

TE WAHANGA TUPUNGA O TE TIRITI A TREATY DEVELOPMENT RIGHT

*Previous page: Development in the twentieth century –
Ohakuri Dam and powerhouse on the upper Waikato
River, with pine forest beyond the hydro storage lake
and farm land in the foreground. The full image is
reproduced in black and white on page 1180.*

INTRODUCTION

In previous parts of this report, we focused on issues of autonomy and of land administration and alienation. Here, we turn our attention to considering the question of a Treaty development right and, if such a right exists, the kinds of Crown obligation that might attach to it. The question is central to many of the claims submitted to us, which concern the right of Maori of this region to be protected in their utilisation of their lands and resources in the new economic opportunities that arose as a result of colonisation.

In the Rotorua and Taupo districts of our inquiry region, relatively significant areas of Maori land had been retained by the early twentieth century. Much of the region was well-endowed with natural resources, which included indigenous forests, geothermal resources, waterways, and natural scenic attractions. These were identified as having significant economic development potential, even in the late nineteenth century. During the twentieth century, new developments, improved technology, and greater scientific understanding brought new opportunities to utilise resources and lands for economic development.

In spite of this apparently significant potential, claims before us raise issues about the extent to which Maori of this region were able to utilise their retained properties and taonga in these opportunities to develop and prosper, as the Treaty of Waitangi envisaged. Central North Island Maori needed to be able to participate and benefit from development opportunities in changing modern circumstances, and control and participate in managing and setting objectives for the development of their properties and resources. Participation in such opportunities was also necessary in order to develop as a people, according to their preferences and as part of exercising their rangatiratanga over themselves and their resources. Autonomy (the theme that underpins the rest of our report) is an

important aspect of development issues, both in retaining the necessary ability to participate in development opportunities at a decision-making and management level, and because development is itself necessary for people to maintain and exercise their autonomy.

We acknowledge that, in general, development extends to more than just economic development. The development of individuals and communities is generally agreed to also include cultural, social, educational, and political development. This is increasingly recognised in domestic and international thinking. Nevertheless, the economic aspects of development opportunities – and the right to participate in them – are a major focus of the claims submitted to us. Historically, it has been assumed that economic well-being is a major factor in maintaining a degree of independence and control over one's destiny, and that it provides the means for access to and control of development. In the mid-nineteenth century (although not exclusively at that time), it was considered a truism that economic wealth was a major contributor to other forms of well-being. Economic prosperity and independence provided the means, and much of the freedom, for other forms of cultural, political, and social well-being, including the ability to choose how they would be expressed. This remains an important factor in development issues today. We will explore the extent to which the Treaty, and the circumstances in which it was signed, reflect this point.

There are four chapters in this part of the report. In chapter 13, we consider Treaty standards generally in relation to a claimed Treaty right of development, the extent of such a right, what – if any – Crown duties might attach to this, and how these duties might be assessed. We follow this, in chapters 14, 15, and 16, with a consideration of the main development opportunities that arose in the region, and the claims submitted to us about the ability of Central

North Island Maori to participate in these opportunities. In chapter 14, we consider development opportunities in farming, before moving on to explore participation in tourism and indigenous forestry in chapter 15, and power generation and exotic forestry in chapter 16. We also consider these opportunities in terms of the changing economic and policy contexts of the twentieth century.

In this stage one inquiry, our intention has been to consider Treaty development issues in a generic context. Particular claims and cases have been used to illustrate trends and issues where they are relevant. Our focus has been on creating a framework that can be used to consider Treaty development issues in the region generally and to assist the assessment of Crown actions and policies. It has not been possible, given this approach, to specifically address all development opportunities and claims in the region. The claimants have accepted this approach at this

stage of our inquiry. We, in turn, accept that in some cases parties may wish to pursue more detailed inquiries, either in negotiations or as part of a later stage of this inquiry.

Many of the claims before us concern a number of overlapping issues that are also considered in other parts of this report. These include issues of land and resource loss and inadequate forms of land title, the loss of ownership or authority over non-land resources such as waterways and geothermal resources, and environmental impacts. Many of these issues have their origin in the large-scale power generation, farming, and forestry development initiatives that were undertaken in this region. All are closely linked with Maori participation in development opportunities. While we acknowledge that these factors are often closely interlinked, the focus of this part of the report is on issues of alleged Treaty development rights.

TREATY STANDARDS AND DEVELOPMENT

The issue of Treaty of Waitangi development rights has been raised before us in this inquiry. This reflects the significance of the issue for those iwi and hapu of the Central North Island inquiry region that had retained significant properties and taonga by the late nineteenth century and wished to utilise them to take advantage of new economic opportunities. They have raised a number of generic issues before this Tribunal, based on a claimed development right relating both to their own properties and to wider economic opportunities. Both the claimants and the Crown have referred us to previous Tribunal reports and court findings relevant to this Treaty right of development, which examine whether such a right exists (and, if so, to what extent) and what, if any, obligations are attached for the Crown. They asked us to consider how these findings might be applied in our inquiry region. In particular, the Crown requested some practical delineation of any such right for its guidance in the future. Our starting point, therefore, is a consideration of thinking on this issue to date, before we move on to consider how it might be applied to our region.

A TREATY RIGHT OF DEVELOPMENT?

