaki and Waiokauri creeks and their tributaries be made "Maori Reserves" for the local hapu in submissions to the Manukau Maritime Planning Committee in June 1980.

6.4 THE RESTORATION OF THE WATERS—A GENERAL PUBLIC PERSPECTIVE

The nature and effect of development was detailed by D S Grove for the Auckland Regional Authority. He described the growth of industrial development around the harbour from 1847 to the present day. In the period of 1900 industrial growth centred around the upper Mangere inlet. Trade wastes and refuse from townships were discharged directly into the harbour. The growth in farming, livestock killing, meat processing and chemical fertiliser works was remarkable in the period 1900 to 1950. By the first World War, land surrounding the upper Mangere inlet was firmly established as the noxious industry centre for Auckland. Many other works were attracted to the area including glass works, engineering firms, concrete manufacturers, steel fabricators, rubber mills, railway workshops, wood processors and fibre wall manufacturing plants. By 1950 pollution was an obvious problem. Some 18 trade waste sewers discharged untreated wastes to the harbour along the northern coast alone, together with untreated urban effluent at several points and additional effluent from process operations. Discharges to the Mangere inlet resulted in severe ecological damage from which the harbour has not yet fully recovered. There was evidence that the water was recycled with each tidal change rather than fully flushed so that contamination was not confined to the main channels but spread throughout the harbour. The inlet was described as "an evil-smelling estuary having a bottom covered with black, sulphide-smelling ooze" with rotting organic matter "several feet thick". Fumes from the mudflats were reported to have blackened the paint of houses.

Grove described the period from 1950 as one of public reaction and response. A Commission of Inquiry was appointed in 1955 to consider the "Noxious Fumes" problem. The 1960's saw a public works response, the construction of the Mangere sewage treatment plant, and a control on the disposal of untreated wastes. The 1970's saw a shift from constructional solutions to the imposition of environmental policies and controls in

- the Clean Air Act 1972
- the appointment of the Auckland Regional Authority to implement water control policies
- the implementation of environmental protection and enhancement procedures for new industries and developments
- the Marine Pollution Act 1974 to control unauthorised dumping of waste

- the introduction of District Schemes to control the urban and industrial spread to rural environments
- the publication of a Manukau Harbour Plan
- the establishment of a Manukau Harbour Planning Authority, and
- the extension of the ARA's planning boundaries to include the harbour.

Several witnesses affirmed the view that pastoral farming in the catchment is a major contributor to the bacterial loading in the harbour and is probably the main cause of the "creeping black mud" referred to, and extensive deposits of silt that have accumulated over the years. The 1780 hectares of the catchment is predominantly farming land. The problem, the measures taken for its control, and the need for farmer awareness, is evidenced in a booklet "Rural Water and Soil Management" published by the Auckland Regional Authority with the co-operation of the Ministry of Agriculture and Fisheries for distribution to farmers.

The organisations with jurisdiction over the harbour (and the nature of their jurisdiction) are as follows

- (1) *The Ministry of Transport* (Marine Division) administers the Harbours Act 1950, an act providing the legislative framework for the control of the foreshore, seabed and water space of harbours. The control rights in the Act apply irrespective of who owns the foreshore, seabed and water space.

Grants of control can be made of these areas to a variety of bodies and then either solely or jointly with others. In the case of the Manukau there is only one controlling body, the Auckland Harbour Board. The Board has had a statutory right to control the foreshore and tidal lands since 1911, a grant of control in respect of the rest of the seabed since 1982 and a control of the water space by virtue of the Harbours Acts.

The Ministry of Transport retains an influence. Although the Board must licence any structure in the harbour, the Ministry must approve the plans. The Board's control can only be effected by bylaws and the bylaws must be approved by the Ministry. The Ministry also retains a responsibility to oversee the removal of sand and shingle and to grant approval for reclamations.

The Harbour Board is responsible for all else including the licensing of structures, the control of pleasure craft and recreational activities, and the management of public facilities.

The Ministry supports the grant of control to the Board. The basic legislative philosophy is that the harbours must be for the public benefit and any licensing for private use must be subject to tight controls. The Board does not comprise sectional interests but is an elected representative body. All sections of the community can elect and stand for membership, including of course, Maori people.

In addition, the Ministry of Transport (Civil Aviation Division) is responsible for prohibitions on fishing and mooring in the vicinity of Auckland International Airport.

- (2) *The Auckland Harbour Board* is a statutory body owning the foreshore and tidal flats by virtue of the 1911 Act, and having control of the whole harbour by virtue of that Act, and control grants given by the Minister of Transport under the Harbours Act 1950. Its primary responsibility is to provide for shipping and navigation in the

Waitemata and Manukau Harbours and the operation of the ports. It seeks to discharge its responsibilities at a profit, by levies, dues and rent monies from reclaimed lands and is authorised to be involved in a number of commercial ventures. To assist with operational costs certain endowments were transferred to it in 1911. Its capital investments in the Manukau now exceed \$10 million. As a result of increased trade the Port of Onehunga is now profitable.

In more recent years the Board has undertaken broader responsibilities that compel a wider overview of the harbour. Maritime Planning Schemes were introduced by the Town and Country Planning Act 1977. They enable the settlement of zones and policies for harbours to provide better for a wide variety of uses, from navigation to swimming, and from reclamation to the preservation of wildlife habitats. An important effect will be that many proposed activities and structures will now require express permission, after a public hearing, they will be measured against the overall scheme, and there will be an appeal to the Planning Tribunal. From a number of public authorities that could have been selected, the Auckland Harbour Board was chosen as the Manukau Harbour Maritime Planning Authority to propose and administer a scheme for the Manukau. A scheme is being worked on at the moment. In the meantime, interim planning controls are provided for in section 102a of the Town and Country Planning Act 1977 (largely as a result of the Auckland Harbour Board's own requests).

The Board has a very limited jurisdiction over pollution, discharge control and water quality standards. It has no control over discharges from the Mangere Sewage Purification Works, for example, even though it owns the ponds, but has a responsibility for oil spillages, for example, under the Marine Pollution Act 1974. It has no jurisdiction in respect of fisheries in the Manukau.

Still the Board has had to maintain an interest in water quality and fisheries. They are relevant to such matters as the promotion of special Acts to authorise reclamations and the environmental protection and enhancement procedures required of some grants, licences and authorisations issued under the Harbours Act.

The Board's basic approach is that the Harbour is a shared resource for some 800,000 Aucklanders. It believes it has no authority to give a particular priority to any one section of the community but must balance a number of competing claims from different sections. Within that broad philosophy it has consistently tried to show respect for Maori interests in considering particular proposals. It sought a specific provision to cover traditional Maori fishing grounds in the legislation prescribing Maritime Planning Schemes—without success. The Select Committee considered the reference to non-commercial fishing adequately catered for any special needs of Maori fishing grounds. In similar vein the Board has consistently sought the application of public planning procedures to proposals affecting the harbour, and has not sought to shelter behind those sections of the Harbours Act that might circumvent public participation.

Nonetheless the preparation of a Maritime Planning Scheme compels the Board to take a broad overview of the harbour, and in so doing to consider water quality, fishing and Maori interests as well as the interests of other groups. Once complete, the scheme takes

force as a regulation, and as a regulation in force, or as a proposed regulation, the Treaty of Waitangi Act 1975 may be used to test whether it is in conflict with the principles of the Treaty of Waitangi.

- (3) *The Auckland Regional Authority* has had regional planning jurisdiction in respect of the whole of the harbour since 1979. In effect, a Regional Plan that includes the Manukau Harbour will contain the broad policies into which the more localised Manukau Harbour Maritime Plan needs to fit. Obviously the Regional Authority and the Harbour Board will work closely together. The Auckland Regional Authority is also the Auckland Regional Water Board with a jurisdiction relating to discharges into the Manukau and the quality of receiving waters.
- (4) *The Department of Health* must approve the location, depth and constructional details of outfall sewers to tidal waters under the Auckland Metropolitan Drainage Act 1960 and may require improvements when health is endangered by storm-water overflows or emergency overflows from main sewers to a watercourse. It researches applications to farm shellfish and may give evidence on water rights applications.
- (5) *The Ministry of Agriculture and Fisheries* also researches and gives evidence on water rights applications. It has jurisdiction with regard to marine life in the harbour and a responsibility for the Fisheries Act 1983 and its regulations. The Ministry is preparing a fisheries management plan for the Auckland district, a very large area covering the northern half of the North Island.
- (6) *The Department of Internal Affairs* (Wildlife Division) has jurisdiction with regard to wildlife on the Manukau. The Manukau is particularly notable for its birdlife. The Siberian godwit migrates to the Manukau and Kaipara harbours only.
- (7) *Some local authorities* including the Otahuhu Borough Council and Manukau City Council have portions of the harbour vested in them, along with the Railways Corporation and the Auckland Regional Authority.

The Maori perception of the history as outlined by Mr Grove differs not in detail but in perspective. In their view the Maoris were taught respect for the sea and environment, and an intimate knowledge of its workings. Their forebears looked after the harbour. The Europeans did not. They claim "we are the best protectors of the harbour—let us set the terms for its control".

They have a different perception of the Treatment Plant established to control the dumping of untreated wastes. The plant takes sewage from the whole of Auckland. In their view it stems from a policy once announced, that Waitemata was Auckland's gateway and Manukau the back-door, a policy that makes the Manukau Auckland's garbage can.

Not only Maori people but many of the general public including the members of the Manukau Harbour Protection Society Inc have a different perception of the effectiveness of the laws set up to establish a greater control. They view with concern that there are approximately 350 existing discharge rights into the Manukau Catchment, with about 20 coming up for renewal each year. In addition about 30 to 35 new discharge rights are sought each year. The society claimed that over 2500 acres of the harbour have been reclaimed for developments in the last 15 years and that approvals for reclamations are continuing as a matter of course. One in the

Pahurehure inlet was said to involve the dumping of trade wastes with the reclaimed area leased to provide further revenue for the Harbour Board. Numerous examples of alleged illegal or legal dumpings were referred to, including the NZ Steel slag heap on the Waiuku estuary purportedly exuding toxic wastes to the harbour and the adjacent oyster beds. Heavy metals are discharged to the harbour from a number of sources including the process waste discharges and stormwater of NZ Steel Ltd. There has been an increase in the zinc content of oysters in proximity to the discharge points. Although the Auckland Regional Water Board considers that zinc and other heavy metal levels do not constitute a health hazard the local people now find the oysters unpalatable and no longer take them. Dr Penny, Marine Biologist, considered that long term monitoring was necessary to gauge the effects of heavy metals "by which time irreversible damage may have occurred".

Some said they had lost faith in the ability of the Harbour Board or ARA to control the situation. They referred to the continuing demands made on the harbour for major industries, gas and power lines, roadways and recreation areas. (The NZ Steel Mill expansion and the LPG wharf terminal proposals raised particular concerns that are dealt with separately).

It was argued that the Harbour Board could not be impartial in these matters because of its commercial interests and historical commitment to servicing shipping. There was evidence that the Board had actively sought the trade that the Steel Mill expansions would engender. It would provide an estimated \$500,000 to the Board's revenues from wharfage and other fees. The Board also receives a substantial income from leasing reclaimed lands.

It was argued that the Regional Water Board lacked the staff and finance to undertake sufficient research or maintain effective surveillance, was committed to the "multiple use" concept in considering water rights, and was a part of the Auckland Regional Authority which had a commitment to electors who depend upon industry in the area.

Needless to say these claims were challenged. Counterclaims that the original state of the harbour could not be verified through the lack of scientific evidence really advanced us nowhere. If anything it meant only that the claimant's evidence was uncontroverted. We do not intend to review the numerous claims and counterclaims or the debate surrounding the particular case examples given but simply to record our broad conclusions based on the totality of the evidence. (They are recorded at para 9.2.2).

The main debate was on how the conflicting interests of fish and factories are to be properly balanced in the future management of the harbour, and on how policies might be applied to particular proposals. For the Maori there was the added dimension of whether the policies would accommodate Maori interests.

We discovered that some policies are in existence, but that finite plans, and some of the resource papers that must precede them, have yet to be produced.

6.5 PLANNING PROPOSALS—A GENERAL PUBLIC PERSPECTIVE

The Manukau Harbour Plan is the result of a joint study conducted by the Auckland Harbour Board and the Auckland Regional Authority from

March 1977 to December 1978. It is not a legally binding statutory planning scheme but a statement of policies adopted by the Board and Authority to guide management decisions pending the completion of a regional plan that includes the harbour, and a Maritime plan for the harbour. The policies are based upon research data in several disciplines collated as supplementary resource papers forming Part Two of the Plan.

In broad terms the Plan seeks to reconcile the preservation of the harbour with economic growth through particular policies and broad strategies. It acknowledges on the one hand, the ecological sensitivity of a shallow harbour and its importance for bird life, fishing and recreation. It acknowledges on the other the intensification of residential living, industrial development and farming pursuits in the catchment. The consequential policies show a necessary bias rationalising the needs of different groups, a bias whereby the need for conservation and protection is presumed and can be compromised only by those developments that are clearly in the general public interest. The question is whether the extent of that bias is actually sufficient given the state of the harbour. We question whether the policies as defined in the plan give a sufficient recognition to the need for substantial works or programmes directed to the improvement of water quality rather than the preservation of an existing state. We wonder also whether the plan was right in apparently presuming that development and preservation are necessarily contradictory and demand a compromise, or whether there ought to be more positive policies providing an incentive to developers to shape their projects to secure an environmental advantage or to contribute to the cost of environmental repair.

The strongest criticism of the Manukau Harbour Plan came from the Commissioner for the Environment. His criticism questions whether the proposed Maritime and Regional Plans will be sufficient when what is required is the "clean up" of a heavily polluted body of water.

He said:

"I do not regard the (Harbour Plan) in its present form as a management plan. The policies are stated only in a suasive manner, for example 'The highest possible standard of wastewater and stormwater disposal from water-related industry should be achieved by the best practical means.' There is a vast difference between that statement and the precise objectives and time scale proper to a management plan, but this in my view would be the logical next step for the authorities to embark upon. The first task would be to audit actual performance under the various headings listed in the original document and establish those areas in which tighter control must clearly be given priority under a management plan. The Commission would be willing to enter into discussions with the agencies concerned so that a joint report on this issue could be made to the appropriate Government authorities".

Although great weight was placed on the acknowledgement of the significance of the harbour for Maori people in the plan and supplementary papers, we have considerable doubts that the sentiments expressed are adequately reflected in the final policy statements.

The plan policies have two aspects relevant to our enquiry

- (a) the identification of specific areas of ecological, visual or historical significance and the formulation of policies appropriate for each, and

- (b) the identification of particular interests and the formulation of broad policies to respect them.

Specific areas singled out for special treatment are, for example, the bush clad hills of the northern heads and the airport (visual), bird roosting and habitat areas (ecological), and Kaiwhare's cave (historic). Policies for the protection of Maori sacred sites are included in the second category.

The policies are therefore clear in their desire to protect or respect ancient or sacred sites. What appeared to us to be lacking, at least in the policy section, was

- (a) the identification of the important marae areas around the harbour and the formulation of policies to ensure their access to and continued association with the harbour
- (b) the identification of the important fishing grounds associated with those marae and the formulation of appropriate policies for them and
- (c) the enhancement of the marae as both historic and living monuments to the importance of the harbour.

In fact in the policy section far greater weight is attached to site identification and policy formulation for the birds.

As we have noted the Plan is not legally binding. Its significance for us is that it is a statement of policies accepted by the Board and the Authority in the absence of an approved Maritime Plan and a Regional Planning Scheme for the harbour. It is those documents that will set out the final criteria for the use or development of the harbour.

These plans are in the course of preparation and we could not view them, although we were given a preview of one aspect. The Auckland Regional Authority referred to a difficulty over "ancestral land". The Authority legal advice is that those words mean, effectively, "Maori land". We find that strange when the Legislature has used words other than "Maori land" for which a particular definition has existed in law since 1865, but we must accept the judicial interpretation as law and consider only whether this places an undue constraint on the recognition of Maori interests in land and water regimes.

Apart from the Manukau Harbour plan, reference was made to the need for overall policies and planning strategies to control waste discharges into the Southern Manukau. It was noted that there is no legislative requirement for Regional Water Boards to prepare overall Management Plans.

Others considered there have been a number of studies directed to the assessment of particular proposals and problems but that no comprehensive study of the entire harbour in terms of water quality or to assess the combined effect of the discharges as a whole has been undertaken. For the claimants Dr S F Penny noted the lack of documented information on the general condition of the harbour. Particular purpose studies have been undertaken but there is no comprehensive study from which trends can be assessed. Other witnesses confirmed that view. A major reason for this has been not the lack of commitment but the lack of funding. For the Auckland Regional Authority A Haughey considered that a full study would take 10 years and cost at least \$10 million.

Another problem is that many of the proposals affecting the Manukau are Crown works not bound by the Town and Country Planning Act under which the ARA derives its planning jurisdiction. The only channel

open to local authorities and the public to voice their concerns is to forward submissions to the Commission for the Environment in accordance with the Commission's Environmental Protection and Enhancement Procedures. Crown proposals have included

- the proposed siting of the Thermal No. 1 power station at Waiau Pa (which did not proceed) subsequent proposals to establish smaller combined-cycle power stations with associated proposals to construct gas pipelines (which also did not proceed)
- the construction of a high pressure natural gas pipeline to supply the Auckland domestic and industrial market
- the proposed AVTUR pipeline to supply aviation fuel from Wiri to the airport (and likely to cross Pukaki creek)
- the NZE proposals to upgrade the Auckland isthmus transmission system, and
- the NZ Steel Mill expansion proposals.

The Crown has a substantial involvement with the last proposal. It is considered in more detail later. What we note here is the considerable consternation that the company obtained consent to a slurry pipeline under the Petroleum Act 1937 so that a public hearing was not required.

In earlier years the Auckland International Airport, the Manukau Sewage Purification Works and reclamations for rubbish tips were all authorised by special legislation under the Harbours Act.

6.6 COMMERCIAL FISHING—THE MINISTRY'S PERSPECTIVE

It was agreed that as a fishery habitat the Manukau has been more affected by developments within its catchment than most harbours. Fishery losses have been sustained by

- the removal of significant intertidal habitats through reclamation
- the build up of fine sediment through land development, and
- the deterioration of water quality from various forms of pollution.

A supplementary paper to the Manukau Harbour Plan draws attention to what we consider a major impediment to the completion of a comprehensive plan that might give a proper consideration to the fish resource in future management decisions. It notes that a paper on that topic supplied by the Ministry of Agriculture and Fisheries appears to be

“... not complete and does not necessarily coincide with existing practice and local view. . . . While the value of the harbour as a fish resource is not in doubt, there are differing views on the measures necessary to preserve that value. It is obvious that more information is necessary. It is obvious that discrepancies between official and local views need to be investigated as part of an overall plan for the management of the Manukau Harbour fisheries”.

The Ministry of Agriculture and Fisheries is responsible for the administration of the fish resource. The Ministry acknowledged the lack of current research data for the Manukau but referred to the new Fisheries Act 1983 and the concept of Fisheries Management Planning there proposed. Four regional management plans are proposed for the country. The Auckland area covers the northern half of the North Island and thus embraces a wide area and several tribal groups. There is an advisory committee for the

Auckland Area with representatives from user groups (including Maori members). Within the area District Liaison Committees comprise representatives of more locally based user organisations. At this time resource papers are being prepared for the Auckland Area plan.

The Ministry referred also to its proposals to deal with overfishing throughout the country by the introduction of individual transferable catch quota systems (a transferable licence to catch a specified quantity of fish within a specified area per annum).

In rejoinder Counsel for the claimants contended the national programmes for ITQ's and the management plans for a massive Auckland area, while probably good in themselves, still failed to confront the particular problems of the Manukau. We were informed that no advisory committee exists for the Manukau, or even the West Coast zone of which the Manukau is part, and there are no particular policies based upon adequate research to deal particularly with the Manukau Harbour. On the other hand, other areas had been made 'controlled fisheries'. Our attention was drawn also to a proposal at that time, and since ratified, to close off the seas at the Motu River mouth to protect snapper from commercial fishing when they aggregate to spawn.

The present position is that a Regional Planning Scheme is proposed but is not yet complete, a Maritime Planning Scheme is proposed but is also not yet complete and a Fisheries Management Plan for the Auckland region is proposed but due to the size of that region may not have any particular provisions for Manukau Harbour.

6.7 THE LOWER WAIKATO RIVER

While those of the eastern marae referred to only the traditional fishing grounds of the Manukau, those of the southern marae, at Waiau, Tahunakaitoto and Whatapaka in particular, advised that their traditional fishing grounds were not only in the inlets and estuaries of South Manukau, but also in the lower Waikato river and river mouth.

There the bounty of the river is shared with other marae on the banks of the lower Waikato including

Oraeroa at the mouth of the river, of Ngati Tahinga and Ngati Karewa sub-tribes.

Tauranganui eight miles from the mouth of the Port Waikato road, of Ngati Tipa and Ngati Kaiaua.

Te Awamarahi twelve miles from the mouth on the Port Waikato road, of Ngati Amaru, Ngati Tipa and Ngati Pou.

Nga-Tai-e-rua at Tuakau, sixteen miles from Port Waikato, of Ngati Tipa. Although one mile from the river, the people are regarded as one of the river tribes, many of them having benches on the river which they use during the fishing season.

The Waikato River offered much more than a network for inter-tribal travel and communication. The river, its swamps and tributaries, provided food—eel, freshwater crayfish, whitebait, mullet, flounder, shellfish, waterfood and wild vegetables. It provided irrigation for kumara, taro and hue. Whitebait has particular importance. The river supports what is generally considered to be the North Island's most important whitebait fishery. Its significance is apparent in the number of benches erected on the river-bank. In an area between the elbow and the Maoro mine site there were

an estimated 300–400 benches, each used by four to six people meaning that between 1,500 to 2,500 people used that section of the river for whitebaiting. Maioro Bay, some four miles from the river mouth, is a spawning area during April, May and June, the eggs adhering to rushes and flaxroots along the banks and islands where they hatch to an embryo state before being carried out to sea on ebb tides. The young fish are attracted to the brackish waters of the estuaries and eventually return to the fresh water rivers and streams.

In the 1940's, it was claimed, the season extended from July to November and yielded some 120 tons. A canning factory was established at Kohanga and the supply was purchased mainly from Maori fishermen who relied upon the whitebaiting to supplement their cash incomes. Today the season is shorter, the canning factory has closed, the yield approximates only 10 tons and whitebaiting by Maoris no longer predominates

It is difficult to over-estimate the importance of the Waikato River to the Tainui tribes. It is a symbol of the tribes' existence. The river is deeply embedded in tribal and individual consciousness. Like Manukau it has its taniwha or guardians, but unlike Manukau, there is a taniwha at each bend. The river has its own spirit. It is addressed in prayer and oratory as having a life force of its own. The spirits of ancestors are said to mingle and move with its currents.

When Waikato people are sick, uncertain or about to undertake a journey or new venture they seek the blessing of the water and the protection of their ancestors by immersion or sprinkling. Its curative and healing powers were claimed by several witnesses from personal experiences.

Today the Waikato adjoins areas that constitute one of the heaviest population concentrations in the country. From Lake Karapiro to the mouth the river provides water at 20 points to industrial developments in river towns and water and sewage outlets to 21 towns. At four points its flow is harnessed for hydro-electricity and at two for coal-fired electricity. The lower reaches are increasingly important for the irrigation of a growing horticultural industry. We were informed that 203 water rights for irrigation have been granted. It is estimated that a massive 90 million litres of animal wastes are generated within the catchment daily and the river is under increasing stress due to difficulties in controlling agricultural run off.

We are solely concerned with the part of the river near to the mouth. It was claimed that extensive fishing there has been seriously depleted by siltation of the bed and mouth, shifting sand banks, commercial fishing and the effects of the Maioro mine site.

The Maioro mine site is considered later at para 9.3.6.

The evidence of several witnesses affirms that the silting of the lower Waikato River has been proceeding for many years. Stop banks were built as a result. Dredging was carried out from the 1920's. Commercial shipping by coasters to Port Waikato ceased in the late forties. The river mouth is shifting north. The depth of water at the bar has decreased and on occasions only the northern channel has remained open where normally two channels are clear.

Some attributed the present state of the river to the extraction of water but the greater weight of opinion is that the decreased flow results from the upstream dams. It is clear also that the drainage of tidal swamplands has had a major impact on the eel and whitebait fishery.

It was claimed that the shallowing of the river outlet has hindered salt water fish entering the river. It was said that in earlier years, the salt water at high tide backed further up the river than it does now. Duck shooting mai-mai erected on sandbanks in what was once salt water are now surrounded by a lush growth of fresh water plants. It was claimed that snapper were once caught in Maioro Bay near where the Steel Mill's pond is now. Many of the whitebait breeding grounds have been lost, whitebait are restricted from returning at the river mouth and whitebait no longer move the same distance up the river. Today snapper, trevally and kahawai are caught between Port Waikato and Hoods Landing.

It was also claimed that commercial licensed eel, mullet, kahawai and flounder fishing has decimated fish numbers. Large numbers of commercial fishermen are reported on the river with drift fishing between boats, "bang" fishing to drive the fish to nets, gutting and scaling fish in the waters and dumping unwanted fish. The claimants sought restrictions on commercial fishing in the area.

The claimants objected also to the "spiritual affront" from the extraction of the Waikato River water at Maioro for eventual discharge to the Manukau at Glenbrook. This objection is considered at para 7.2.

7. SPECIFIC CLAIMS

Some specific concerns were given in Chapter 5 as a background to the main claim. They were presented to us in that form but constituted also specific claims in respect of current concerns. We refer to

- the compulsory acquisition of Maori land for the Waiuku Forest (para 5.4)
- the fishing restrictions in proximity to Auckland International Airport (para 5.5), and
- the marae site, burial ground and lagoon at Pukaki (para 5.8).

We come now to review other specific claims, the first of which has already been commented on but in another context.

7.1 THE MANGERE SEWAGE PURIFICATION WORKS

The Mangere Sewage Purification Works ranked high in the claimant's concerns. At paras 5.6 and 6.3.1 we noted how the Works destroyed the traditional harbour fishing grounds of the Makaurau marae and the Oruarangi creek that provided both seafood and harbour access. In addition, the largest input of plant nutrients to the Manukau undoubtedly comes from the works effluent.

We now refer to the Works in the context of an issue raised at our hearings of whether control and supervision is satisfactory.

The conditions for the discharge from the Works to the harbour were worked out in 1954. Briefly they are to treat sewage and industrial wastes from Metropolitan Auckland at a reasonable cost, with a minimum of nuisance to surrounding properties and without creating objectionable conditions in the receiving waters. They are not the specific conditions that one would expect in modern water right grants. The words used are too vague and inadequate as yardsticks for performance. We think there ought to be proper criteria. This discharge, along with any other existing use discharges that have not been the subject of a public inquiry, ought to be referred to the Regional Water Board to reformulate appropriate conditions.

In the meantime no claim to replace or abandon the works or the point of discharge was seriously pursued and there was certainly no evidence to support an alternative proposition. Most of the claimants appeared to accept the Works as a fact that had to be lived with. We felt there was a genuine concern to seek continual improvements and to treat the broad and general nature of the 1954 conditions as creating a social obligation to do that. But we still urge clearer and better conditions so that performance can be measured against minimum standards.

We were referred to a midge nuisance and strong smell that once caused serious concern. We are satisfied that that was due to operational problems that have now been resolved. Further problems may well present themselves due to unusual weather conditions or otherwise but we have no doubt the search for improvements will continue too.

An unexpected result of the substantial release of nitrogen nutrients to the harbour has been a better algae growth, more food for fish and the unusual growth of red seaweed (*gracilaria*) on the mudflats around the outfall.

The gracilaria growth has been bad and good. It is said to weigh down fishing nets, but according to the Auckland Regional Authority, the gracilaria is localised to the outfall area and save for prolonged gales does not spread to other parts of the harbour. It also has some good points. It binds fine sediments susceptible to disturbance thus decreasing the turbidity of the waters, it improves water quality by removing nutrients, and it produces high quality agar for which there is a world-wide demand. Harvesting for processing or export has potential and intensive mariculture in ponds seems practicable. A permit has issued for a company to take up to 600 tonnes dry weight per annum.

Experiments have also established the feasibility of the large scale mariculture of paua fed on gracilaria, the paua growing much faster on this seaweed than in normal conditions. A trial shipment of the paua was well received overseas and the establishment of a new paua industry based on gracilaria has been projected.

Our conclusions on this matter are to be found at para 9.3.4.

7.2 THE SLURRY PIPELINE AND THE MIXING OF WATERS

The New Zealand Steel Mill Works at Glenbrook is a major undertaking for the supply of an estimated 75% of the country's steel requirements. It is on the Waiuku estuary of the Manukau Harbour handy to the ironsand deposits at Waikato North Head, coal supplies at Huntly and the Auckland market. New Zealand Steel Limited was formed in 1966. By 1977 most of the plant was operating close to capacity producing finished products from imported materials. In addition a 300 million tonne deposit at Taharoa was being mined to produce ironsand concentrate for export to Japan and South Korea at about 1.5 million tonnes annually. In 1981 and 1982 respectively the Government approved the first and second stages of an expansion project. Involved was a five fold increase in primary steel production utilising the 150 million tonne ironsand deposit at Waikato North Heads, enabling finished products to be produced from indigenous raw materials.

The utilisation of the ironsand resource is a Crown policy. The mining and mill expansion is undertaken by a subsidiary company in which the Crown holds 60% of the shares and the company has had considerable assistance from the Crown.

An underground slurry pipeline 18 kms long is to convey ironsand concentrate to Glenbrook from the mine site at Maioro using water drawn from the Waikato river. After separation of the ironsands and clarifying the water will be discharged to the Manukau Harbour.

The claimants have several reservations about the works. Its enormous monolithic appearance dominates the landscape and is in full view of the rural Tahuna marae on the opposite bank. A large and unattractive slag heap on the estuary is thought to leach industrial chemical wastes. A substantial work force now fishes and gathers in this once relatively remote area. The work's discharges and said to contaminate the shellfish in the estuary, which, we were told, are now unpalatable if they can be found.

In our view the problems in the estuary are probably mainly due to the extensive sedimentation from land developments that began many years ago. The very size of the mill singles it out for attention but it seemed to us

unfortunate that the works received the attention that it did in the proceedings before us when the promoters of the works have undertaken their social responsibilities to the environment and its people with uncommon seriousness and sensitivity. The evidence is that the works promoters are aiming for very high standards in air and water pollution control and their water treatment works alone have added \$45 million to the work's cost. The company denies that its stormwater and process water discharges are affecting the shellfish. For our part we accept the finding of the Planning Tribunal, based on extensive research work engaged by the company, that the discharge will not cause the quality of the receiving waters to fall below an appropriate standard or adversely affect fisheries. While the Planning Tribunal recognised that that prediction could not be absolutely certain, the power to cancel discharge rights is reserved should performance not match it. Human wastes from the mill are separately disposed of and do not form part of these discharges.

Additionally, the company is undertaking further studies of fishing areas identified by Maori people as important. It has maintained close consultation with the Maori people, and significantly in our view, has given them substantial funding to conduct their own researches to make known clearly their concerns. Obviously an undertaking of the size must have its effects but the undertaking by itself ought not to be the scapegoat for the ills of the harbour.

Our attention must focus on the claimants' main concern. They want to stop the slurry pipeline that will take water from the Waikato River and discharge it to the Manukau Harbour. It must first be noted that there are two distinct lots of water drawn from the river. They are drawn from different places, carried by different pipelines, used for different purposes and discharged at separate points. Pure water is drawn from well up the river for use in mill processes. It is re-used several times and with evaporation most is used up and not discharged. The 'slurry' water is taken from the river at Maioro, near the mill site and closer to the river mouth. It is brackish water. This water will not be used in the mill processes but for transportation. In the short term at least most of this water will pass to the harbour (after clarifying).

Although the expansion works will mean a big increase in the process water intake there will be a more modest increase in the discharge rate due to recirculation and evaporation. The claimants are chiefly concerned with the slurry pipeline which requires both a substantial draw off and a substantial rate of discharge.

The claimants' first two grounds of complaint are that the pipeline will affect fishing in the Waikato River and cause siltation and a deterioration in water quality in the Manukau. At the intake point is a breeding and feeding ground where whitebait and juvenile eels run. The discharge point is close to the Needles Maori oyster reserve. The third ground of complaint is that the proposal is culturally offensive. The mauri of the two water bodies is incompatible. The waters of the Waikato should not be mixed with those of the Manukau. They say an alternative to the pipeline should be found.

Originally the company promoted a number of options to convey the ironsand to the mill that did not involve the use of water. These were audited by the Commission for the Environment and debated by the public. In the light of many objections the company settled on the slurry pipeline. It could be buried and so hidden from view and would have the least environmental impact on the local community. It was practicable and

cost no more than other alternatives. The slurry pipeline was approved by the Minister of Energy under the Petroleum Act 1937. It was not the subject of a separate environmental audit or a public hearing under the Town and Country Planning Act 1977.

Separate water rights have now been granted for the extraction of more water from the river and the discharge of more waste water to the harbour. These required public hearings. The Maori claimants were objectors (and appellants) just as they were objectors and appellants to the original grants. We accept the findings of the Planning Tribunal with regard to the first two of their complaints, that the intake's effect on the aquatic biota will be negligible and that the discharge will not seriously affect the waters and fisheries of the estuary, and confine ourselves to the third ground, the "metaphysical" concern that the Planning Tribunal considered outside its statutory purview.

We find the metaphysical concern is relevant to the provisions of the Treaty of Waitangi and that the failure to provide for it is inconsistent with the principles of the Treaty. (Our reasons for so finding are given at para 8.3 below).

The values of a society, its metaphysical or spiritual beliefs and customary preferences are regularly applied in the assessment of proposals without a thought as to their origin. Some societies make rules about noise on Sunday while others protect sacred cows. When Maori values are not applied in our country, but western values are, we presume our society is monocultural. In our multicultural society the values of minorities must sometimes give way to those of the predominant culture, but in New Zealand, the Treaty of Waitangi gives Maori values an equal place with British values, and a priority when the Maori interest in their taonga is adversely affected. The recognition of Maori values should not have to depend upon a particular convenience as when the meat industry found it convenient to introduce Halal killing practices to accommodate Islamic religious values.