The claimants' case

The claimants submitted to us that a Treaty right of development is now well-established by the Tribunal and the courts. This right exists at a number of levels. At its most basic, it is part of the property rights guaranteed to Maori

for their various properties (including their taonga). This guarantee includes the right of Maori to develop their properties as they choose, including the application of new technologies and knowledge not known to them in 1840. The properties and taonga are those specified in the Treaty texts, as well as those which the Tribunal has subsequently found to be taonga.

Claimants submitted that in this inquiry region, in particular, natural resources have been vital for development purposes. The guarantee of tino rangatiratanga meant that they were part of the properties guaranteed by the Treaty. The well-established Crown duties of active protection of these properties and taonga, and active protection of tino rangatiratanga over them, also apply to the Treaty development right inherent in them. In this instance, active protection of tino rangatiratanga involves the Crown's facilitation of Maori control over development according to their preferences and custom.

Claimants submitted that the Treaty development right entails more than simply a right to develop their properties. They based this submission on the principles of partnership, active protection, and reciprocity, and on the expectation that Maori should be able to participate in new opportunities and share in their benefits. In the claimants' view, this extends to resources and modern economic enterprises not known or necessarily foreseen in 1840. Further, the Treaty right of development involves a more general right of development as a people, including social, cultural, political, and economic development. As with the development of properties and taonga, the Treaty

guarantees Maori autonomy – the right to develop as they choose – and tino rangatiratanga over these other kinds of development.

Claimants agreed that it is not easy to assess how the Crown fulfilled its obligations to protect a Treaty right of development in the varying circumstances of the nineteenth and twentieth centuries. Any such assessment requires a balancing of interests and a consideration of what was reasonable at the time. However, the property rights guaranteed by the Treaty, including the development right inherent in them, cannot be balanced out of existence. The Treaty right of development and the Treaty's guarantee of tino rangatiratanga must also give iwi and hapu the right to control and participate in the development of their properties and taonga, and of themselves as a people.

The Crown's case

The Crown accepts that a Treaty right of development for properties and taonga is guaranteed in the Treaty and that this includes a right to utilise them using new technologies and knowledge. However, this right is no more than the general right available to any property owner, and it does not impose a positive obligation on the Crown. The Crown submitted that the Treaty right of development is often expressed in broad and aspirational ways and that it requires more practical guidance as to the extent of the right so it can carry out its Treaty obligations. The Crown proposed that we follow the view of the Court of Appeal in *Te Runanganui o Te Ika Whenua Inc v Attorney-General* in this respect, and the minority opinion in the Waitangi Tribunal's *Radio Spectrum Final Report*. In the Crown's view, these decisions show that any Treaty development right is limited to aboriginal or customary rights and usages as they existed or could be reasonably foreseen when the Treaty was signed in 1840, and to the application of new technologies and knowledge to those rights and usages.

The Crown also submitted that the Treaty right of development must be balanced with other Treaty rights and with the rights and interests of all New Zealanders. In doing so, a 'minimal infringement' of Maori rights and interests (including a development right) is not always reasonable in the circumstances. The Crown agreed that the Treaty requires Maori interests to be given significant weight and protection, but it also asked us to fairly articulate a process of balancing interests that it could use to meet its obligations to Maori and to other citizens.

Key question

The claimants and the Crown agree that there is a Maori Treaty development right. However, parties before us raised the question of how this right might be best expressed or delineated for practical application in our inquiry region. Given the importance of the development issues submitted to us, we have identified the following question for consideration:

WHAT IS THE EXTENT OF THE TREATY RIGHT OF DEVELOPMENT AND WHAT CROWN DUTY, IF ANY, ATTACHES TO THIS?

In addressing this question, we will first outline the claimant and Crown submissions in more detail, and then present our analysis under the following topics:

- a. the right of Maori to develop their properties and taonga, and the principle of mutual benefit from settlement;
- b. the nature and extent of the right to develop properties and taonga;
- c. the interface between kawanatanga and tino rangatiratanga in respect of development;
- d. the Treaty right of development in the changing circumstances of the mid-to-late twentieth century; and
- e. applying the Treaty right of development in current circumstances.

DELINEATING A TREATY RIGHT OF DEVELOPMENT

KEY QUESTION: WHAT IS THE EXTENT OF THE TREATY RIGHT OF DEVELOPMENT AND WHAT CROWN DUTY, IF ANY, ATTACHES TO THIS?

The claimants' case

Claimants submitted to us that a Maori right to development is a well-accepted concept, recognised within the jurisprudence of the New Zealand courts. Internationally, human rights law accepts that there is an inalienable right of all human beings and peoples to participate in and enjoy economic, social, cultural, and political development.¹

Claimants further submitted that the Maori Treaty right of development is now long established through both the Tribunal and the courts.² They submitted that this Treaty right is fundamentally based on guarantees to Maori of their properties and taonga, and of their tino rangatiratanga over these. The Treaty guarantee of full rights in properties and taonga includes a right to develop and profit from them.³ Claimants submitted that this Treaty development right extends not only to land, but to all resources or taonga that Maori have not willingly and deliberately alienated. This is particularly important in the Central North Island, where non-land resources have always held considerable value for possible development purposes. They include rivers and waterways (and the water resource within them), the geothermal resource, and indigenous forests. The proprietary rights in these resources include the rights to develop them and to exercise rangatiratanga over that development.⁴