It is to the beliefs of other countries that Professor Ritchie turned to explain the Maori views. He considered the Maori view not unlike that of Hebrew and Islamic people. In Israel Rabbinical law requires that effluent from human wastes, however purified, be returned to the land. Their effluent treatment plants discharge to the land by irrigation channels. Recycling by irrigation is also practised in Muslim contexts. Both Hebrew and Islamic people believe in a spiritual water cycle. All water begins as a sacred gift from the deity to sustain life. Waste water is defiled water which must be purified by returning it through the cleansing qualities of the earth.

Here, wai maori (fresh water) is also the life giving gift of the Gods (te wai ora o Tane) and is also used to bless and to heal. Separate water streams are used for cooking, drinking and cleaning (which explains why no Maori will wash clothes in a kitchen). Waste water is purified by return to the earth, ritualistic purification or, with the exception of water containing animal wastes, by mixing with large quantities of other pure water.

Wai mataitai (salt water) is separate (te wai ora o Tangaroa). It provides food but its domestic use is limited. Conceptually each water stream carries its own mauri (life force) and wairua (spirit) guarded by separate taniwha (water demons) and having its own mana (status). Of course the waters mix. The mauri of the Waikato river flows to the mauri of the sea, but on its landward side the mauri of the Waikato is a separate entity. The Maori objection is to the mixing of the waters by unnatural means, the

mixing of two separate mauri, and the boiling processes that discharge “dead” or “cooked” water to living water that supplies seafood.

This objection like so many Maori customs has a sound environmental basis. When the temperature of the water is increased, even slightly, there are ecological consequences on marine plant and fish life.

But the ancient Maori was also a developer of the earth and an exploiter of its resources which necessitated modifications to the natural world. Tohunga (priests) were trained to cope with and placate necessary spiritual infringements and perform purificatory rites. They both caused and cured mate mauri (psychosomatic illness caused by intentional or unintentional breaches of sacred laws) and fixed the utu or koha (payment, satisfaction or accord) necessary to restore the mana of the offended persons or the atua (gods) present in all natural life. Development was achieved through tohunga who had to ensure that it could be done with harmony and balance, equity and justice in accordance with ancient lore.

New Zealand Steel Limited is more aware than most developers of the Maori view, and short of abandoning the pipeline is seeking a solution with the local people. It is examining the potential use of part of the excess brackish water (and the pure water too) for irrigation, other local water supply needs, and use of the water in plant processes to minimise the quantity of the discharge. The discharge will also pass to the land first, via a river feeding into the harbour.

Our conclusions on this matter are at para 9.3.5.

7.3 New Zealand Steel Limited, Forest Service and the Maoro Mine Site

A background to the Waiuku State Forest was given at para 5.4. Nearly one quarter of the forest is former Maori land now taken under the Public Works Act. All that remains as Maori land is the Te Kuo Urupa and the Tangitanginga riverside strip. We noted earlier that what began as sand dune reclamation works became in time a substantial State Forest and is now the subject of large scale iron-sand minings by NZ Steel Ltd.

The forest generates a substantial revenue and should soon be profitable. The New Zealand Forest Service pointed out that mining within State Forests is within the contemplation of the Forests Act and the concept of the multiple use of forest lands. In this case it is a conjoint use. Working one section at a time of up to 100 ha, trees are harvested by the Forest Service and the bared sand is mined by NZ Steel and transported to the mill at Maoro. There the iron ore is extracted by a magnetic and centrifugal separation process using water from the Waikato River. The non-magnetic tailings and water are piped to bands where the solids are deposited and the water percolated back into the river. The ore is conveyed to the mill at Glenbrook. The sand tailings are spread and pine forests are re-established upon the old tailings. Further research is necessary to determine the extent of the risk from boron toxicity from the tailings-waste mix. This massive operation requires a skilful dovetailing of forestry regime management and the management of an even flow of raw materials to the steel mill if both parties are to be satisfied. There is room for conflict there.

There is room for conflict with Maori people too. We saw for ourselves the huge undertaking in operation at Maoro where mining has begun.

The configuration of the land has been totally changed and further massive changes will occur as mining extends throughout the greater part of the forest. Within that forest are areas of early and recent Maori habitation with several urupa and sacred and significant sites both within the Te Kuo urupa and on Crown lands. Burials continued in the area well into the 1930's. One witness said that her mother was buried at a place called Tirimata near the Tangitanginga block. Already mining operations are taking place on the Tangitanginga block taken from the Maoris in 1959, and there are complaints that tail and sludge dumpings are encroaching onto the Tangitanginga riverside reserve, that other works are causing the erosion of the reserve, and that discharges are affecting the water life.

With the exceptions mentioned the land in the forest is owned by the Crown, managed by the Forest Service and used also for mining. The question is whether the Crown, through the Forest Service is ready willing and able to protect the wahi tapu of the Maori people.

The NZ Forest Service is aware of its statutory responsibilities to safeguard and respect archaeological sites, traditional sites, historic areas, Maori artefacts and human remains within State Forests. The statutory duties are prescribed in the Forests Act 1969, the Historic Places Trust Act 1980, the Antiquities Act 1975 (considered later at para 7.4) and the Burial and Cremation Act 1964. The broad duties are adequately developed in the forest management plans prepared for each State Forest as supplemented by policy statements or directives from the Director-General of Forests.

Areas of special significance may be protected under the Forests Act either by way of management plan zoning, or more formally, through dedication in the New Zealand Gazette. In addition areas may be set aside as Maori Reservations under the Maori Affairs Act 1953.

In the Waiuku State Forest areas of special significance are being protected through management plan zoning. We were surprised that formal protection had not been sought for the last remaining Maori lands, Te Kuo Urupa and the Tangitanginga riverside strip by having them gazetted as Maori Reservations. Although these areas are not part of the forest they physically adjoin and cannot be excluded from planning considerations. Their establishment as Maori Reservations would result in the appointment of trustees by the Maori Land Court so that the Forest Service could treat with persons having legal authority in respect of the land, and the trustees would be able to represent the owners in any suit for unlawful encroachment. Maori reservations may also be created in respect of other areas of significance that are no longer Maori land. The option to vest these as Maori Reservations remains open to the Crown.

We were primarily concerned with the practical implementation of the broad plans and policies. In reviewing the work of the Forest Service officers at Waiuku and especially of the archaeologist Mr Lawlor, we were favourably impressed. There has been full consultation with the local people, some wahi tapu (sacred places) and urupa (burial grounds) have been identified and surveyed and Te Kuo urupa has been fenced off with access provided. The further identification of sites is proceeding.

While we were impressed by the extensive investigations we wondered whether the management plan overly restricted the area available for mining. We were told that the four blocks of former Maori land (Te Papawhero, Waiarapona, Te Kuo and Tangitanginga comprising in all 725 acres) together with seven other areas identified as important sites, comprised about one quarter of the total forest area. The four blocks were

described as "historic wahi tapu" apparently because they were called "wahi tapu" when the blocks were reserved for Maoris in 1856. As we understand it the words "wahi tapu" were used on many early maps and deeds to describe areas of Maori habitation and not always to describe "sacred sites" in the same way as urupa or some natural features of the landscape may be regarded by local tribes. We are also aware of complaints in other cases that surveys were badly done (some say Te Kuo urupa is located some distance from where it is surveyed) or wrongly done, as for example the early delineation of lands for Maoris on poorer land and not in accord with the area of actual habitation. We wondered therefore whether the recording of "historic wahi tapu" for each of the four blocks mentioned was strictly accurate, and whether, for the purposes of prescribing development, there should not be a greater check for wahi tapu as "sacred sites" within those blocks.

We also wondered whether dispersed burials needed to restrict mining. R T Mahuta described the mining of the Taharoa ironsands with an arrangement for the recovery and reinterment of remains with due ceremony, the recovery of remains having been a common practice amongst tribes on vacating an area, and the removal of remains to central burial grounds having been promoted by Princess Te Puea as Waikato policy, following the loss of burial grounds from confiscations.

In addition we were informed of archaeological sites within the forest area. These are graded so that some may be developed only after further investigation by the archaeologist for the conservancy.

In our view the archaeological section of the Forest Service is providing an excellent service to the Maori people in the identification of sites of significance before works proceed. The Forest Service is in a position to take or initiate steps to counter any hazardous or unacceptable activities and to advise the Maori people of any occurrences that may be contrary to their interests.

The requests of the Ngati Te Ata people for the protection of their wahi tapu within the mining area were conveyed by the Forest Service to NZ Steel Ltd together with advice that those requests had the support of the Auckland Regional Authority and the Commission for the Environment. Both the Authority and the Commission were agreed that protected sites should not be left as "islands" with the sides mined away but should be battered and protected against erosion by wind and water.

In addition, most of the Tangitanga river strip had been covered by sand tailings from mill operations up to 15 metres thick. It was not established that the mill operations are the cause of the erosion of the land and there is not yet sufficient evidence on the effect of leaching from waste gas solids to the Waikato river. A Forest Service report conveyed to NZ Steel itemises nine recommendations for the rectification of the problems caused by dumping and erosion, which, if actioned, should satisfy current concerns. (We accept NZ Steel's explanation that the dumpings began before the location of the Maori land was known and that the movement of sand has obscured landmarks, but we do not accept that works should have begun before the location of the site was clear and the land pegged. The existence of the Maori land was apparent on survey maps of the area. Nor can we accept the continued discharge of sand in close proximity to this area of Maori land as at present.)

The question is whether the recommendations of the Commission for the Environment, the Auckland Regional Authority and the New Zealand Forest Service (the archaeological section in particular) will be followed.

We are of the opinion that there is not a sufficient statutory authority and no arrangement or agreement to compel compliance with them or to ensure an appropriate control. The Iron and Steel Industry Act gives very wide powers to facilitate mining. No planning consent was needed but only the consent of the Minister of Mines. The consent of the Minister in this case, given in 1966, is a broad-banded consent. The urupa and riverside strip are excluded from mining but there are no provisions for the protection of other wahi tapu. While New Zealand Steel Limited has co-operated with the identification of sites and has agreed to conditions proposed to protect the riverside area, we do not consider the Maori people should have to rely on unenforceable assurances.

We considered whether the Historic Places Trust Act 1980 gave a proper protection, as that Act, of course, binds all developers. We have real doubts that it does. As its name implies, that Act focuses on sites of historic interest and does not give to wahi tapu the sort of protection that it is able to give to sites of historic importance for the people of New Zealand generally, or to sites that have a particular value for research purposes.

We make the following comments on that Act mindful that neither the Historic Places Trust Board established under the Historic Places Trust Act of (now) 1980, nor the Department of Internal Affairs which administers the Act had notice of the various claims relating to wahi tapu.

As we see it, under the Historic Places Trust Act it is an offence to wilfully damage a *traditional site*, that is, an area of historical, spiritual or emotional significance for Maoris, unless

- (a) the site is not under the control of the Historic Places Trust or
- (b) the trust has consented to the works proposed (refer s54 and the definition of *historic place* in s2).

But when is a traditional site placed under the control of the Trust? All that the Act provides is that the Trust may declare a site to be a traditional site. Does that place the site under the Trust's control? The Act provides that the Trust may, after considering the importance of the site, recommend that it be considered for setting aside as a Maori Reservation or that the matter be referred to a Maori association to consider what action should be taken. It may also "recommend proposals to any appropriate body or person for the recognition and preservation" of the site, and the local territorial authority "shall take into account the desirability of protecting or preserving it". Where the land is General (European) Land, it cannot be set aside as a Maori Reservation except with the consent of the owner or prior acquisition of the land by the Crown.

We now compare the provisions for traditional sites with archaeological sites and historic buildings.

Archaeological sites are defined as areas associated with human activity of more than 100 years which, through investigation by archaeological techniques, may be able to provide scientific, cultural or historical evidence as to the exploration, occupation, settlement or development of New Zealand.

Although traditional sites may also be archaeological sites the emphasis here is on the scientific or research value of the site rather than its importance in Maori culture. It is an offence to wilfully damage these sites whether or not they are registered sites and remain under the control of the Board—but the sites may be destroyed with the consent of the Trust after any necessary scientific investigation has been carried out.

For both archaeological sites and historic buildings there are provisions for protection notices, for recording the notices on land titles and notification of the sites on district schemes. There are no similar provisions for the protection of wahi tapu or urupa.

Bluntly put, there is one standard for sites of significance to New Zealanders as a whole, and another lesser standard for sites of significance to Maori people. Reference was made to the far more extensive provisions for the protection of Aboriginal sacred sites in Australia.

With regard to wahi tapu in the Waiuku forest the New Zealand Forest Service has not been restricted by the interpretation of legal responsibilities given above but has sought to provide for identification and protection having regard, in the first instance, to those areas that the Maori people themselves considered sacred.

Our conclusions on this matter are at para 9.3.6.

7.4 The Artefacts of the People

Complaint was made that Maori artefacts found in the Awhitu and Manukau lands and estuaries had been retained by the finders. We drew attention to the Antiquities Act 1975 which protects such taonga (treasures) and vests them in the Crown. Finders are required to notify the Minister of Internal Affairs who will decide the custody of the artefact. Any person who wishes to keep or acquire them must be registered as a collector. The Forest Service which manages the Waiuku State Forest is a registered collector. In addition the Maori Land Court is given jurisdiction to determine the ownership and custody of found Maori artefacts where cases are referred to it—but none have been referred.

It was said that found artefacts should be in the control of local marae or Maori families. Some people wondered whether they were destined to lose not only their lands and fisheries but even their artefacts. We wondered whether there was provision for Maori people to complain to Internal Affairs about found artefacts in the possession of non-owners and to seek an investigation, whether local hapu were advised when the discovery of artefacts was reported or when artefacts were given over to registered collectors, whether Internal Affairs published a list of all finds reported to it, whether Internal Affairs would make application to the Maori Land Court to determine the ownership as a matter of practice (to date there have been no applications to the Court in respect of found artefacts) and whether ownership or custody could be given to marae trustees when security can be assured.

Our conclusions on this matter are at para 9.3.7.

7.5 The LPG Wharf Terminal

Liquigas Ltd is a private company in which the Offshore Mining Co Ltd, owned by the Crown, is a 25% shareholder. Liquigas is a vehicle for the Government's policy, promulgated in "Energy Strategy 1979", to promote the nationwide distribution of LPG as an alternative fuel (to reduce New Zealand's dependence on imported oil), through a single supplier. As part of its national distribution network, Liquigas proposes the supply of LPG to the Auckland region through the Manukau Harbour. LPG from Taranaki would be unloaded from a coastal tanker at a wharf terminal in the Papakura Channel and conveyed by underground pipeline to an on-shore depot.

The Auckland Regional Authority approved the proposal provided the terminal was designed to cause minimum impact on the marine environment, the least visual impact on the harbour and the least restriction on fishing and navigation in the Papakura channel. Planning approval has since been given by the Manukau Harbour Maritime Planning Authority and upheld by the Planning Tribunal on an appeal by the Auckland District Maori Council. It was found that the works would not have a significant effect on fishing, shellfishing or navigation and would be unobtrusive when viewed from the shore. We accept those findings of fact.

The size of the terminal is small in relation to the scale of the harbour, but the claimants' objection is not only to the visual impact of the terminal but also the failure to measure the cumulative effect of continuing development and determine when enough is enough. They oppose the terminal because in their view the tolerance threshold has already been passed.

The claimants (and the Manukau Harbour Maritime Planning Authority) are also concerned that what was really an integrated series of planning applications for the distribution of LPG were dealt with separately. The establishment of the on-shore depot was a separate application from the establishment of the wharf facility and the pipeline is another matter again. An authorisation for the pipeline is yet to be sought from the Minister of Energy under the Petroleum Act 1937. The Commission for the Environment considered that the Minister would probably call for submissions rather than an Environmental Impact Report and there would not be a public hearing. The process has not enabled the project to be assessed as a whole.

Counsel for Liqueigas properly described the Planning Tribunal decision on the wharf terminal as a landmark (we refer again to this decision at para 9.2.10). Thoughtful consideration was given to the value of the harbour in the culture and traditions of the Maori people and as well the principles of the Treaty of Waitangi. We have no reason to derogate from the findings of the Planning Tribunal in those areas. In addition after noting that the harbour bed is not vested in the Maori people, the Planning Tribunal perceived what we think to be a major concern, that the terminal "in a symbolic way may be regarded . . . as inconsistent with the respect due to the Treaty of Waitangi and in particular the Second Article of it". This matter it also took into account and determined that as there was not "a substantial hindrance to the enjoyment of the fisheries, it would not be right to refuse consent to the proposed wharf terminal on that account".

Our conclusions on this matter are at para 9.3.8.

8. THE TREATY OF WAITANGI AND THE TREATY OF WAITANGI ACT— INTERPRETATION

8.1 “PRINCIPLES” AND “PRACTICAL APPLICATION” OF THE ACT

The Waitangi Tribunal is required to consider whether certain acts or policies are “inconsistent with the *principles* of the Treaty” (section 6 (1) Treaty of Waitangi Act 1975 with emphasis added).

The Tribunal *may* make recommendations “if it thinks fit *having regard to all the circumstances of the case*” (section 6 (3) of the Act with emphasis added).

The thrust of the Act is explained in the long title,

“... to provide for the observance and confirmation of the *principles* of the Treaty of Waitangi by establishing a tribunal to make recommendations on claims relating to the *practical application* of the Treaty ...”

and the preamble

“... and whereas it is desirable that a tribunal be established to make recommendations on claims relating to the *practical application* of the *principles* of the Treaty ...” (emphasis added).

Accordingly the Waitangi Tribunal is not required to make final determinations on particular applications in the manner of most Courts. The Tribunal may decline to hear a claim if there is an adequate remedy or right of appeal in another Court—section 7 (1) (c)—and it is directed to consider what action might be taken “to prevent other persons from being similarly affected in the future”—section 6 (3).

The jurisprudential point arising is that although a claim may be well founded according to our interpretation of the Treaty, we have still to consider whether in all the circumstances of the case it is practicable to apply the principles of the Treaty to it. If a tribe has Treaty rights to the exclusive ownership of certain fisheries the Waitangi Tribunal has still to consider the practicalities of awarding an exclusive ownership today.

The legislative intent is clear. Given that the Treaty has not previously been part of the domestic law, we are to consider what steps might be taken to ensure that domestic laws and policies adequately reflect its general principles or what might be done to remedy or compensate for existing breaches.

The corollary is also clear. The Treaty of Waitangi Act was passed “to provide for the observance and confirmation of the principles of the Treaty. . .” (preamble). It follows that while we are to consider the “practical application of the Treaty” we must approach that task by seeking to give to the Treaty the fullest effect practicable. In this sense it is now no longer to be treated as ‘a simple nullity’.

8.2 PRINCIPLES OF TREATY INTERPRETATION

While we are not like United States Courts that give a final definition of treaty rights as applied to particular cases, we must still consider the “meaning and effect” of the Treaty of Waitangi—section 5 (2). To do that we must have regard to the general principles of treaty interpretation as

applied to municipal law. In particular we must consider the rules affecting bilingual treaties, for although with one exception it was the Maori text of the Treaty that was signed by the chiefs at Waitangi and elsewhere, we are bound by the provisions of section 5 (2) of the Act to have regard to both the Maori and English texts of the Treaty. We are "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".

With regard to bilingual treaties McNair in *The Law of Treaties* states that neither text is superior to the other. The two texts should help one another so that it is permissible to interpret one text by reference to the other.

This approach helps in interpreting the Treaty of Waitangi and reconciling differences between the two texts, but we must also have regard to other principles. In the United States, which has had considerable experience in the interpretation of treaties with the Indian people, the Supreme Court has laid down an indulgent rule which requires treaties to be construed "in the sense which they would naturally be understood by Indians"—see *Jones v Meehan* (1899) 175 US 1. This requires much more than the literal construction urged by Counsel for New Zealand Steel Ltd. It may be regarded as an extension of the contra proferentem rule that in the event of ambiguity a provision should be construed against the party which drafted or proposed that provision. Relevant in this context is the predominant role the Maori text played in securing the signatures of the various chiefs.

We must also have regard to the principles 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 (PC).

8.3 THE MEANING OF THE TREATY

We heard submissions on the meaning of the Treaty from several of the claimants, their Counsel, the Commission for the Environment, New Zealand Steel Limited, the Centre for Maori Studies and Research of Waikato University (R T Mahuta and J E Ritchie with a paper by P Harris) and D V Williams. The latter is a law lecturer and an ordination candidate for the Anglican Ministry. He was able to explain the missionary use of Maori words in the Treaty by reference to scripture, and give evidence on the extent to which the scripture was read by Maoris at 1840.

The discussions on the Treaty at the national hui at Ngaruawahia in September 1984 and Waitangi in February 1985 do not represent a new Maori awareness of the Treaty. The Maori debate on the importance of the Treaty has continued throughout most of the 150 years since it was signed. D V Williams referred to a four week conference of Native Chiefs from throughout New Zealand at Kohimarama in 1860 to debate (and eventually affirm) the Treaty (see 1860 AJHR E-9 and Te Karere 1860 Nos 13-18), the proceedings of a Maori Parliament at Orakei in 1879 when the Treaty was again the sole topic of debate (see 1879 AJHR sess II G8), and a further conference held at Kohimarama in 1899. (See *Ko te Pukapuka o te Tiriti o Kohimarama*, Auckland, 1889). We were referred to an explanation of the Treaty by Sir Apirana Ngata published in 1922 in response to the then Maori debate, and the Maori appointee to this tribunal can confirm that the Treaty has been a major topic of debate at most Maori gatherings over the last several decades.

When we look at the Maori understanding of the Treaty we again find the claims of today are not new (although they may sound novel to those European New Zealanders who have been unaware of the long debate within Maoridom).

The recurring theme in the Orakei debate of 1879 is that the Treaty promised Maori people the retention of their *mana* or traditional authority and status. The following extracts are from the transcript of those proceedings (with emphasis added).

"The Queen stipulated in the Treaty that we should retain the *mana* of our lands, the *mana* of our forests, fisheries, pipi grounds and other things . . ." (Eruena Paerimu)

"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, fisheries, pipi grounds, forests" (Te Hemara)

"The Queen in the Treaty of Waitangi promised that the Maoris should retain their *mana*. The word is correct because the Queen accepted us as her subjects and she said to the Maori people belonged the *mana* over his pipi grounds . . . the Queen also said that the Maori should have the *mana* over the sea" (Waata Tipa)

"By the Treaty of Waitangi we were to continue in possession of our lands and fisheries and forests. I ought to have the *mana* over my fishing grounds" (Arama Karaka Haututu)

"We ought to have the *authority* over all our lands as well as the foreshore and over all the fisheries" (Hori Tauroa)

Those statements were made within living memory of many of those present, 39 years after the signing of the Treaty. Some speakers could recall its execution or descriptions given by their parents. A similar view was expressed in 1840 by Nopera Panakareao of Te Rarawa. He replied to those chiefs who felt that the Treaty might threaten their *mana* with the words "the shadow of the land goes to the Queen but the substance remains with us". It was his interpretation of the Treaty that the *mana* Maori would be retained and thus he signed it.

In the Maori text the chiefs ceded to the Queen 'kawanatanga'. We think this is something less than the sovereignty (or absolute authority) ceded in the English text. As used in the Treaty it means the authority to make laws for the good order and security of the country but subject to an undertaking to protect particular Maori interests.

'Kawanatanga' was well chosen by the missionary translators; Sovereignty or 'Rangatiratanga' is not conditioned. Although 'Kawanatanga' is a coined word it was known to Maoris from the Bible. Pontius Pilate was the 'Kawana' of Jerusalem but his authority was not the supreme authority of Ceasar or God. At 1840 "Kawanatanga" was something sought by both Maori and Pakeha. Both were aware of the lawlessness of many whalers and traders and of the fights that followed, of the devastating effects of inter-tribal musket warfare, of the projected invasion by other powers and the imminence of further settlement. The Treaty opens by talking of the need for "Peace and Good Order" and the "evil consequences which must result from the absence of necessary Laws and Institutions". We think Maori people would have understood the Treaty as a promise of internal peace and security through the authority of the Queen. We think both parties to the Treaty wanted this, and got it.

In the Maori text the Queen guaranteed to the Maori people in return, 'te tino rangatiratanga' of those things they wished to retain. This is something more than the 'full exclusive and undisturbed possession' guaranteed in the English text. As used in the Treaty we think 'te tino rangatiratanga' (literally 'the highest chieftainship') meant 'full authority status and prestige with regard to their possessions and interests'. 'Rangatira' and 'Rangatiratanga' are used in the Bible to denote absolute power and authority. They are used to describe the Kingdom of God, the Kingdoms of the world, and God's dominion. Interestingly Hobson's own reference to the sovereignty of the Queen in a later proclamation of 27 April 1840 was rendered as "te Rangatiratanga o te Kuini" and in 1869 when the Legislative Council ordered a careful translation of the English text, "all the rights and powers of sovereignty" was rendered as "nga tikanga me nga mana katoa o te rangatiratanga."

The last rendition couples 'mana' and 'rangatiratanga'. In Maori terms the two words are really inseparable. In *Williams Dictionary* the first meaning given to 'mana' is 'authority of control' but even the examples cited for its use in that context incorporate the subsequent given meanings, 'influence, prestige, power and psychic force'. As we see it, 'rangatiratanga' denotes 'authority'. 'Mana' denotes the same thing but personalises the authority and ties it to status and dignity. The difficulty is that in Maori thinking 'rangatiratanga' and 'mana' are inseparable—you cannot have one without the other—but in European thinking 'authority' is an impersonal concept and can stand apart from the personality to the lawmaker. The result is that 'mana' is often left untranslated, as in the case of the Orakei transcript.

In his *Declaration of the Independence of New Zealand* (Te Wakaputanga o te Rangatiratanga o Nu Tireni) Busby used 'mana' to describe 'all sovereign power and authority'. Some commentators consider that 'mana' best describes 'sovereignty' and imply that a careful avoidance of 'mana' in the Treaty is obvious and was misleading, the missionaries knowing that no Maori could cede his mana. We think the missionaries' choice of words was fair and apt. In English terms the personal standing of the Queen (her mana) is divorced from the Crown's authority. To capture that sense, and to ensure that in ceding the right to make laws the Maori retained his mana without denying that of the Queen, 'Kawanatanga' was an appropriate choice of words. It also underlines the spirit of the Treaty of Waitangi apparent in both the English and Maori texts. In both texts the intention to record an appropriate priority and respect to the Maori people is very clear. Those who attended the Orakei conference understood the Treaty to mean that. At Orakei, 'mana' was preferred to 'rangatiratanga'. It emphasises the personal insult and grievance occasioned by the non-recognition of Treaty promises.

The substantial difference between the two texts arises from the use of the word 'taonga'. In the English text the Treaty promised 'exclusive and undisturbed possession of lands and estates forests fisheries and other properties'. 'Other properties' may be construed ejusdem generis to mean such other things as lands estates forests and fisheries. In the Maori text the words are 'te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa' or literally 'the highest chieftainship of their lands homes and prized possessions'. In the Te Atiawa report (March 1983) we concluded that 'fisheries' were covered by the Treaty because they are taonga in the Maori text and because the English text refers to fisheries. But the Maori interpretation goes further as evidenced by the transcript of the proceedings of the Orakei hui of 1879. It is of great significance to note

that the interpretation of the Treaty at that time included the notion that the Maori people retained the mana over all seafoods and even the seas. Thus

“What is meant by the rivers in which fish are caught? and which are the fish? Do the words of the Treaty mean fresh-water rivers or the sea? When the Maori says “ika”, we know that he means fish—that he means those animals that have breath in the seas. Now, do you suppose that we still possess those fisheries that were to remain with us by the words of that Treaty? I think not. They have been taken away, in spite of the words of this Treaty. I do not know how they went. They are not like lands or forests (a reference to the confiscation of lands). You have to make an agreement before they can be handed over or taken” (Paora Tuhaere)

“It was only the land that I gave over to the pakehas. The sea I never gave, and therefore the sea belongs to me. Some of my goods are there. I consider the pipis and fish are my goods. I have always considered them my goods up to the present time” (Apihai Te Kawau of Manukau Harbour)

“I object to the Europeans taking the fisheries where the flounders were caught and stealing my mussels” (Wi Tamihana Tukere)

“We should ask the Government to allow us to retain our claims over the foreshore. I have seen for the last two years that the Europeans at Kaipara have gone over our beds and have taken our fish, shells and oysters without our permission. We only look on. I think that every tribe should watch carefully what this Government will do in regard to these things” (Mihaka Makoare)

“Another matter in respect to which I say that the Government did wrong was the Manukau. I was not aware of the Government taking all my large pipi-banks and shoals in the Manukau. Those large banks have all gone to the Government. I was not told why these were taken. I wish to know now whether they belong to the Queen or remain my property” (Hori Tauroa)

“By the Treaty of Waitangi the fisheries were secured to the Maoris, but they are now in possession of the Queen. Therefore, as we turned to the oath we had taken under the Treaty of Waitangi, I think those things which were taken from us should be restored under that Treaty” (Tare)

“Therefore I say that the Maoris should ask Mr Sheehan to investigate those claims to land which the Maoris think they have. Their grievances are the sea and the fisheries. These were the original possession of ours. The payment for vessels anchoring goes to the Queen; we do not get any of it. We should speak to Sir George Grey and Mr Sheehan about these matters, in order that they might give us some consideration for the loss of our mana over the sea-fisheries” (Pataromu)

“The Queen also said that the Maori should keep their mana over the sea . . . When vessels anchor they have to give money to the Queen but none of it is given to the Maoris” (Waata Tipa)

“I think Sir George Grey should restore the foreshores to us” (Arama Karaka Haututu)

The obvious point is that the harbours and foreshores were as much the prized possessions of particular tribes as their landed estates. On a reading

of the Maori text the lands and seas cannot be divorced no matter how preposterous or inconvenient the result may now appear to the general public gaze. The obvious point also is that the Maori claims have been consistent. Tawhiao we noted earlier, claimed ownership of the Kawhia harbour with the words "I have a title—the Treaty of Waitangi". Those who appeared before us repeated the claim, thus "the Manukau belongs to us" (Carmen Kirkwood). A series of Court cases from then to now testifies to the fact that the Maori claims to the foreshores and harbours will not die for as long as they adhere to the Treaty that their ancestors executed.

Counsel for the Auckland Harbour Board, adopting the arguments of the Solicitor General in *Re The Ninety Mile Beach* [1963] NZLR 46, contended that the Crown's sovereignty preceded the Treaty by prior annexation and that as a result of an Imperial Act then in force the common law presumption that the Crown owned the sea-bed applied in New Zealand. That is not an issue that we must determine. The question for us is whether the presumed ownership of the Crown, or its ownership by virtue of any Act currently in force, is contrary to the Treaty and then whether or not a presumptive ownership arose in the manner that Counsel contends, or by virtue of the cession of sovereignty in the Treaty.

The Maori and English texts point to different expectations that are basically a reflection of two different cultures. In the Maori view the Maori tribes owned the harbours and foreshore within their tribal areas as a matter of Maori customary law. The Maori text affirms that ownership because it guarantees to the Maori people the ownership of all their taonga.

If the matter is in issue at all the sovereignty that assumes that the sea belongs to the Crown was not in fact ceded in the Maori text but only 'kawanatanga', the right to make laws for the peace and good order of the country and the security of the realm.

It is the English text that is not specific. The Crown owns the harbours and foreshores as a matter of the English common law. Its ownership and the rules of common law are presumed to arise by the cession of sovereignty. But in the text the English presumptions of common law are nowhere apparent. They may have been apparent to English lawyers but they would not have been apparent to the Maori signatories had it been the English text that was in fact used and signed. On the evidence before us it can reasonably be assumed that had a Manukau Maori been asked whether by this Treaty his harbour would pass exclusively to the Queen, he would have emphatically replied in the negative.

We consider therefore that in terms of the Treaty the interest of Maori people in the harbour and foreshore areas can no longer be denied.

By the same token we do not think the Maori interest in the seas is the "full exclusive and undisturbed possession" of the English text. European New Zealanders need this Treaty too because by it the Maori people agreed to and accepted the existing and projected settlements and emigration referred to in the preamble and thereby agreed that the Europeans too would 'belong'. Both parties stood to gain by this Treaty as partners in a new enterprise. The new partner necessarily needed access. The Europeans' interest in the harbour and foreshore areas cannot be denied either.

We suspect that the original Maori signatories would have appreciated this and that the subsequent claims to exclusive ownership reflect the total denial of the Maori mana in the laws of the seas and fisheries. Those who appeared before us claiming that the Manukau belonged to them spoke of

the Maori willingness to share the Manukau. They spoke also of the belittlement they felt when their 'first nation' status was relegated to that of 'an ethnic minority'.

We conclude that the Treaty did promise the tribes an interest in the harbour. That interest is certainly something more than that of a minority section of the general public, more than just a particular interest in particular fishing grounds, but less than that of exclusive ownership. It is in the nature of an interest in partnership the precise terms of which have yet to be worked out. In the meantime any legal owner should hold only as trustee for the partnership and acknowledge particular fiduciary responsibilities to the local tribes, and the general public, as distinct entities.

With regard to other claims and submissions on the meaning and application of the Treaty of Waitangi we conclude as follows

1. 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 envisaged 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.
2. The protection of fisheries must accord with the Maori perception of those fisheries. It must be recognised that those disruptions of fisheries that offend cultural or spiritual values, as for example the discharge of animal wastes to the waters of the fishery, is as offensive as a physical disruption that reduces the quantity or quality of the catch. The guarantee of undisturbed possession or of rangatiratanga means that there must be a regard for the cultural values of the possessor. We accept in this respect the arguments of Counsel for the Commission for the Environment.
3. 'Taonga' means more than objects of tangible value. A river may be a taonga as a valuable resource. Its 'mauri' or 'life-force' is another taonga. We accept the contention of Counsel for the claimants that the mauri of the Waikato River is a taonga of the Waikato tribes. The mauri of the Manukau Harbour is another taonga.
4. The guarantee of possession entails a guarantee of the authority to control that is to say, of rangatiratanga and mana.
5. Both 'fisheries' and 'taonga' inherently denote not simply the marine biota but the associated marine habitat, the waters, reefs and beds.

8.4 JURISDICTION

Section 6 (1) of the Treaty of Waitangi Act empowers the Tribunal to consider

- (a) any Act, regulations or Order in Council for the time being in force
- (b) any policy or practice adopted by or on behalf of the Crown and for the time being in force or any policy or practice proposed to be adopted by or on behalf of the Crown

- (c) any act which, after 10 October 1975, being the date of commencement of the Act, is done or omitted, or is proposed to be done or omitted by or on behalf of the Crown.