In the claimants' submission, it is also well established that the Treaty right of development is not frozen in time at 1840. It includes the right to use new technologies, or to use taonga in new and unforeseen ways.⁵ The right of development, therefore, is not limited to customary rights and usages as exercised at 1840. In that respect, the claimants submitted that it is selective to rely on the Court of

Appeal's findings in *Te Runanganui o Te Ika Whenua Inc v Attorney-General* without considering them in their full context and in light of the subsequent position and findings of the Te Ika Whenua Rivers Tribunal.⁶ The claimants reject any attempts to limit what a Treaty development right means, and they reject any categorisation of this right as aspirational only.⁷

The claimants also submitted that the well-established duty of active Crown protection of lands and resources extends to the active protection of the right to develop them. Further, the Crown's duty to actively protect Maori in the retention of sufficient land and resources is closely linked to a right of development in two ways: first, because without that sufficiency there is nothing to develop, and secondly, as the Ngai Tahu Tribunal and others have found, because the Crown was required under the Treaty to ensure that Maori retained a sufficient base not just to survive but to prosper in the new settler economy. The claimants argued that economic development was the necessary prerequisite for fulfilling Lord Normanby's 1839 instructions to the first Governor, William Hobson, and also the Treaty principle of mutual benefit.⁸ Maori were thus entitled to retain sufficient land and resources to prosper and develop as a people.

The claimants submitted that the Crown's duty of active protection extends to positive assistance to Maori in some circumstances.⁹ This duty of positive assistance may require some consideration and priority to be given to Maori so that they can participate in development opportunities. One example is a grant of a temporary monopoly in an important industry for Maori, such as tourism, as was found appropriate by the Court of Appeal in *Ngai Tahu Maori Trust Board v Director-General of Conservation*.¹⁰

The claimants also submitted that there is a strong link between development and Maori autonomy. In guaranteeing tino rangatiratanga, the Treaty also necessarily conveys a right of development, for without that development no true autonomy as provided for by the Treaty can exist. Autonomy has been recognised by the Taranaki Tribunal

as pivotal to the Treaty and the concept of partnership inherent in it.¹¹

Claimants submitted that the general right Maori have of development as a people has been recognised in a number of recent Tribunal reports. These include the *Mohaka ki Ahuriri Report*, which recognised that Maori had a general right to participate fully in the developing colonial society and economy.¹² Claimants also referred us to the three levels of a Treaty right of development that were put to the Radio Spectrum inquiry and which that Tribunal accepted in its majority final report. These were:

- ▶ the right to develop resources to which Maori had customary uses prior to the Treaty (development of the resource);
- ▶ the right under the partnership principle to the development of resources not known in 1840 (development of the Treaty); and
- ▶ the right of Maori to develop their culture, language, and social and economic status using whatever means are available (development of Maori as a people).¹³

The claimants also referred us to the majority finding in the *Radio Spectrum Final Report* that:

Maori expected and were entitled to develop their properties and themselves and to have a fair and equitable share in Crown-created property rights, including those made available by scientific and technical developments...¹⁴

The claimants submitted that their right of development as a people is further informed by trends in international thinking and law. We were referred to article 1 of the United Nations Declaration on the Right to Development, adopted by the General Assembly in 1986 and supported by New Zealand, which refers to the inalienable human right of every person and all peoples to participate in, contribute to, and enjoy economic, social, cultural, and political development. Similarly, the draft United Nations Declaration on the Rights of Indigenous Peoples includes a statement that the right of self-determination includes a right to develop resources, and also a right of compensation where

indigenous peoples have been deprived of their means of subsistence and development. The claimants submitted that the established Treaty principles are not inconsistent with this draft.¹⁵

The claimants also submitted that while the nature of the right of development has often been stated at a general level, that does not make it little more than an 'aspiration'. It was fundamental to Maori expectations of the Treaty, and to the guarantees in the Treaty, that Maori would be able to share in and benefit from colonisation.

The claimants accept that the partnership principle does require some balancing of interests. However, especially where property rights are concerned, more than a simple balancing is required. Property rights and the development interests inherent in them need to be taken proper account of.¹⁶ The national interest, for example, does not give the Crown an unfettered right to exercise its kawātanga powers. Policies or actions that will have a major impact on resources and properties, and on the development rights attached to them, require consultation and agreement.¹⁷

It was also submitted to us that in this inquiry the Crown has focused too narrowly on issues of development of Maori land and resources, rather than looking at the wider issue of the development of Maori as a people according to their preferences and needs. It was submitted that iwi and hapu of this region have not been totally reliant on Crown intervention and assistance in order to develop, as the Crown assumed. In fact, from an early period, they have utilised new knowledge and technologies to develop in areas such as tourism. The Treaty development right requires the Crown to facilitate such development in ways chosen by iwi and hapu according to their preferences. This is not the same thing as heavy-handed, paternalistic intervention, where the Crown decides what is good for Maori or assists with developing Maori properties and resources without regard to Maori communities, their participation, or their right to make decisions about the nature and direction in which their communities develop.¹⁸

In terms of the Crown's duty to actively assist with Maori development, the claimants argued that we should give weight to the farm development schemes of the 1930s, which show conclusively that the Crown had accepted such a duty by at least that time. For the late nineteenth and early twentieth centuries, claimants relied on the evidence of the Crown's historian, Donald Loveridge, that governments provided active assistance to settlers while refusing to provide Maori with equivalent access to credit, training, and assistance, even though the need to do so was clearly articulated at the time. They also failed to help Maori overcome barriers to development that were unique to them and imposed by the Crown's own title system, even though this was also suggested at the time. These things were not only evident with 'hindsight', Dr Loveridge concluded. The claimants argued that the Crown had obligations to provide Maori with equal access to the opportunities that it actively provided for other sectors of the community, assist Maori to overcome unfair barriers to development, and provide such other assistance as was appropriate in particular circumstances. These were concrete ways in which the Crown could help fulfil the Treaty promise of development for Maori.¹⁹

The Crown's case

The Crown submitted to us that the Tribunal has found that the Treaty entitled Maori to develop their property and themselves, and that this includes development made possible by scientific and technological change. The Crown agrees that the Treaty does not require a static notion of the expression of Maori property rights.²⁰ The Crown submitted, however, that while Treaty development rights are often broadly defined, any right of development must also co-exist with other rights and other principles of the Treaty. As such, the notion of a right of development must be reasonable and compatible with a balancing of interests.²¹

Crown counsel invited us to provide 'practical guidance to the Crown as to the way in which government should behave in order to meet Treaty principles', arguing that

'some delineation of the extent of the right [of development] may be necessary'.²² The Crown submitted to us that in any such delineation the view of the Court of Appeal in *Te Runanganui o Te Ika Whenua Inc v Attorney-General* was correct. The president of the court, Lord Cooke, stated that:

however liberally Maori customary title and Treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power.

The Treaty of Waitangi is to be construed as a living instrument, but even so it could not sensibly be regarded today as meant to safeguard rights to generate electricity.²³

The Crown also relied on the minority opinion in the Tribunal's Radio Spectrum inquiry, that the right to development was not a 'generalised concept'. It 'could only apply to an existing right and did not extend to a right to develop resources not used in a traditional manner at 1840'.²⁴

The Crown noted that some claimants have framed the right of development as 'something more than an affirmation of the general right of Maori to develop their property rights and express them in modern terms'. Counsel submitted that this approach assumes that the right of development carries a positive obligation on the Crown to assist that development, and sought clarification of the basis for characterising the right in this way.

The Crown submitted that any positive obligation to assist Maori needs to be balanced in light of other Treaty interests and the interests of other New Zealanders. It should be subject to the criteria of reasonableness identified by the Privy Council in the *Broadcasting Assets* case. An assessment of such a right of development would require a careful assessment of the State's capacity at the time and the economic implications of such assistance. The Treaty does not endorse a particular economic approach or attitude to market forces. Different economic policies can be consistent with the Treaty, and macro-economic

decisions are properly the realm of ministers responsible to the elected Parliament.²⁵

The Crown characterised the Mohaki ki Ahuriri Tribunal's comment that a 'right to develop' entitled Maori to fully participate in the developing colonial society and economy as an 'aspirational right'. The Crown submitted that an aspiration that Maori might fully participate does not necessarily require Crown intervention in, for example, a tourism market, nor in any other particular resource or industry. The steps the Crown has to take to fulfil its overarching obligation of good faith and active protection will depend on the circumstances, taking into account the Government's broader obligations. The Crown reminded us that there may well be circumstances in which Maori resources and development have been adversely affected by economic changes and events beyond the Crown's control. This needs to be borne in mind in any Tribunal analysis.²⁶

The Crown submitted that article 1 of the United Nations Declaration on the Right to Development, referred to by claimants, does not create any legal obligation for the Crown, even if the New Zealand Government has supported resolutions in its favour. Therefore, its persuasive weight must be limited. The article is highly aspirational, and as such it requires a balancing between the relative rights of all peoples to participate in and contribute to particular elements of development. General references to such non-binding international resolutions do not provide practical guidance about how to apply Treaty principles to specific acts or omissions of the Crown. The Crown submitted that the situation is similar with the non-binding draft United Nations Declaration on the Rights of Indigenous Peoples. It is a general aspirational statement of international law, which, while 'not inconsistent' with Treaty principles, does not contribute to a detailed framework by which the Crown can assess, and be assessed in relation to, those principles.²⁷

The Crown also questioned whether a requirement for minimal infringement of Maori rights or interests is necessarily always compatible with the reasonable steps the Crown might need to take in particular circumstances and

its obligation to balance a number of interests. The Crown accepts that the Treaty requires Maori interests to be given significant weight and protection, but asked us to fairly articulate a process of balancing interests that it might use to meet its obligations to Maori and other citizens.²⁸

Tribunal analysis

To assist with the analysis of this complex issue, we start by summarising our understanding of the five key components of the Treaty right of development, which will be set out in this chapter:

- ▶ the right as property owners for Maori to develop their properties in accordance with new technology and uses, and a right to equal access to opportunities to develop them;
- ▶ the right of Maori to develop resources in which they have a proprietary interest under Maori custom, even where the nature of that property right is not necessarily recognised, or has no equivalent, in British law;
- ▶ the right of Maori to retain a sufficient land and resource base to develop in the post-1840 economy, and of their communities to decide how and when that base is to be developed;
- ▶ the opportunity for Maori to participate in the development of Crown-owned or Crown-controlled property or resources in their rohe, and to do so at all levels (including as entrepreneurs); and
- ▶ the right of Maori to develop as a people, in cultural, social, economic, and political senses.