It appears to us the Legislature intended that the Tribunal could not review specific acts or omissions that occurred before 1975, but could review matters that are part of a continuing legislative scheme or policy maintained in force after 10 October 1975. Paras (a) and (b) above refer to legislative schemes and policies of current application. The test is not when they started but whether they are currently in force. The maintenance of an Act or policy that started before 1975 is a policy or practice of current application. Para (c) refers to specific acts or decisions. The test is whether they happened after 10 October 1975. That paragraph is reinforced and extended by section 6 (6) (c) which provides that nothing in the Act shall give the Tribunal jurisdiction in respect of anything done or omitted before that date. Section 6 (6) (c) covers more than things done by the Crown.

A failure to honour a promise may also be a policy and as such is subject to review. We consider there is no significant distinction to be drawn from the fact that section 6 (1) (c) refers to omissions but sections 6 (1) (a) and (b) do not. The reference to omissions is necessary in para (c) to maintain the sense intended, but not necessary in paras (a) or (b).

On the question of retrospectivity Mr Giles for the Auckland Harbour Board contended we could not make recommendations on the Board's ownership of the tidal flats. Although the vesting of that title is authorised by an Act currently in force (The Manukau Harbour Control Act 1911) the title itself was issued in 1967. The simple repeal of the Act would not affect the title. The Board has an indefeasible title.

In rejoinder Ms Elias for the claimants argued that the Board was given title by the Crown and the Crown could equally take it away. The Board's position was entirely statutory. Its authority was dependent upon Acts continued in force. The maintenance of the 1911 Act was an affirmation of the continuing policy of the Crown that the Board should have certain powers with regard to the harbour and for that purpose should own the tidal flats. Either of those purposes could be changed by a change of that policy, and ought to be changed because the effect was that the Maori customary title could not be asserted (sections 12 and 62 Land Transfer Act 1952 and section 158 Maori Affairs Act 1953). In the alternative, she argued, the 1911 Act expressly provided that the land be held on 'trusts from time to time prescribed by law' ie, upon such trusts as the Crown acting through Parliament may declare (section 5). A trust in favour of the tribes ought now to be declared.

We are of opinion that had the Crown granted title to the Board as a single act independent of a general policy concerning the administration of harbours (and the Manukau in particular), it would be beyond our review. But that was not the case. The gravamen of the complaint is the administration of harbours in accordance with current laws. The title is not indefeasible against the Crown from whom it is held in fee. It is a matter of current moment to consider whether the policy of the Crown in maintaining that fee, as a part of harbour control laws, necessarily restricts the provision of integrated and nationally co-ordinated control and planning laws as well as Maori interests. The more important question is whether other acts have been done, like reclamations, improvements and leases, that ought to have the protection of section 6 (6) (c).

With regard to the remaining harbour seabed we note that it is "deemed to be and always to have been vested in the Crown" by virtue of section 7 of the Territorial Sea and Exclusive Economic Zone Act 1977.

In this general discussion on jurisdiction as regards the Auckland Harbour Board and its interest in the Manukau Harbour there is an important provision in the Manukau Harbour Control Act 1911 which must now be discussed. Section 5 of that Act provides that the lands conveyed to it

"... shall be held by the Board with the powers and upon the trusts from time to time prescribed by law with regard to lands and endowments held by the Board."

Clearly Parliament intended the Board to hold the lands conveyed to it as a trustee but we are told by Counsel for the Harbour Board that no such trusts have ever been created. He submitted that the provision means the Board should hold the lands on its usual statutory authority as a trustee for all the citizens of Auckland in the same way that it holds all its other properties.

Counsel for the claimants challenged this interpretation of the provision. She submitted in reply that the 1911 Act plainly intended by section 5 that specific trusts should be created. She said that if the Board's submission was correct there would be no need for the provisions in section 5 and that provision would be otiose. She pressed us to apply the canon of construction that meaning must be given to the words the Legislature has used and that we should decline to apply an interpretation that would make the provision in section 5 unnecessary and in that sense meaningless.

If the Board holds all the rest of its assets and properties on behalf of the citizens of Auckland in the sense submitted by Counsel we have to ask ourselves the obvious question, why did Parliament enact section 5? If the Board were intended to hold the tidal flats and other lands covered by the Act in this way there was no need for section 5 and it would be otiose.

There is another clear possibility which gives section 5 full force and effect, viz. that Parliament intended the Board to hold all the lands upon statutory trusts that were to have been created but which for some reason that has not been discovered, have not been created.

The statute does not specify what were the terms of these trusts nor does it identify the beneficiaries.

This would be an opportune time to remedy this omission which persists today and which as a continuing omission is an act of omission within the meaning of section 6 (1) (c) of the Treaty of Waitangi Act 1975.

A further question concerned our authority to investigate things done "by or on behalf of the Crown". The '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'. A E Currie *The Crown and Subject* p 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 and other agents of the Crown, and instrumentalities of the Crown through whom and through which the executive functions assumed by the state are exercised."

It was conceded that this Tribunal can examine the jurisdiction of statutory and judicial bodies but it was argued that it could not examine specific

acts unless they were done on behalf of the Crown. Mr Giles contended that the Auckland Harbour Board is not an agent of the Crown, in either that capacity or as a Maritime Planning Authority. It is a creature of statute (under the Harbours Act 1950, originally the Harbours Act 1871) with defined powers and none of the residual or prerogative powers of the Crown. In fact nothing in the Harbours Act "shall be construed or allowed to affect any right or prerogative of the Crown". The Board is an elected and representative body variously described in statutes as a local authority, public authority and a public body. It does not consult with the Crown in the exercise of its powers and its funds are independent of the Consolidated Fund.

For the claimants Ms Elias argued that the words 'on behalf of the Crown' were wider than 'agent' and would be redundant if only agency in the strict legal sense was intended. The tests were whether the body concerned was established to perform any function normally carried out by the State, or whether the body concerned or any project undertaken by it was in any way promoted by the Crown as a matter of policy. The Auckland Harbour Board, she argued, came within the first test. Caught by the second test was the Auckland Regional Authority when acting as an Airport Authority (as evidenced by the Heads of Agreement for the airport administration) and NZ Steel Ltd, formed by the Government for the utilisation of the Crown's ironsands resource at the North Waikato heads and supported by the Crown in a variety of ways.

With regard to the Auckland Harbour Board we do not find it necessary to question its particular acts except insofar as they relate to the nature of its statutory jurisdiction. We find no reason to move beyond the findings in the Te Atiawa report that the first question is whether the Crown has a responsibility in terms of the Treaty. The question is then whether the statutory parameters prescribed for others in defining that responsibility are adequate having regard to the principles of the Treaty. It follows that the Crown cannot divest itself of its Treaty obligations or confer an inconsistent jurisdiction on others. It is not any act or omission of the Board that is justiciable but any omission of the Crown to provide a proper assurance of its Treaty promises when vesting any responsibility in the Board.

9. FINDINGS

9.1 BACKGROUND FINDINGS

The Manukau and lower Waikato are part of the tribal demesne of the Waikato-Tainui confederation of tribes as represented today in the Kingitanga, the Tainui Maori Trust Board and Nga Marae Topu (paras 3.1 to 3.5).

The tribes having the traditional right to use and occupy the land and waters of the Manukau area are various subtribes of Waikato-Tainui together with the related Waiohau, Kawerau and Ngati Whatua. The tribes of central Waikato also had access to the Manukau seafood resources (paras 3.1 to 3.4). That use has continued to the present day. The relationship of the people to the water is evidenced today by the marae in close proximity to the harbour shores and the river. These marae have enjoyed traditionally particular rights in respect of particular parts of the waters and access to them. They are an integral part of the river and harbour (para 6.3).

9.2 FINDINGS ON THE COMPREHENSIVE CLAIM

9.2.1 General findings

The Treaty of Waitangi affirmed protection to the tribes in the use, ownership and enjoyment of their lands and fisheries (para 8.3).

In the Manukau the tribal enjoyment of the lands and fisheries has been and continues to be severely prejudiced by compulsory acquisitions, land development, industrial developments, reclamations, waste discharges, zonings, commercial fishing and the denial of traditional harbour access (para 6.4).

The omission of the Crown to provide a protection against these things is contrary to the principles of the Treaty of Waitangi (para 6.3).

The act of omission began last century with policies that led to war and the confiscation of tribal territories. It was continued in this century by a failure to give adequate protection to or recognition of Maori rights in the acquisition of lands or the proposal of major works. It is reflected after 1975, from whence our jurisdiction begins, in an omission to recognise or give appropriate priority to Maori interests in laws and policies and in planning in a number of statutory jurisdictions (chapt 5 and paras 6.1, 6.2 and 6.3).

9.2.2 Conclusions on Manukau Harbour

Although constrained by a lack of statistical data in many areas we come to these broad conclusions on the present position of the Manukau Harbour and lower Waikato River as outlined in chapter 6.

- There is insufficient co-ordinated research data on which conclusively to assess the impact of development in the past, the constraints necessary to control present proposals or the basis on which to monitor progress for the future but the cost of a fully comprehensive survey would be well beyond the means of the Authorities and Boards concerned.

- Nonetheless it is clear that the waters once supported an abundant marine resource. This resource has been seriously depleted and adversely affected.
- There is inadequate research to determine precisely the depletion of the seafood resource through overfishing on the one hand and pollution (in its broadest sense) on the other. We cannot quantify the losses but can conclude that overfishing has depleted the fish stocks and that the quantity and quality of the fish and marine habitat has been seriously affected by reclamations, sedimentation through land development, and the deterioration of the water quality through waste discharges.
- The Maori people have been further affected by the loss of their traditional access to the sea, the destruction of their traditional fishing grounds by physical works, and by a failure properly to define and protect areas of special significance to them.
- Since the 1950s there has been a substantial improvement in water quality due to the Mangere Sewage Purification Works and firmer environmental policies and controls but the waters have not returned to a proper state for the maintenance of healthy fish life.
- Although there is evidence of illegal dumpings, breaches of the law, and the continuance of water rights that will deleteriously affect the harbour as a marine habitat, there is nonetheless a commitment on the part of local and regional authorities to introduce greater controls. In this they are aided by research and pressure from such independent groups as the Manukau Harbour Protection Society Inc and the Environmental Defence Society Inc.
- Although there is still no operative Maritime Harbour Plan or Regional Plan for the harbour these plans are being worked on. Past delays have been adequately explained, but urgent action is now required.
- Nonetheless the proposed Maritime and Regional Plans may not constitute a sufficient action plan with the positive proposals we see necessary to clean up the harbour and improve its water quality.
- There is scanty information on the relative importance of the harbour and lower Waikato river for commercial and recreational fishing. The extent to which reclamations, sedimentation, waste disposal and major works affect the fishing industry has not been assessed. This is a major limitation on the formulation of plans and strategies for the harbour and in balancing competing interests when assessing individual water rights applications.
- Such policies as exist do not adequately recognise fishing areas of particular importance to the local tribes, the significance of local marae, or the preservation of access to the harbour from those marae.
- A fisheries management plan for the wider area is being prepared with an opportunity for local contribution. Policies have been proposed in response to evidence of nationwide overfishing. But there is no indication that these plans and policies will face the particular problems of the Manukau and Waikato River, will help formulation of the regional authorities plan or consider whether areas of importance to the tribes should be closed or reserved.

From those findings we move to examine the claimants' various proposals for relief. They were

- (a) The 'return' of the harbour to its 'rightful owners', the Manukau tribes
- (b) To vest the control of the harbour in the Manukau tribes as the persons best able to protect it
- (c) A moratorium on granting further water rights for both the harbour and river
- (d) The appointment of Maori Guardians to contribute to planning and policy formulation and the application of those plans and policies to particular cases
- (e) Provision for Maori representation on planning bodies
- (f) The reservation of parts of the harbour for associated marae, and the Whatapaka and Pukaki creeks in particular
- (g) A prohibition (or increased controls) on commercial fishing in the harbour and lower Waikato river
- (h) The review of all relevant laws to ensure that traditional fishing grounds are acknowledged and given a proper weighting, and
- (i) A share in the rewards of development.

We examine those alternatives in the context of our interpretation of the Treaty of Waitangi and the Treaty of Waitangi Act as given in paras 8.1 and 8.3.

We note the one option that was not sought was compensation although compensation is one thing that we may specifically recommend. Some considered that compensation merely exposed them to a policy that their fisheries could be bought or taken, in the same way that their land was. Their fisheries are not for sale. Others referred to the Maori concept of ownership. They own no more than a right to use and enjoy the fruits of the land and water. They hold them in trust for their children, and their children's children after them. They cannot sell or destroy the rights of future beneficiaries, but have a duty to pass them on in at least as good a condition as they received them. They also considered that their early forebears had sold land to settlers in the belief that this meant that the settlers would come to share the land with them. They did not wish to repeat that mistake. The problem as seen by Te Kani-a-Takirau Wawatai was that Europeans did not know how to share.

Despite the claimants' reluctance to seek compensation for land or fishing losses, in many cases compensation is the only practical option today.

9.2.3 On the ownership of the harbour

We do not support the claim of some that the ownership of the harbour should pass to the Manukau tribes. The real issue in this case is not who owns the harbour but its use. Ownership and control are properly severable although it was not severable in the minds of those who claimed ownership. We also appreciate that the restoration of the mana Maori is an important aspect of this claim.

But is it necessary for the Harbour Board to own the tidal lands either in order to maintain a control? We do not think so for the same reason. We do not think that a revesting of harbour lands in the Crown need affect existing reclamations or the right to control, lease and receive an income from them or future reclamations. We accept that the income from these

sources is important to help meet the cost of essential navigation and shipping services but these matters can be covered by appropriate legislation, grants of control and other delegations.

In the meantime the evidence before us points to a confused variety of circumstances governing the ownership and control of various harbour beds, tidal flats and foreshore areas throughout the country, most of which emanate from decisions predating the current concern for better and more integrated planning for coastal areas and adjoining lands.

Our concern is primarily with the fact that where the Crown has vested the ownership of tidal and harbour lands in particular bodies, even though those bodies may be public authorities, the Maori customary claims against the Crown, or claims that its ownership is subject to a fiduciary responsibility to the local tribes in terms of the Treaty of Waitangi, is extinguished.

We consider the whole question of the ownership and control of river, harbour, coastal and foreshore areas should be reviewed so that the Crown might regain ownership by statute, rationalising existing and future grants of control, and seeking a statutory expression of the Crown's fiduciary responsibility to local tribes as well as to the general public. We consider that this might best be done in conjunction with an intended review of planning laws generally.

9.2.4 On the control of the harbour

We do not support the claim of some that the control of the harbour should be vested in the Manukau tribes in so far as an exclusive control may have been intended. The real issue is the extent to which controls can be effective having regard to the state of the harbour. We accept that the tribal stewardship of the harbour has been exemplary and that the tribal experience has lessons for all who are concerned with the conservation of natural and renewable resources. But we cannot accept that Maori experience alone is sufficient to deal fairly with the complexities of a modern reality and with water uses beyond the experience of tribal forebears, or, that the *rahui* (moratorium) that tradition would place on most of those uses is a realistic option given the current extent of development.

9.2.5 On a moratorium on further water rights

It follows that we do not support the claim of some for a total moratorium on the granting of further water rights. While we can appreciate their reasons for seeking that, it is an overly blunt instrument for dealing with a complex issue like this.

There is no sufficient evidence to support the discontinuance of the role of the Auckland Regional Authority as a Regional Water Board.

9.2.6 On Guardians and an Action Plan

The Manukau Harbour occupies a unique position. It is the second biggest harbour in New Zealand. Its importance in the West Coast fishing system is recognised (although imperfectly understood). It is subject to the special demands of the largest city in New Zealand and the demands of major projects approved and supported by the Crown. It has had more than its fair share of abuse. Protection and management of the harbour now deserves national as well as regional support.

The proposed regional and maritime plans may provide a further measure of protection but they lack the precise objectives and time scales

proper to a plan of action to restore the harbour. They do not answer the questions left begging of when is enough enough and what can be done now to repair the damage already done. The Manukau needs an affirmative action plan to 'clean up' the harbour. We must distinguish between policies to control farm run off, for example, and subsidised programmes for the retirement and planting of lands, between controls on specific projects and programmes to measure the cumulative impact of incremental development and determine the point at which a stop must be demanded.

We consider that the Commission for the Environment should propose such an action plan to the Crown, or the methodology for its formulation, and in the light of the Maritime Plan yet to be completed. The Commission should consider funding, regional contributions and national subsidies, who should undertake major responsibilities and how efforts can be co-ordinated.

Pending the formulation of an action plan we consider that Government should not approve further reclamations.

We see the need for the appointment of Guardians to advise and assist in the formulation of management and action plans and to speak with authority on matters affecting the harbour. At present regional and maritime plans are being prepared by bodies with a stake in the development of the region, a particular interest in serving industrial needs and which gain from the continuance of reclamations. The continuance of reclamations affects ecologically sensitive fish feeding and breeding grounds and endangers a fishing industry already threatened. The Harbour Board may be able to achieve impartiality when acting as a planning authority but in the public eye its planning function must be seriously compromised by its port interests.

To restore the mana of the tribes and to protect their particular interests, one set of Guardians, the Kaitiaki o Manuka should be appointed by the Minister of Maori Affairs to seek the well-being and preservation of the traditional status of the tribes in the harbour and environs. Another set of Guardians, the Guardians of the Harbour, should be appointed by the Minister for the Environment to promote with them the restoration of the harbour. The collective body of some eight persons should meet together, as one body, the Manukau Guardians, sharing a common interest, but additionally the Kaitiaki should advise, assist, and be enabled to speak with authority on

- the identification of the marae, wahi tapu, Maori lands and significant sites in the district, and the formulation of proposals for their protection and enhancement and the preservation of access to traditional resources.
- the identification of important fishing grounds associated with local marae and the formulation of proposals for their protection and the protection of the Maori fishing interests in the harbours, lakes and rivers of the district in laws, regulations and management plans affecting the district
- the assessment of individual projects affecting marae, wahi tapu, Maori lands, important sites and fisheries, and the formulation of proposals concerning them including the apportionment of any development levy or the assessment of compensation (see also para 9.2.12).