Because of the importance of the Treaty right of development to the claims before us, we begin with a survey of the way in which that right has been considered and explained to date. We start with a brief summary of the point broadly agreed between the Crown, the claimants, previous Tribunals, and the courts: that Maori have a Treaty right to develop their properties and taonga. As argued to date, this has been characterised as part of the 'full rights' guaranteed in the 'ownership' of properties and taonga. There has also been broad acceptance by the Tribunal and the

courts that the Crown's obligation of active protection applies to the development right inherent in these properties and taonga.

We then go on to consider how and to what extent a Treaty development right might extend to modern circumstances and enterprises, and to Maori people as iwi and hapu communities. In doing so, we also consider the kinds of Crown obligation that might attach to any such extension of the development right.

(a) Two agreed aspects of development: the right of Maori to develop their properties and taonga; and the principle of mutual benefit from settlement

We note that, in our inquiry, all parties before us have accepted some form of development right arising from the Treaty guarantees. At its most fundamental, this right of development is recognised as inherent to the property guarantees of the Treaty, because a right of development is part of the full rights of property ownership. Also, the Crown and claimants agree that there was and is a Treaty right to participate in the development opportunities, and share in the benefits, that were expected to result from British colonisation. The Crown, however, characterises this right as 'aspirational' and cautions that the steps it has to take to meet it must be assessed in light of what is reasonable at the time and its need to balance other interests.²⁹ Nonetheless, the Crown accepts these two aspects of a Treaty right of development.

As the Treaty consists of two texts, it is now well established that underlying principles inform its interpretation and understanding. These principles help to clarify and confirm the Treaty right of development. In particular, the Tribunal and the courts have discussed the development right in terms of the generally agreed principles of active protection, partnership, mutual benefit, and reciprocity (which we discuss below).



An instance of resource-based development. Maori had long used flax for traditional purposes. With the arrival of Pakeha traders, there came a demand for prepared flax to supply the rope-making industry. To meet this new market opportunity, a number of Maori communities switched to producing milled flax in commercial quantities.

The general acceptance by the Tribunal and the courts of a Treaty right of development is based on the strong emphasis, in the wording of both texts of the Treaty, on guarantees for the properties and taonga retained by Maori. In article 2 of the English version, Maori are guaranteed exclusive possession of their lands, forests, fisheries, and such 'other properties' as they own individually or collectively, unless they choose to alienate them to the Crown. In the Maori version, iwi, hapu, and rangatira are guaranteed tino rangatiratanga (full authority) over their kainga (villages), whenua (lands), and taonga katoa (all their valued possessions or treasures, whether tangible or intangible). Further, their 'just Rights and Property' are recognised in the preamble to the Treaty, and 'royal protection' is promised in article 3. In the view of Tribunals such as the Whanganui River and Te Ika Whenua Rivers Tribunals, these rights were – at the very least – rights of property ownership, even for taonga where British law did not recognise a property right. Part of enjoying full property rights is the right that owners have to develop their properties as they choose. The properties specifically referred to in the English version of the Treaty are lands,

forests, and fisheries.³⁰ Further, all taonga are guaranteed by the Maori version of article 2. A number of Tribunals have helped to ascertain, after careful inquiry, what might be considered taonga. It includes the Maori language and culture, particular tribal rivers, and geothermal resources. Developable 'property', therefore, has been defined, among other things, as what Maori actually possessed and not what British law of the time said could be owned.³¹

The Treaty guarantee of full rights in these properties and taonga, and of tino rangatiratanga over them, included a right to develop them if Maori so chose. This must be set, in the first instance, in its nineteenth-century context. Landed property owners in Britain were leading the way in entrepreneurial commerce and business. Settlement and colonisation were expected to be based on property and the ability to participate in development opportunities based on ownership or leasing of property. Indeed, not only was the development of New Zealand for farming expected, it was required by the governments of the day. A cursory examination of parliamentary debates reveals constant fulminations against British speculators, who bought up property and failed to use it, and against Maori, who were regularly told that their land must be developed for the good of the colony. This was the era of progress and projected prosperity, in which the Crown took an active role in the development of land and other resources (as we will see in chapters 14 to 16). There was not only a nineteenth-century right to develop one's property, therefore, but a belief that one must so develop that property, or lose it to those who would.

At the same time, it was recognised that, for Maori, retaining sufficient of the properties and taonga guaranteed by the Treaty was critically important if they were to participate successfully in the new society that was being created. Just as British settlers were entrepreneurs, evidence was presented in our inquiry that Central North Island Maori (among others) also took advantage of the commercial opportunities of early settlement. The trading economy of the pre-1860s period was addressed by a

number of witnesses. The scene was set, it seemed, for the mutual prosperity of both peoples.³²

It has been well established, however, that the British Crown saw risks for Maori. It publicly accepted that by entering into a Treaty and establishing a new relationship it had an obligation to protect Maori while also actively promoting European colonisation. Maori were not to suffer in the way that other indigenous peoples had done from the impacts of colonisation and settlement. Acknowledgement of the need to offer such positive protection was, in fact, one of the reasons the British Crown gave for intervening in New Zealand. Positive protections offered by the Crown at this time included the provision of necessary laws and institutions for controlling British settlers and thus preventing Maori suffering 'calamity' from them. Governor Hobson was instructed to ensure that the Crown controlled the transfer of any property from Maori for settlement. This was conceived, at least in part, as a measure for the protection of Maori.³³ As was noted in the now famous *Lands* case, it placed the Crown as a buffer, or intermediary, between settlers and those Maori who wished to sell.³⁴

Hobson was also instructed that when the Crown's agents purchased Maori land they were not to allow Maori to enter unfair contracts or sell land they required for their own needs. An official protector was to monitor and ensure this. At the same time, Maori would sell some land cheaply to the Crown (which it would resell at a profit), so that they, too, would benefit from the arrival of settlers, the investment of capital, and the rise in property values.³⁵ These policies helped to establish the principle that the Crown had a duty of active protection of Maori, to ensure that they retained sufficient properties to profit from settlement and were able to participate in future opportunities.

The Muriwhenua Fishing Tribunal commented that Lord Normanby's instructions to Hobson could be described as reflecting the principle that:

nothing would impair the tribal interest in maintaining personal livelihoods, communities, a way of life, and full economic opportunities. It was subject to the overriding principle of

protecting Maori properties. It was even more important that settlement would not in itself be the excuse to relieve Maori of that which they wished to keep.³⁶

As early as 1840, it was understood in Britain that it was:

the fundamental right of aboriginal people, following the settlement of their country, to retain what they wish of their properties and industries important to them, to be encouraged to develop them as they should desire, and not to be dispossessed or restricted in the full enjoyment of them without a beneficial agreement.³⁷

Maori would also benefit, as the Hauraki Tribunal observed, from the rise in the value of the properties that they retained. As noted above, this assumed that Maori would alienate some areas of land for settlement and that the land they retained, now interspersed with that of the settlers, would gain added value for the future benefit of their communities. They would share in the general prosperity.³⁸

These ideas were not confined to the Crown colony period. As we saw in part II of this report, many officials and ministers of the Crown proclaimed their public belief that Maori would and should prosper from the development of the colony. To take but one example, the Secretary of State for the Colonies, the Earl of Derby, wrote to the Governor of New Zealand in 1885:

Although, therefore, Her Majesty's Government cannot undertake to give you specific instructions as to the applicability at the present time of any particular stipulations of a Treaty which it no longer rests with them to carry into effect, they are confident, as I request that you will intimate to your Ministers, that the Government of New Zealand will not fail to protect and to promote the welfare of the Natives by just administration of the law and by a generous consideration of all their reasonable representations. I cannot doubt that means will be found of maintaining to a sufficient extent the rights and institutions of the Maoris, without injury to those

other great interests which have grown up in the land, and of securing to them a fair share of that prosperity which has of necessity affected in many ways the conditions of their existence.³⁹

The Hauraki Tribunal also found that British politicians and officials recognised, from the very outset of the colony, that specific efforts were required from the Crown not just to grant Maori formal legal equality with settlers (as is implied in article 3 of the Treaty), but also to help them become 'equal in the field' with settlers.⁴⁰ This requirement of active protection was essential for properties and taonga guaranteed in article 2 and also encompassed the development interest inherent in them. In our view, this is a key point. From the beginning of the colony, it was known that Maori would only share in the anticipated benefits of settlement if they were able to participate equally with settlers in development opportunities. Based on instructions to the colony's Governors, the Tribunal concluded that the New Zealand Government was supposed to assist Maori to 'become "equal in the field" with settlers, by appropriate management of reserved lands, education and training, and a share in the machinery of state'.⁴¹

As Dr Loveridge noted in our inquiry, the Government's early attempts at assistance to Maori included overcoming their lack of capital by helping them to acquire mills, ships, and the other expensive assets needed to participate in the trading economy of the day. This active assistance tailed off from the 1870s, however, just as the development of land for pastoral farming began to be seen as the key opportunity for both Maori and settlers. In Dr Loveridge's view, this was a vital factor in explaining why Maori had not been able to develop their lands for farming by the end of the Liberal period.⁴²

The claimants relied on the following statements from Dr Loveridge, which appear to us to be apposite:

during the 1890s and early 1900s there were repeated appeals from informed Maori and European observers for the governments of the day to support agricultural education for Maori,

and to provide prospective Maori farmers with better access to State-supported credit. Although – once again – this subject has not received the attention from historians which it deserves, it would appear that relatively little was done. It is difficult to avoid the conclusion that the country in general, and Maori in particular would have been much better off in the long run if the funds employed for the continuing Crown purchase of Maori lands in the early 20th century had been devoted instead to this kind of investment . . .⁴³

Under cross-examination by Richard Boast, Dr Loveridge elaborated on this point:

the argument that is being made quite strongly in the '90s and early 20th century, before the First World War, is that we need to take all the programmes we've got for assisting European settlers, well, for settlers, and enable Maori, despite all the problems with tenure and title, enable them to benefit from those as well. So, what I'm saying is there was a strong movement at the time. This isn't hindsight, and it just never went anywhere, unfortunately.⁴⁴