A substantial funding should be met by levy on authorities and departments with jurisdiction in the areas of concern. In all other respects the

Manukau Guardians should have the authority and functions proposed by the Commissioner for the Environment in paras 17 to 20 of his submissions.

"17. It is this concept of "Guardians" which I would now like to discuss. I wish to make two points:

- (a) New Zealand has for a decade had experience with the use of Guardians to protect sensitive features of the aquatic environment. With or without legislation they are recognised in Rotorua, Wanaka and Manapouri-Te Anau as authority figures. The Commission is familiar with the administrative support required by these Guardians and the way they do their business. It is a very efficient tool of environmental management.
- (b) The institution can readily function in a multi-cultural sense; in a Maori perspective the leaders selected as Kaitiaki would be vested with *mana*, and their role would uphold the *mana* of the people. The essential link between the health of ecosystems and the well-being of the people would be given clear expression.

"18. Following the pattern established by existing Guardians in New Zealand, the essential features of such groups are:

- (a) They should be citizens of standing in the *local* community, ie, they should have *mana*;
- (b) They should be detached from resource management functions, and have a clear role as "trustees";
- (c) They report directly to a Minister of the Crown—in the case of the existing Guardians this has been the Minister for the Environment;
- (d) They should represent an appropriate range of interests and philosophies.

"19. In general the functions of Guardians are to:

- (a) Monitor environmental trends, particularly in relation to assets which are under no special statutory protection;
- (b) Sponsor the preparation of studies on environmental issues and options;
- (c) Consult with the regional agencies on the maintenance of environmental quality;
- (d) Take up with central or local government, and private developers, issues of environmental concern raised with them by citizens.

"20. In his seventh submission Dr Mahuta suggests how the Manukau Guardians as a body might be made up. It is important to ensure that the Guardians have among their number someone qualified in a relevant scientific discipline and the Commission would recommend that the ecological viewpoint, as well as local knowledge should also be represented.

"An industrial or commercial leader with a clear philosophy of social responsibility but with no direct interest in using the resources of the harbour should be included. We would, however, strongly oppose ex-officio membership of the Guardians since this has not been adopted in the past and would create a difficult precedent in relation to existing Guardians. I endorse Dr Mahuta's suggestion of

six members in all, since this would enable adequate representation of Maori interests by three members, as well as the inclusion of individuals drawn from the wider community who can meet the other requirements of the group."

9.2.7 On Maori representation

Many claimants urged Maori representation on planning and controlling authorities. In a number of cases that has already been provided for.

The Auckland Harbour Board as the Manukau Harbour Maritime Planning Authority has appointed a member of one of the local tribes to the Manukau Harbour Maritime Planning Committee which will advise the Authority on the completion of its draft scheme. (Criticism that the Committee has not met yet was adequately explained.)

The Auckland Regional Authority, which has an impressive record in maintaining consultation with Maori people, has appointed a Maori to its Regional Planning Committee.

The new National Water and Soil Conservation Authority is to have a representative of Maori interests (see section 3 of the Water and Soil Conservation Amendment Act 1983 sec 3).

While representation of Maori interests on planning bodies is extremely important in ventilating Maori concerns, that is not a complete solution. They must be backed by adequate research facilities and not simply expected to make a contribution to schemes that may have already progressed a distance down the track. The Fisheries Act 1983 provides for Maori representation on committees preparing Fisheries Management Plans, but we saw no evidence of departmental studies on the options available for the recognition and protection of Maori fishing interests, or of any start on the enormous task of identifying areas of major Maori habitation and the location of marae and traditional fishing grounds. Without such background studies, supplemented by comparative studies on the recognition of the interests of indigenous peoples overseas, we wondered if the Maori representatives could be effective, short of doing this work themselves.

It is not satisfactory to have token Maori representation. All too easily will such bodies merely assert a 'democratic' right for the majority to out-vote the minority, which will perpetuate grievances and bring no better results in the future than those that have been produced in the past.

In this respect we prefer the model of NZ Steel Ltd from the private sector. Not only did that company maintain close liaison and consultation with local groups but it funded research to enable their concerns to be more fully and effectively stated.

9.2.8 On the recognition of Maori fishing interests

The crux of the problem is not the failure of planning laws to recognise Maori fishing interests but the failure to establish those interests in fisheries laws. Both the Harbour Board and the Auckland Regional Authority made the point that it was difficult to provide for Maori fishing rights in planning if there are none. The Harbour Board considered that if Maori fishing rights were prescribed in the Fisheries Act there was nothing in the Manukau Harbour Control Act 1911 to prevent them from being accommodated. Counsel for the claimants described the Treaty guarantee as 'empty' without the machinery to investigate a fishing claim and establish

a fishing right. The record of events in the Manukau testifies to the enormous losses sustained by the tribes through failure to honour the clear words of the Treaty or to make provision for Maori fishing grounds in earlier enabling legislation.

A record of the statutory and judicial determination of Maori fishing rights and the recognition given to tribal fishing grounds was given at para 6.2. It is necessary to summarise the position.

From 1877 to 1894 the fisheries laws recognised customary fishing claims under the Treaty but provided no machinery to have those claims converted to defined rights.

From 1894 to the present day the fisheries laws have provided that the provisions of the Fisheries Act shall not affect 'any existing Maori fishing rights' but the Courts have held that save from some special provision in an Act or Crown Grant, there are no 'existing Maori fishing rights'. This has thus become an empty provision. Those words mean nothing.

In the Manukau, only one Crown Grant (for Whatapaka) conferred a special right, but that grant was later defeated by the Manukau Harbour Control Act 1911.

In 1894 there was provision for oyster beds to be reserved for Maoris. Only one Maori Oyster Reserve survives in the Manukau but the oysters no longer survive there.

From 1903 to 1962 there was provision for the reservation of tribal fishing grounds, but this was dependent on the exercise of a Ministerial discretion and no reserves were created.

The current Fisheries Act enables the Director-General of Fisheries to confer 'special rights' on 'special communities' in respect of defined sea areas. Thus 'rights' now depend upon the exercise of an administrative discretion and there is now an open reluctance to refer to *Maori* fishing grounds or the Treaty of Waitangi, or to confer any priority on the Maori community in terms of that Treaty. (See section 89 (3) of the Fisheries Act 1983 and Regulation 7 of the Fisheries (Amateur Fishing) Regulations 1983).

In written submissions Counsel for the Ministry of Agriculture and Fisheries explained that in the drafting of the Fisheries Act 1988 "every time a reference to Maori came up it had to be tested against the provisions of the Race Relations Act 1971". To our amazement he could not then instance the respects in which there might be a conflict with the principles of that Act. He was unable to comment on the overseas cases referred to by D V Williams where this very issue has been considered fully.

In *United States v State of Washington* 384F Supp 312-1974 affirmed in the US Supreme Court at 99 S Ct 277-1978 it was held that the recognition of hunting and fishing rights in Indian treaties did not breach the United States constitutional provisions for equal rights and protection. In Canada legislative distinctions based on race are valid if directed to a valid federal objective (which includes the recognition of hunting and fishing rights). In Australia the provisional view of the Law Reform Commission is to support the Canadian approach and in this respect to abrogate the finding of first instance in *Gerhardy v Brown* (1983) 49 ALR 169 that Aboriginal hunting access rights are contrary to the Racial Discrimination Act 1975 (although that finding is now subject to an appeal). (See Australian Law Reform Commission, Reference on Aboriginal Customary Law, Research Paper 15).

We were also amazed that in answer to our question whether the Treaty of Waitangi Act 1975 was considered by the drafters of the legislation, Counsel thought that it had not been and yet it is this Act that specifically provides for the review of legislation against the principles of the Treaty.

The problem was very apparent to us. Officers of the Ministry were unaware of any work being done within the Ministry to consider how the fishing rights guaranteed by the Treaty might be realistically provided for or accommodated by Regulation 7 above referred to. They were unaware of the extensive developments in other countries in situations similar to our own. Increasingly Maori people are not unaware and they are making the comparison. In the United States the Courts have recognised the rights of Indian Tribes to both own and control fishing grounds (eg *Whiteford v US* 293F 2nd 658–1961), to claim damages for anything that limits their use and enjoyment of those grounds (eg *Menominee Tribe v US* 391, US 404–1968), to both make and police regulations for fishing grounds (eg *Settler v Lameer* 507F 2nd 231–1974), and to have particular fishing rights in off-reservation areas (*US v Washington* 384F Supp 312–1974). In the latter case, often referred to as the “Boldt decision”, the tribes were held entitled to regulate a specific percentage of the salmon fishing in the State, and conversely, that the State was not entitled to regulate their fishing. It was noted that the Indian right was not just to fish, but to husband and harvest fishing for domestic and commercial purposes.

In Canada Indian hunting and fishing rights have been recognised as emanating from customary title (*R v White and Bob* (1964) 50 DLR (2d) 613), from customary law independent of titles or treaties (*Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d 513), from treaties (*Isaac v R* (1975) 13 NSR (2d) 460) and from particular statutes (*R v Wesley* (1932) 4 DLR 774).

The Australians are more like us in that they have little past experience in recognising native hunting and fishing rights but they are now drawing heavily on the wealth of North American experience to change that. Significantly the Australian Law Reform Commission considers “. . . it is desirable that recognition be accomplished in some formal way, rather than—as has so often been the case in Australia—being left to depend on essentially unreviewable exercises of administrative discretion” which is where we are in New Zealand. (See Research Paper 15—supra). In 1983 the Commission saw a need to establish the principles on which the recognition of fishing and foraging rights should be based, as a guide to legislators, and the options available. In New Zealand we have seen no evidence of any attempt within the Ministry even to recognise this problem let alone provide any research comparable with the extensive research coming from Australia and so face up to it.

The Ministry referred to Fisheries Management Plans and the provisions made for a Maori contribution, but it was patently clear that there is no research work being undertaken to identify Maori fisheries, or to assess the extent and nature of Maori fishing interests in order that they might be provided for in fisheries management plans.

Reference was made to proposals to compensate those commercial fishermen who might be unable to renew their licences as a result of other new policies. The prospect of compensating Maori interests for the depletion of their fisheries was not even remotely considered.

In the meantime the claimants specifically seek “legislative provision for the identification and protection of traditional fishing grounds in accordance with the guarantees of the Treaty of Waitangi” and certain of the

claimants sought Maori fishing reservation status for the Whatapaka and Pukaki inlets in particular.

We think it would be unfortunate if Maori fishing rights fell to be determined solely on a literal interpretation of the Treaty which guarantees an *exclusive* use of *all* Maori fisheries, for Maori fisheries are extensive and indeed, the whole of the Manukau could be described as a traditional Maori fishery. We think that in New Zealand we can find better answers than those found in North America which depend upon relator actions in the Courts. There is obvious potential for conflict between Maori, private and commercial fishing interests and the potential for conflict should be minimised. Compromises will be necessary. But the answer is not in the blatant denial of Maori rights, it is not in glossing over the problem, and it is not in the maintenance of a Fisheries Act that contains empty words and clearly fails to match the promises of the Treaty. Those answers merely strengthen, and probably cause, Maori demands for the ownership of harbours, and exclusive fishing grounds, demands based upon a strict interpretation of the Treaty. Instead a genuine search should begin to define the options available for the recognition and protection of Maori fishing grounds and securing compensation for Maori fishing losses. There is a need to define the principles to be applied and the rules that ought to be made, supported by comparative studies of overseas trends but adapted to our way and in which it must be recognised that some compromises will have to be made. As an integral part of that study, the identification of particularly important tribal fishing grounds must begin. This work ought to have started a long time ago.

In the meantime pending the formulation of better policies and better laws to honour the fishing guarantees of the Treaty we consider that the Whatapaka and Pukaki inlets should be reserved as requested. The Treaty is simply so clear and the lack of research for better alternatives is simply so obvious that we have no alternative but to accede to that demand.

9.2.9 On commercial fishing

More information is needed from the Ministry of Agriculture and Fisheries to enable inductive conclusions to be drawn on the effect of commercial fishing in both the harbour and lower Waikato river, but on the evidence as actually given, (see 6.3.2 and 6.6) we deduce that commercial overfishing has seriously depleted the catch to the very considerable detriment of the claimants' legitimate interests. Although Mr Little for the Ministry proclaimed that there was no need to curtail or restrict commercial fishing, his opinions were not backed by research and were not sufficient to counter the evidence of the claimants based on their observations (and catch records over a ten-year period in the case of one marae). In fact, apart from what Mr Little said, such evidence as was given for the Ministry supported the call for a total prohibition or at least a greater control on commercial fishing in the harbour and at the Waikato river mouth. The Ministry noted the lack of current research data but countered with proposals to deal with the problem of overfishing throughout the country by the introduction of individual transferable catch quota systems and proposals for fishery management plans. These proposals were considered at para 6.6. We noted there that the Manukau will be but a small part of a massive Auckland area covering the northern half of the North Island. We are therefore in sympathy with the call from Counsel for the claimants that a particular plan for the Manukau is needed based upon adequate research into the Manukau position. The Auckland Harbour Board and the

Auckland Regional Authority appear to share that view. As noted at paras 6.5 and 6.6 the Ministry is criticised in the resource papers attaching to the Manukau Harbour Plan for its limited contribution to the plan despite its important responsibility for the fishing resources.

We conclude that through the Ministry there should be a comprehensive study and public debate on the effects of commercial fishing in the harbour and river. In the absence of an adequate response to the claims in this case then, based on the evidence before us, commercial fishing in the Manukau and lower Waikato River should be prohibited.

We feel bound to add that in our opinion the Ministry of Agriculture and Fisheries has not discharged its responsibilities in respect of the Manukau harbour but we studiously refrain from making any further comment than that.

9.2.10 On attitudes

Attitudinal changes are needed as much as legislative change in other areas as well. Most of those bodies with an interest in the harbour and its catchment considered that in terms of their empowering statutes the Maori interest could be no greater than that of other special interest groups within the general public.

Often specific legislative authority to acknowledge Maori interests is narrowly construed to mean that the acknowledgement must not exceed the strict terms of that authority. Section 3 (1) (g) of the Town and Country Planning Act 1977, for example, requires Maori values with regard to "ancestral land" to be brought into account in the preparation of District and Regional Schemes. The Auckland Regional Authority has sought to go as far as it can to identify Maori concerns and provide for them, but it is bound by legal opinion based on decisions of the Planning Tribunal, that 'ancestral land' refers only to land that is technically Maori land but does not include ancestral land owned by Maoris that is not technically Maori land. Furthermore the Tribunal has said it refers to land not seas. On that basis section 3 (1) (g) has a limited application, especially in this district where most of the Maori land has gone.

By way of contrast, the Commission for the Environment takes a broader view of its responsibilities, (defined in this case by policy directives rather than statutory provisions). Although charged with the protection of the environment for the good of all, it relates the enjoyment of the environment to the particular spiritual, cultural and philosophical mores of user groups and so is able to consider Maori interests without reliance upon any particular statutory instruction to do so.

In similar vein, in April 1983 the Planning Tribunal held that in its consideration of maritime planning proposals under the Town and Country Planning Act the Tribunal is to have regard to "the public interest" and under this heading the Tribunal can consider the value which the Manukau harbour has in the culture and traditions of the Maori people and the principles of the Treaty of Waitangi. It said

"We consider that in cases where it is relevant, it is in the public interest that the legal obligations of the Crown be observed, whether their source is the Treaty of Waitangi or elsewhere. Even though individual citizens may not be entitled to bring Court proceedings to enforce observance of the provisions of the Treaty, where a proposal which is the subject of an application under s 102A is alleged to be inconsistent with the principles of the Treaty,

any objector (whether Maori or pakeha) should be permitted to bring that matter to the attention of the maritime planning authority, and the Tribunal on appeal. . .

“Likewise, even in a case where the provisions of s 3 (1) (g) of the Act may not be directly applicable, it is in the public interest, and consistent with the provisions of s 3 (1) (a), s 4 (1), and s 102A (4) (b) of the Act, that any objector may bring to the attention of the decision-maker as a ground of objection any respect in which the proposal will be inconsistent with the integrity of the cultural environment, or the cultural, social or general welfare of any section of the people, including the culture and traditions of the Maori people.

“We therefore hold that the existence of a Maori fishing ground can be recognised, and the effect on it of the proposed use or work can be considered, on an application under s 102A of the Act” (see *Auckland District Maori Council v Manukau Harbour Maritime Planning Authority and Liquigas Ltd* 6 NZTPA 167)”

The only difficulty with this dictum is that it proceeds from the basis that ‘a legal obligation of the Crown be observed’. There are judicial decisions still extant which assert that the Treaty does not give rise to any legal obligations. We have commented on these cases in the Kaituna River finding (December 1984).

Counsel for the Ministry of Works and Development ably argued the potential for the positive promotion of Maori values in existing planning laws referring to various provisions enabling or requiring cultural and social issues to be dealt with in local, regional and maritime planning schemes. Counsel nonetheless conceded that there must be the will on the part of planners to use the available statutory tools in this way, and that that will must be restricted by a need to consider other sections of the community in the absence of an authority to give Maori interests the priority guaranteed in the Treaty.

Others who argued that they are constrained by Acts in force from giving effect to the principles of the Treaty, illustrated the need to reform those Acts that govern them. We felt that this was appreciated by certain of the local authorities. The Onehunga Borough Council was concerned that “there must be a balance between the interests of the wider community and those representing a minority of it”. The approach of the Mount Roskill Borough Council was eminently reasonable and was in fact shared by a number of the Maori claimants. It said

“... there are a number of groups and people within (the borough) who share with the Maori people some spiritual and cultural values arising from the Manukau Harbour. The interests of these people and the wider community generally should be considered by (the Waitangi Tribunal) in making any recommendation to the Government under the Treaty of Waitangi Act 1975.”

At the other end of the spectrum we learnt that along with the Ministry of Agriculture and Fisheries it is the view of the Franklin County Council that the Treaty of Waitangi Act 1975 is in conflict with the “Races Reconciliation Act” (sic). The Council claimed that the Treaty “perpetuates a privilege based solely on race” and that “until the Government reviews both Acts to make them compatible we contend that the Treaty of Waitangi Act must become subservient to the Races Reconciliation Act and that the Treaty of Waitangi Act and its functions must lay idle until these matters are resolved”. (We commented on this view at para 9.2.8)

The Commissioner for the Environment saw as urgent the need for both attitudinal and administrative reform. In his view of discussions he held with certain Maori groups, the Maori world-view pointed to the way in which environmental administration will need to be organised in order to give recognition to the better conservation of renewable resources and greater weight to the value of clean water. He said "the fact that water is managed in a monocultural framework and with a bias towards consumption rather than conservation is in my view part of the problem" and he urged the incorporation of Maori values into the main cultural traditions of New Zealand. As a further result of those discussions he was reinforced in his view "that the administrative agencies concerned with water in New Zealand need as a matter of urgency to undergo professional training to improve their capacity to communicate when confronted with a Maori viewpoint and to develop their sensitivity, not only to Maori values in relation to water, but towards the conservation ethic in general".

9.2.11 On planning laws and procedures

Current attitudes underline the need for legislative change in a plethora of statutes. We are aware of some initiatives at a government level to review all planning and related legislation in order that several Acts might be integrated and modernised and certain basic principles made common to all. Pending that general review, some Acts stand out for attention.

The Water and Soil Conservation Act 1967 was aptly described as monocultural legislation. On our interpretation of the Treaty Maori fishing interests and the particular cultural and spiritual values pertaining to Maori fisheries and the natural waters should be provided for (see para 8.3). An amendment along these lines was proposed in our Kaituna Report (December 1984). At this hearing the amendment had the support of the Auckland Regional Authority and Regional Water Board, the Ministry of Works and Development and the Commission for the Environment.

The preamble to the Water and Soil Conservation Act indicates that "fisheries and wildlife habitats" are to be brought into account. It was submitted by several that while there is no specific provision for Maori fishing grounds Maori interests are relevant in demonstrating prejudice to one's own rights or the rights of the public generally, prejudice to one's interests or the interests of the public generally being a ground for objecting to a private application for a water right in section 23 of the Act. It was said the Planning Tribunal has shown a concern for Maori interests. Given the attitude earlier described, that Maori interests are no greater than the general public interest, and the fact that apart from a few oyster reserves, Maori fishing reserves do not in fact exist, we think it is necessary to refer specifically to Maori fishing interests in this Act and to accord those interests a real measure of priority.

Others complained about water right discharges antedating the current legislation. The Mangere Sewage Purification Works received particular prominence in this debate and we found the conditions in the existing agreement lacked the appropriate standards for a proper monitoring of the work's performance. (see para 7.1) We concur in the view that all existing discharges should be re-examined by Water Boards with a view to setting new terms and conditions, and other subsisting water rights should be reviewed as they expire to bring them into line with current standards and any new management plans in operation. We note that this proposal would have the support of the Federation of Commercial Fishermen, although the Federation went further in its unanimous resolve "that all

existing marine outfalls and all future outfalls be allowed to discharge nothing other than purified water”.

The Town and Country Planning Act 1977 was also singled out for comment. We considered at para 6.5 the difficulty experienced by the Auckland Regional Authority in the application of the provisions of section 3 (1) (g) of that Act to a regional plan that embraces the Manukau Harbour. Also at para 6.5 we pointed out that the Crown is exempt from the provisions of the Act and that this is a matter of particular concern in the Manukau where a number of Crown proposals affected the harbour in the past, and a number of proposals could affect it in the future.

Aside from deficiencies in the legislation we were told of deficiencies in the processes. It was alleged

- (a) That major commitments have been made to major projects before appropriate authorisations have been sought. These have included political pronouncements, investment arrangements and actual construction. The objectors feel that the tribunal concerned can hardly refuse the consent sought when the project in question is already underway.
- (b) That the National Development Act in itself prejudices the best result.
- (c) That to be effective the objectors need lawyers but cannot always afford them.
- (d) That proceedings are overly formal, intimidating and inappropriately adversarial.
- (e) That objector groups are unable to marshal expert evidence or assistance because they lack resources and money.

We understand the Government is considering the first three of these concerns now. The next concern would involve our commenting on the procedures of other tribunals and bodies and we refrain from doing that. Those who appeared before us reminded us that an inquiring body such as ours with a power of recommendation only, has greater freedom in its style and proceedings. But we have noted the comments by the Environmental Defence Society (Inc) that more could be done to assist Maori and other groups to present written evidence and in a better structured form. The Society suggested that officers of Town Planning Committees and Regional Water Boards could assist by direct contact with local Maoris about their interests to ensure they are fully covered and presented in those officers' reports. It suggested that Government departments should also make expert assistance available to Maori groups for major planning hearings. In our view that assistance should be forthcoming in order that the tribunals might be better advised, and Maori concerns properly weighed.

9.2.12 On development levies

Industrial development and Maori interests need not conflict. The cardinal cause of complaint is twofold, that the tribes have not been adequately consulted on developments that affect their interests in the lands and fisheries of an area, and that they receive no benefit from the utilisation of those resources of the lands and waters that they have not freely alienated.

Consultation can cure a number of problems. A failure to consult may be seen as an affront to the standing of the indigenous tribes and lead to a confrontational stance. Admittedly some values and traditions are not

negotiable but the areas for compromise remain wide. Thus the Tainui tribes have re-interred human remains to accommodate developers just as developers have amended plans to accommodate the interests of the tribes.

It is not apparent that the tribes receive a proper benefit from development. Development may mean more jobs for some local Maoris but rarely is a Maori group benefit conferred. Unless Maori land is involved, there is no chance to seek a share in the profits. Where Maori land is involved the owners are not always averse to its exploitation.

Through the mining of their ironsands at Taharoa, Maori people are now the fourth largest shareholders in NZ Steel Ltd, and are developing forests on the mined land. But when the tribes see 'their' rivers, lakes and harbours being used to benefit developers, their marae being affected by developments around them, and their fishing grounds exposed to new dangers, it is not surprising or unreasonable that they should expect a more direct benefit from that development by way of compensation.

The Tainui tribal authorities approach their people's underperformance in health, education, housing, employment and law observance as symptomatic of the powerlessness derived from the underdevelopment of the people. Having lost most of their land they seek a new economic base for the tribes by a collective involvement in new private enterprises, but the opportunities for this are not great. While they ponder their position, others better skilled and funded are able to utilise those natural resources in which they claim an interest.

Development levies are provided for under the Local Government Act 1974 as a fraction of the estimated total costs of the proposed work to meet the consequential increased costs of servicing the area and establishing cultural and recreational amenities. The committee for the control of the fund comprises representatives of affected local authorities. There is no assurance that any proportion of this fund will be deployed to meet the cost of minimising impacts on local marae, papakainga or fishing grounds or of providing compensation for any effects on traditional fishing grounds, or for the treatment of any environmental damage.

We consider it timely that Government consider affirmative action to fund and assist tribal authorities to establish a new economic base for their people. We consider it appropriate that Government should provide for an apportionment of development levies to tribal authorities where marae and papakainga are affected by development and for an additional levy where traditional fishing interests are affected or where the Maori people have a significant cultural interest in the resources to be developed.

9.3 Findings on the specific claims

9.3.1 On compulsory acquisitions in the Waiuku Forest

At para 5.4 we noted the legal argument on whether the compulsory acquisition of Maori land in the Waiuku Forest at various dates prior to 1975 is within our jurisdictional purview. In the meantime, and to its credit, the Forest Service began almost immediate negotiations for a return of the land. A necessary caveat (which may in fact be negotiable) was that private interests must be protected, and in particular the mining rights of New Zealand Steel Ltd under what we judge to be terms very favourable to the company.

We have decided not to settle the jurisdictional question on this claim. We encourage the resolution of disputes without recourse to this Tribunal. We therefore have no specific recommendations on this part of the claim and instead commend the Forest Service's initiatives to seek a settlement. To protect the interests of the claimants we simply grant leave to them to file a fresh application in respect of the same subject matter should that be necessary. Meanwhile we urge that the search for a settlement be continued.

9.3.2 On Pukaki

The totally tragic position of the Pukaki people is mainly the result of events preceding the commencement of our jurisdiction in 1975. But some matters are relevant to Acts and policies now in force.

We refer to the sacred and significant sites of Pukaki, the marae site, the burial ground in current use as a burial ground, and the Tapuwae o Mataaho ki Pukaki or Pukaki lagoon. In this case, to use the words of the English version of the Treaty, none of them are sites that the Maori owners were "disposed to alienate". As sacred sites they ought still to have the protection of the Treaty.

There are existing Acts and policies for the protection of some sacred and significant sites. The trouble is that those Acts and policies do not contain the measures necessary for the "guarantee" that the Treaty promised. The clear legislative intent is not always capable of enforcement.

The Town and Country Planning Act has provision for such sites to be noted on district schemes but there is no requirement that they be so noted. We do not imply a criticism in this case. Far be it for the local authority to have to assess the significance of a site at the behest of a non-owner group when the legal owner's property interests are threatened. (In this case the marae site has now been zoned as a marae site although the Maoris do not own it.)

The Historic Places Trust Act provides local authorities with a measure of relief. The Historic Places Trust Board may require the notification in district schemes of certain buildings (of historic value) and archaeological sites (of research value) but there is no such provision for urupa or other significant sites (see para 7.3).

The Maori Affairs Act 1953 contains provisions in sections 439 and 439A for the reservation of sacred and significant sites for the common use and benefit of the tribes affected but where the lands are not Maori lands, the consent of the owner is required. The Crown may acquire the land but there is no provision for its compulsory acquisition.

Clearly there are existing Acts and policies whereby the Crown has expressed its concern to protect significant Maori sites. That intention accords with the principles of the Treaty. But insofar as the Acts and policies are not necessarily capable of being perfected, they are inconsistent with the Treaty in that it guaranteed a protection which the legislation fails to provide.

The New Zealand position does not compare with the steps taken in Australia, at both Federal and State levels, for the legal return to native control of aboriginal sacred sites (as, for example, Ayers Rock) or to have those sites declared protected areas. As considered at para 7.3, in New Zealand greater protection is given to historic buildings than to sites of particular significance for Maori people.

We consider that provision should be made for the compulsory acquisition of Maori sacred sites with a view to their settlement as Maori Reservations.

In the interim we urge that the Crown negotiate with the current owners and lessees for the acquisition of Pukaki marae, urupa and lagoon for the purposes of establishing them as Maori Reservations for the common use and benefit of Te Akitai and Waiohua, and without charge to the hapu. (We note that the Auckland Regional Authority offered to assist in negotiations.) The Pukaki people lost their land. There was no justification for taking it from them and giving it to the Auckland Harbour Board. We cannot adjudicate upon the taking of the land but we can make a finding on the keeping of it. The Board now holds the land by authority of a statute that the Crown keeps in force today even though the trusts on which the Board was to hold the land have not been established nor even defined.

9.3.3 On airport fishing restrictions

The restrictions as a result of the airport were described at para 5. We are satisfied that the prohibition on fishing is pursuant to a regulation of the Crown now in force. We are also satisfied that the area affected includes on old fishing ground and that the prohibition on fishing is contrary to the guarantees of the Treaty.

But we do not recommend the total removal of the prohibition. We accept that that could endanger lives. We recommend instead that Civil Aviation Division re-assess the prohibition in the context of any possible danger from licensing nominated individuals of Pukaki to cross, or cross and fish the prohibited area, and the terms and conditions of any such licence, having regard to the traditional rights of access and fishing of the Pukaki people, and our finding that the regulation is contrary to the principles of the Treaty.

We also noted that the Pukaki crash-fire bridge is currently under the Division's review in the context of public safety. We recommended that in the course of that review the Division should consider and report on the possibility of altering the causeway and bridge to improve the flow to the creeks and to maintain the access of the Pukaki people to the harbour.

9.3.4 On the Mangere Sewage Purification Works

We have no recommendation to make concerning the continued operation of the Mangere Sewage Purification Works other than that included in the "comprehensive" claim, that existing use discharges should be the subject of review. In the case of these works, the existing agreement is inadequate and there should be more appropriate conditions for monitoring the works performance.

9.3.5 On the mixing of waters, Maori values, and development

As noted at para 7.2 the slurry pipeline is an integral part of the NZ Steel Mill expansion which is assisted by the Crown. As concluded at paras 8.3 and 9.2.8, the relationship of Maori people, their culture and traditions to the natural waters is relevant to our enquiries in terms of the principles of the Treaty of Waitangi. We now consider the impact of those values, and the principles to be applied, on developments generally and the slurry pipeline in particular.

Maori values are not inimical to development. As we said at para 7.2, the Maori is a developer and exploiter of resources. To quote Professor Ritchie, the religious rules of Maori society are primarily directed to ensuring 'that development accords harmony and balance, equity and justice'. In this respect Maori ways are not unlike Western ways. It might be considered that Western society, although espousing a religion, is predominantly secular and individualistic in its world-view. Although there is a religious premise for the presumption that humankind has authority over nature, that view probably springs from the secular and rational characteristics of our society. Maori society on the other hand is predominantly spiritual and communal. The Maori world view emphasises the primacy of nature and the need for man to tread carefully when interfering with natural laws and processes.

But the difference is basically one of emphasis. Western society, after the large scale modification of the natural environment, has seen the need to impose constraints. It has come to uphold certain values that argue the case for the maintenance of more of the natural environment or higher standards in environmental care. In some quarters the approach is rationalised in the view that nature has its own purpose. Maori society, for its part, has tempered what might have been a fundamental religious bar with a basic pragmatism, enabling modifications to the environment after appropriate incantations or precautionary steps.

Accordingly, in fashioning the world both societies strive to achieve pleasantness, harmony and balance from either a secular or spiritual stand-point or a combination of both points of view. In the final analysis the alternative approaches may not be important. The ultimate test may be not what is right, if that is capable of determination, but what is acceptable to the community. The current values of a community are not so much to be judged as respected. We can try to change them but we cannot deny them, for as Pascal said of the Christian religion, "the heart has its reasons, reason knows not of". That view alone may validate a community's stance.

The main problem in this case is not with the traditional religious rules of the Maori, but the slight given to the mana or status of the people who hold to those rules. We saw, at para 3.6, that Maori society has been able to adapt to a number of substantial changes and still survive. All people can accept change if they themselves feel accepted and acknowledged and are free to make changes on their own terms. In the days before the land wars when things were good, the Tainui people made remarkable changes to take part in the agricultural and trading pursuits of those early times (see para 3.6). Now they are given to understand that their values have no place in our society, and they are no longer able to share in the developments occurring around them. In Professor Ritchie's view, overseas experience shows that as the standing of native peoples improves, so also does their capacity to work through the consequences of change. As things are, the local tribes have no status. Continually they feel it to be pressed upon them that they have only two options—to capitulate to Western ways, which they refuse to do, or cling to past ways in the belief that they contain fixed and uncompromising truths freed from the challenges of change. We believe there is a better option.

We consider that Maori values ought to be provided for in planning legislation. We do not think they should predominate over other values but we do think they should be brought into account and given proper consideration when Maori interests are particularly affected. And if Maori

interests are not exclusively affected then there might at least be a search for a practical alternative if there is one, or a reasonable compromise.

To achieve a reasonable compromise it is preferable that there be consultation with the tribe rather than have the tribe resort to objection processes, or even protests and demonstrations. It would help if the conduct of the parties were related to planning procedures so that the Tribunal could adjourn proceedings and require discussion and a search for a settlement.

It is unfair to imply that NZ Steel Limited has not consulted with the tribes when it has gone much further than most to consult with and actively assist them. The problem in this case is not in that area and certainly not with NZ Steel Ltd. The problem is in the reality that as the law stands the works had to win. In this case the Maoris objected on the ground that the proposed pipeline offended their particular values. But in accordance with the law, these particular values were held to have no weight. There was neither the incentive nor the need to search for an alternative, or a compromise. To the objectors it was as though not just their beliefs had no status, but they as a tribe and as a people had no status. Yet they see themselves as the traditional guardians of the harbour and river mauri, as persons who ought to have a special and specific right to be consulted.

Given that slight, a compromise may now be harder to achieve, but given the willingness of New Zealand Steel Ltd to seek a solution, despite legal rights now secured by it, a compromise is still possible. Mr Mahuta hinted at one solution but he added very wisely that the only acceptable compromise is one that Ngati Te Ata can work out themselves.