We will explore this issue in depth in chapter 14. Here, we note Dr Loveridge's evidence that development assistance was provided to Maori up until the 1870s, and that it was certainly contemplated after that time and up until the development schemes of the 1930s. The evidence in the reports of Terry Hearn, Tony Walzl, and others, and in the tangata whenua evidence, shows that after the 1930s it became a constant (if muted) theme within the consideration of governments.⁴⁵ There is nothing presentist, therefore, in the claimants' argument (advanced by Lennie Johns, for Ngati Tutemohuta, and by many others) that the Crown could and should have been assisting Maori, at least to the extent that it assisted settlers, and assisting them in particular to overcome barriers of tenure and title that it had itself created.⁴⁶ There is no hindsight needed for this, as Dr Loveridge stated under cross-examination. We make a particular note of this point, because, while the Crown accepts that Maori had a Treaty right to develop properties and benefit from settlement, it queries whether it had, or

has, any obligation to provide active assistance for them to do so.

We note also the view of previous Tribunals that the ability to participate fully in economic development opportunities requires more than just the possession of properties and taonga. In particular, appropriate experience, skills, and knowledge, the ability to accumulate funds or access loan finance, and suitable recognised forms of management and title for property have been identified as important factors. Historians have noted that on occasions Maori, like other indigenous peoples, faced considerable challenges in participating equally in development opportunities.⁴⁷ This meant that the Crown's duty of active protection extended not just to ensuring that Maori retained sufficient properties and taonga to participate in opportunities, but also to ensuring that Maori were facilitated or assisted to do so. The *Mohaka ki Ahuriri Report* commented that without this active protection even Maori who retained land might well end up little better off than if they had been unable to retain any land at all.⁴⁸

This stance is very firmly based on the idea of present and future benefits, and protections that took account of this. The Court of Appeal, in its judgment on the *Lands* case, confirmed that:

the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable . . .⁴⁹

Using lands and waters to the 'fullest extent' includes the right to develop them. The *Mohaka ki Ahuriri Report* commented that active protection of a sufficiency of land for present and future needs requires consideration of what might be needed for development. It acknowledged that determining sufficiency is not easy. A number of relevant factors (and the circumstances of the time) have to be taken into account. Nevertheless, it confirmed a 'development right inherent in the Treaty' that requires the Crown to do more than just protect a subsistence lifestyle.⁵⁰

Also important are the Treaty principles of partnership and mutual benefit, particularly that the overall intent

of the Treaty was (and is) to enable both peoples to live together, to participate in creating a better life for themselves and their communities, and to share in the expected benefits from settlement. Participation in new opportunities and sharing in the benefits of settlement relied to a large extent on Maori being able to utilise some of their properties and taonga for economic development. This participation would, in turn, help to facilitate other forms of community and individual development and well-being, so long as Maori were able to make their decisions in accordance with their preferences and custom.

The *Report on the Muriwhenua Fishing Claim* found that the basic object of the Treaty was to enable two peoples to live in one country and establish a better life for themselves. In doing so, the Treaty provided ‘for a continuing relationship between the Crown and Maori people, based upon their pledges to one another. It is this that lays the foundation for the concept of a partnership.’⁵¹ The *Report on the Mangonui Sewerage Claim* similarly found that the Treaty made a place ‘for two people of vastly different cultures, to their mutual advantage, and where the rights, values and needs of neither would be necessarily subsumed.’⁵² In the final report of the Radio Spectrum Tribunal, the majority opinion found that the principle of mutual benefit assumes that Maori will be able to participate in development opportunities at all levels – as owners and managers, as well as consumers.⁵³ Thus, the Tribunal linked development to the tino rangatiratanga (exercising authority in development opportunities and enterprises) – as well as the properties – retained by Maori.

The Court of Appeal, in the *Lands* case, unanimously found that the Treaty signified a partnership between Pakeha and Maori, requiring each to act towards the other reasonably and with the utmost good faith.⁵⁴ The Treaty also fundamentally signified a partnership or compact that was the foundation of an enduring relationship, enabling both peoples to participate and prosper in the new society being created.⁵⁵ We note the view of Justice Somers that the principles of the Treaty remain the same today as they were in 1840: ‘what has changed are the circumstances to

which those principles are to apply’. When the Treaty was made, ‘all lay in the future’ and the expectation was that the Treaty would be honoured.⁵⁶ The Treaty’s creation of an enduring relationship, based on a positive duty to act in good faith, fairly, reasonably, and honourably, has been reaffirmed by the Court of Appeal in a number of subsequent decisions, including *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* and *Ngai Tahu Maori Trust Board v Director-General of Conservation*.⁵⁷

Previous courts and Tribunals have also noted the Treaty principle of reciprocity, derived directly from articles 1 and 2 of the Treaty. This recognises that the cession of sovereignty or kawanatanga in article 1 was conditional upon the continuing guarantee of tino rangatiratanga in article 2. Any exercise of kawanatanga is, therefore, limited by a duty to respect and give effect to Maori tino rangatiratanga over their properties and taonga. This principle further clarifies our understanding of what is involved in the Treaty right of development. The central notion of this ‘essential bargain’ – the exchange of the right to govern for the right of Maori to retain authority and control over their properties and taonga – underpins the right of Maori to retain significant control over the development of those properties and taonga.⁵⁸ It is for Maori to set the goals and objectives for development according to their preferences and customs, and to meet the needs and well-being of their communities.