For the future we propose a change to the law to admit of Maori values, and the appointment of Guardians to give the tribes status in the affairs of the region. For the present we decline the recommendation sought that the pipeline do not proceed upon the ground that the matter is one that ought reasonably to admit of a compromise arrangement.

9.3.6 On mining at Maioro

The mining at Maioro is a policy of the Crown that threatens certain wahi tapu and lands of the claimants, that is to say the Tangitanginga Riverside strip, the Te Kuo urupa, and other sacred sites within the Forest. Although other sacred sites are now owned by the Crown, they were not freely alienated by the Maori people. It is inconsistent with the principles of the Treaty of Waitangi that those sacred sites, and the lands still owned by the people, should be adversely affected by the mining operations.

The claimants sought a recommendation that all mining cease until the identification of wahi tapu is completed. We decline that recommendation. The Crown is taking steps to identify the sacred sites through the archaeological section of the conservancy in consultation with representatives for the Maori people. We consider the identification of sites can proceed ahead of the mining.

But new terms and conditions must be set for the mining to expand from its present site. The existing licence does not provide a guarantee for the protection of identified sites. NZ Steel Ltd must formally undertake

- to repair the damage to the Tangitanginga reserve in accordance with the recommendations already made by the Forest Service

- to comply with future directions of the Forest Service for the protection or repair of other sites, and
- to comply with the recommendations earlier made by the Commission for the Environment and the Auckland Regional Authority.

In the identification of sites, the Forest Service should not accept the whole of the former Maori blocks as wahi tapu, simply on the grounds that they were once so described, but should strive to identify those sites that are strictly wahi tapu through burials or through having a particular sacred significance for the tribe. But nor should the Forest Service restrict itself to those sites that might be protected in accordance with the Historic Places Trust Act 1980. As noted in paras 7.3 and 9.3.2 that Act does not ensure a proper protection in accordance with the Treaty. The test should be whether the site can be shown to have a sacred significance for Ngati Te Ata.

On the question of dispersed burials we consider, as did Counsel for the claimants, that there is again room for compromise. It is a question of whether Ngati Te Ata can accept the Taharoa precedent for reinterments (we note that the Taharoa case was settled only after long negotiations). We do not think it unreasonable that Ngati Te Ata should defer a decision on that question until after they have considered whether the insult to their mana through the compulsory acquisition of their lands without notice has been adequately redressed.

Once the sites to remain untouched have been determined we urge the Crown to aid the settlement of those areas as Maori Reservations, if Ngati Te Ata seeks that, so that trustees are appointed to take any action that may become necessary as mining operations progress.

Accordingly we consider that mining operations may continue provided mining terms and conditions are renegotiated along the above lines.

9.3.7 On Maori artefacts

The claim that Maori artefacts found in the Awhitu and Manukau districts were not being returned to the rightful holders had not been notified to the Department of Internal Affairs which administers the Antiquities Act 1975. We therefore decline to find other than that while the principle of protecting Maori taonga is consistent with the promises of the Treaty, the Treaty promises were intended to confer a benefit on the hapu owning or entitled to those taonga. Presently they are not getting that benefit. Simply put, the taonga are not returned to the owners. The Act and associated administrative policies should be reviewed in light of the concerns expressed to us at para 7.4. Publicity should be given to the Act and any relevant policies for its administration.

9.3.8 On the LPG wharf terminal

The complaints in respect of the wharf terminal are primarily complaints in respect of the planning process and current laws.

The first concern relates to the cumulative effect of continuing development. That is dealt with at paras 6.5 and 9.2.11 relating generally to the planning process.

The second relates to the way in which one project for the distribution of LPG to the region was dealt with in three separate applications, one of which would involve nothing more than an application to the Minister under the Petroleum Act. The same problem is evident with regard to the

slurry pipeline as reviewed at paras 7.2 and 9.3.5. We consider that short of using the National Development Act which raises other problems, Government should seek some mechanism to enable one hearing before one Tribunal of related applications affecting one project. We think this would assist all parties, developers, planning authorities and the general public and save time and expense.

An issue raised by the Planning Tribunal in the wharf terminal case concerned the ownership of the seabed and whether customary fishing rights have been extinguished. Those matters are dealt with at paras 6.1, 6.2, 8.2 and 9.2.8. The "symbolic" affront is important, as the Planning Tribunal appreciated. Any affront from the LPG terminal is predominantly symptomatic or illustrative of the failure to recognise the status of the tribal people in the general laws affecting the seabed, the harbour and its fisheries.

It is not for us to review the decisions of the Planning Tribunal except insofar as those decisions define the problems for Maori people in the context of the practical application of current laws and the principles of the Treaty and except insofar as we are bound to determine the meaning and practical application of the Treaty. In the wharf terminal case the meaning and practical application of the principles of the Treaty were considered by the Planning Tribunal and we have no reason to disagree with its findings in those matters.

For these reasons we have no recommendations to make with regard to the LPG wharf terminal itself. That the LPG wharf terminal did not figure more than it did in the presentation of the claimants' case is probably largely due to the Planning Tribunal's approach to its jurisdiction. The case for the incorporation of the principles of the Treaty into the general law rather than to have those matters separately determined by us is illustrated by this example.

10. RECOMMENDATIONS

We recommend to the *Minister of Maori Affairs* in each case, and

1. *To the Ministers of Transport (re Harbours Act), Local Government (re controlling authorities), Energy (re Coal Mines Act and rivers), Fisheries (re seabeds) and Works and Development (re planning laws)* that in view of Maori sensibilities to the ownership of river, coastal and foreshore areas and the need to reconcile those sensibilities with public ownership, and in view of the diversity and occasional anomalies in the laws and practices governing grants of control of various parts of those areas, and the need to integrate those controls with sound planning principles in both environmental and commercial management, the laws relating to the ownership and control of rivers, harbours, coastal and foreshore areas be reviewed, together with the particular enactments in force for particular harbour, coastal and foreshore areas with a view to restoring the ownership of the Crown and expressing therein the Crown's fiduciary responsibilities to the local tribes in terms of the Treaty of Waitangi, and with a view to rationalising existing control anomalies and providing integration with other planning statutes (refer paras 6.1, 6.4, 6.5, 8.3, 9.2.3 and 9.2.4)
2. *To the Minister of Civil Aviation and Meteorological Services* that in view of the tribal interests in the fishing grounds of Pukaki Creek and the Karore and Oriori banks, now affected by the Auckland International Airport, the Civil Aviation Division of the Ministry of Transport be directed
 - (i) to investigate and report to you on the practicality of restricted fishing and/or passage rights to licensed individuals of the Pukaki tribes within the areas of current restriction, and
 - (ii) to include in its current review of the Pukaki causeway and bridge, a report to you on the possibility of changes to improve water flows and maintain sea access in order that the fishing rights guaranteed to the Pukaki people in the Treaty of Waitangi might be partly restored (refer paras 5.5, 5.8 and 9.3.3)
3. *To the Ministers for the Environment and Works and Development*
 - (a) that following the release of the Manukau Harbour Maritime Planning Scheme the Commissioner for the Environment be asked to advise on the formulation of a Manukau Harbour Action Plan with definite commitments to take positive measures for the restoration of the harbour having regard to our finding that the deterioration of the harbour seriously prejudices the enjoyment of fisheries protected by the Treaty of Waitangi, and that positive action is needed more than policies of containment to remove that prejudice
 - (b) that the advice should consider ways in which the plan might be implemented and subsidy assistance settled (refer paras 6.5 and 9.2.6)
4. *To the Minister of Transport* that pending the formulation of an Action Plan as in 3 above, further reclamations in the Manukau be prohibited. (refer para 9.2.6)
5. *To the Ministers of Maori Affairs and Environment* that Manukau Guardians be appointed to provide a Maori and environmental

overview of the harbour and a Maori overview of the environs, and to restore the mana Maori in both, in the manner recommended at para 9.2.6.

6. *To the Minister of Fisheries*

- (a) that in view of Treaty of Waitangi guarantees for Maori fisheries and the current lack of recognition given them, contrary to the Treaty, and in view of our findings that there is need for greater research on how Maori fisheries might be more adequately provided for in legislation, policy and management planning and in view of our finding that there is potential for conflict between Maori, public and commercial fishing interests and that the potential for conflict should be eliminated and in view of the fact that the options adopted in other countries with indigenous minorities have not been fully examined or made known locally and in view of our finding that Maori representatives on bodies under the aegis of the Ministry ought to have appropriate support and access to research opinion that comprehensive studies be undertaken now to identify areas of major Maori habitation and fishing activity throughout the country, the nature of the fishing activity, the location of particular tribal fishing grounds and the marae and hapu associated with each, and the options available for the recognition, protection or compensation of Maori fishing interests and that the information be made available for public consideration
- (b) that in the interim, the lower creek and mouth of Whatapaka or Clarkes creek, and the Pukaki-Oruarangi creeks and tributaries, be reserved now for the exclusive use of the hapu of Whatapaka and Pukaki marae respectively
- (c) that a comprehensive study be undertaken on the effects of commercial fishing in the Manukau Harbour and lower Waikato River and
- (d) in the event that conclusions on that study cannot be finalised within 3 years, following consultation with affected interests and public consideration, commercial fishing in the Manukau Harbour and Port Waikato River mouth areas be prohibited until such time as a marked improvement in the fish stocks is clearly apparent (refer paras 6.1, 6.2, 6.3.1, 6.3.2, 6.6, 8.3, 9.2.7, 9.2.8 and 9.2.9)

7. *To the Minister of Works and Development*

- (a) that consideration be given, in the long term, to modernising and integrating a range of planning statutes with provisions to bind the Crown in the same way as the private citizen (paras 6.5 and 9.2.11) to codify the principles to be applied, as appropriate, to all affected statutes (para 7.2.11) to provide for combined hearings to enable projects requiring several consents to be dealt with at one hearing (para 9.3.5) to provide for the assessment and consideration of the cumulative effect of developments and the maintenance of appropriate environmental qualities (para 9.2.6) to enable the conduct of the parties to be considered and any direction for further disclosure, discussion or research to be made (para 9.3.5) and to provide for the review of existing use rights (para 9.3.4)

Applicable principles should include consideration of the relationship of the Maori people, their values, culture and traditions to any lands, waters or resources, and the protection of Maori lands and fishing grounds.

- (b) that existing legislation be amended forthwith
 - (i) to enable Regional Water Boards to take into account Maori spiritual and cultural values when considering water rights applications
 - (ii) to provide specific reference to Maori fishing areas and the values pertaining thereto in the laws affecting water rights
 - (iii) to provide for the review and reformulation of existing water right discharges that have not been approved by Regional Water Boards (the Manukau Sewage Purification Works, for example) to bring them into line with current standards
 - (iv) to require that Maritime Planning Schemes and Regional and District Planning Schemes shall have regard to the relationship of the Maori people, their values, culture and traditions to any land, waters or resources
 - (v) to remove any exemptions for the Crown from the requirements of the general planning laws and to apply the planning procedures to all mining under the Mining Act 1971 and gas pipeline authorisations under the Petroleum Act 1937 or provide other sanctions for the protection of Maori interests affected by those Acts (refer paras 6.5 and 9.2.11)
- 8. *To the Ministers of Maori Affairs, National Development and Local Government* that consideration be given to affirmative action to fund and assist tribal authorities to establish an economic base for their people, that development levies be apportioned where marae and papakainga are affected by developments and that an additional levy be provided where traditional fisheries are affected or where Maori people have a significant cultural interest in affected resources (refer para 9.2.12)
- 9. *To the Ministers of Lands, Forests, Energy and Works and Development* that negotiations be continued with all affected parties for a settlement of the claims in respect of the compulsory acquisition of lands in the Waiuku State Forest, if practicable without further recourse to this Tribunal (refer paras 5.4 and 9.3.1)
- 10. *To the Minister of Internal Affairs*
 - (a) that the Antiquities Act 1975 and any policies for the administration of that Act be reviewed in the light of the concerns expressed in para 7.4 upon the ground that while the principle of protecting Maori taonga is consistent with the promises of the Treaty of Waitangi, the Treaty promises were intended to confer a benefit on the hapu owning or entitled to those taonga and that the claimants in this case have not received a benefit since the passing of that Act
 - (b) that in view of the apparent lack of knowledge of this Act among those who appeared before us, the Department make known widely in the community both the provisions of the Act and Departmental policies under it (refer paras 7.4 and 9.3.7).

11. *To the Ministers of Maori Affairs, Lands, Forests, Environment, Science and Technology and Fisheries* that their Departments be authorised, at their discretion to assist Maori groups with the preparation and formulation of submissions and the presentation of available evidence to those bodies, boards and tribunals involved in planning processes in order that their concerns might be better known and where practicable verified from available information or opinion (refer paras 6.5 and 9.2.11)
12. *To the Ministers of Lands, Forests and Energy*
 - (a) that the consents and licences whereby NZ Steel Ltd is authorised to undertake mining operations at Waikato North Head be reviewed and renegotiated, or new undertakings sought, to protect sacred sites and adjoining Maori lands, as referred to at para 9.3.6 (but not so as to presume that all former Maori freehold lands are sacred sites), with provision for the re-interment of discovered remains, and with provision for the re-interment of the remains within larger wahi tapu where burials are dispersed, with the concurrence of elders of Ngati Te Ata
 - (b) that if agreed to by Ngati Te Ata, assistance be given for the survey of agreed sacred sites, and their establishment as Maori Reservations with trustees appointed for their control (refer paras 7.3 and 9.3.6)
13. *To the Ministers of Maori Affairs and Works and Development* that in view of our finding that Maori wahi tapu are not adequately protected and that the ownership or control of wahi tapu are not adequately secured to the tribes, and that these things are contrary to the Treaty, statutory provision be made for the compulsory acquisition of significant sacred sites for settlement at Maori Reservations in appropriate cases (refer paras 5.5, and 9.3.2), and
14. *To the Ministers of Maori Affairs and Internal Affairs* that research be undertaken into the desirable options for the identification of Maori sacred sites on Crown or General land having regard to the recent Australian experience pertaining to Aboriginal sacred sites (refer 7.3 and 9.3.2)
15. *To the Minister of Lands* that the Crown negotiate with the current owners and lessee for the acquisition of the Pukaki marae site, urupa (with access thereto) and lagoon, and if those areas or any of them can be acquired then without charge to the Maori hapu the Crown should gazette those areas as Maori Reservations for Ngati Te Akitai and Waiohua, upon the ground that they are existing wahi tapu of those tribes, that such action is necessary to secure and protect them, that there are currently insufficient laws to protect and secure such areas to the prejudice of the affected tribes, and that the omission to provide such laws is contrary to the principles of the Treaty (refer paras 5.8 and 9.3.2)

We now end our report where we began it. The enormous losses sustained by the Manukau tribes must be looked at, although they are for the most part beyond our jurisdiction to examine in any detail. The policies that led to the land wars and confiscations are the primary source of grievance although they occurred last century. It is the continuation of similar policies into recent times that has prevented past wounds from healing. Special consideration must now be given to the people of the

Makaurau, Pukaki and Te Puea Marae. In various degrees they have lost the greatest part of their traditional seafood resource and access to the harbour or have been affected by developments around them predating the year from whence our jurisdiction begins. The Makaurau people lost more than most. Compensation has not been assessed but even were it to be assessed under existing laws, the tribal and fishing loss is not compensatable. This most unsatisfactory state needs to be remedied. Any compensation payable ought to be payable not to individuals but to the various marae. Although compensation was not sought it provides the only practical alternative (refer paras 5.6 to 5.8)

Even after all these years Ngati Te Ata ought to be fully informed on why they had to vacate Moeatoa marae (para 5.3) on whether or not they still have an interest in the Awhitu Lakes and whether access or user rights can still be secured to them (para 5.9). The Rangiriri people ought to be told of on the position concerning their papakainga and should be assisted to re-establish their mana whenua at Awhitu (para 5.10)

Despite the injustices of the Manukau's past, and some chafing at the bit from a younger generation, those before us re-affirmed their loyalty to the nation and their reliance on the due processes of law. It is not their loyalty that is in question but the good faith of the other party to the Treaty, the Crown in right of New Zealand.

Past wrongs can be put right, in a practical way, and it is not too late to begin again.

Dated at Wellington this 19th day of July 1985.



A handwritten signature in black ink, appearing to be "E T J Durie".

E T J Durie—Chief Judge
Chairman

A handwritten signature in black ink, appearing to be "Graham Latimer".

Sir Graham Latimer—Member

A handwritten signature in black ink, appearing to be "P B Temm".

P B Temm QC—Member

LIST OF REPORTS OF THE WAITANGI TRIBUNAL

Wai-1	Fishing Rights (Hawke)	March 1978
Wai-2	Waiau Pa Power Station	February 1978
Wai-4	Kaituna River	November 1984
Wai-6	Motunui—Waitara	March 1983
Wai-8	Manukau	July 1986
Wai-9	Orakei	November 1987
Wai-10	Waiheke Island	June 1987
Wai-11	Te Reo Maori	April 1986
Wai-12	Motiti Island	May 1985
Wai-15	Fishing Rights (Te Weehi)	May 1987
Wai-17	Mangonui Sewerage	August 1988
Wai-18	Fishing Rights (Lake Taupo)	October 1986
Wai-19	Maori 'Privilege'	May 1985
Wai-22	Muriwhenua Fishing	June 1988
Wai-25	Maori Representation (ARA)	December 1986

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