The Crown, however, is troubled by the characterisation of the principle of mutual benefit – and the expectation that Maori would prosper from settlement, and should have been assisted to do so – as a ‘right’. In the Crown’s view, this is something so broad that it can only be termed an aspiration; it is not a concrete right with set outcomes for which governments can be held to account if they do not deliver them. Also, as we have noted, the Crown disputes that it had a duty to provide active assistance for Maori economic development.

First, we note the view of other Tribunals that the Crown was in fact required to provide active assistance to Maori economic development in the nineteenth century.

Secondly, in our own inquiry the evidence shows that it did so – however haphazardly – until the 1870s. Even after that, the Crown did not necessarily forget the obligations that it had undertaken from 1840. As we discussed in part II, ministers such as Ballance in the 1880s and Seddon in the 1890s promised Maori that the Government would assist them to achieve prosperity. What else were Rotorua Maori to think, when Ballance told them at Whakarewarewa that:

it is the earnest desire of the Government to promote the prosperity of the Maori people. Our policy is not one of force and repression to be applied to the loyal Natives of New Zealand, but of friendly discussion and assistance to enable them to work out their own destiny in a way that will secure the permanent prosperity and happiness of the race.⁵⁹

Public rhetoric is one thing; actual delivery is another. Vincent O'Malley's evidence, for example, shows that the Government wanted to encourage the development of a silk industry in the 1880s. The Education Department sent mulberry plants to native schools and asked teachers to encourage Maori to cultivate the plants for silk worms if conditions were suitable.⁶⁰ In chapter 14, we will explore Gary Hawke's evidence on the question of what were considered appropriate roles for the State at the time. But the fact that this kind of initiative was even conceivable or possible sets a standard for the Crown in the nineteenth century, no matter how well or how poorly it was executed. Governments could and should have provided active assistance for Maori economic development (at least to the extent that they did for settlers) and provided the means to deliver on the Treaty bargain of mutual prosperity from settlement. As discussed above, we are persuaded by the evidence of the Crown's historian, Dr Loveridge. Had governments continued their pre-1870s economic assistance to Maori, or had they even provided Maori 'with the same level of assistance for agricultural development as was being provided to European settlers',⁶¹ then Central North Island Maori would not have fallen behind their settler compatriots by the turn of the century.

None of this means that the Crown had to guarantee economic success for Maori in any or all of their ventures. We return to that point below. Here, we note that the mutual benefit implicit in the Treaty was deliverable. The generation of wealth in this country from (often former) Maori land and taonga is indisputable. New Zealand has prospered; so too should the Maori people have prospered. In our view, the right of development is in part a right to have shared in that prosperity. The Government was required to provide equality of access to development opportunities. In practical terms, as we will see in chapters 14 to 16, this meant providing the same level and quality of assistance to Maori that it provided to settlers and, where its own actions had created barriers to Maori development, appropriate assistance to overcome those barriers.

(b) The nature and extent of the right to develop properties and taonga

The Radio Spectrum Tribunal, in its majority final report, explained that a Treaty development right for properties and taonga includes a right to profit from uses unknown in 1840 and to develop them using new technologies. This has been widely accepted for the properties specified in the English version of the Treaty (lands, forests, and fisheries). There has been less agreement, however, about the 'other properties' mentioned but not specified in article 2, and some dispute about what is or is not a taonga. The Crown has accepted, for example, that there is a development right for intangible taonga, such as language and culture.⁶² The Waitangi Tribunal has made findings in other inquiries, as it is required to do, about further taonga guaranteed by the Treaty. For our purposes, it is important to note that things which cannot necessarily be owned under British law, such as water or geothermal energy, were nonetheless taonga in the exclusive possession of Maori in 1840. In the view of the Tribunal, the closest British equivalent is that such taonga were in fact property and therefore Maori had a right under the Treaty to develop and profit from them. We will give specific instances in this section.

In the *Radio Spectrum Final Report*, the Tribunal argued that where there was doubt over what was included as taonga or 'other properties' the Crown's obligations were to find out what Maori considered to be taonga and then to protect such taonga. Further, pre-emption applied to non-land resources as well as land. The Crown could not simply acquire Maori taonga by claiming ownership under the common law or, where the common law did not suffice, legislating to acquire it by such laws as the Petroleum Act 1937. In the Tribunal's view, such:

encroachments on properties undefined in the Treaty not only used the Crown's right of kwanatanga to overcome Maori rangatiratanga but defied the Crown's fiduciary obligation under the Treaty to protect Maori 'just Rights and Property'.⁶³

Those properties and taonga that are particularly relevant to our inquiry region include natural resources such as indigenous forests, waterways (including rivers and lakes and the water resource in them), and the geothermal resource. Intangible taonga of great value to Central North Island Maori include their language and culture, as we heard from many witnesses.⁶⁴ Where the Tribunal has identified 'other properties' or taonga not specifically identified in the Treaty texts, the Treaty's guarantees have been found to include a right of development. The Whanganui River Tribunal found that Atihaunui rights in their river included a development right. This development right included a right to control access and rights to water within the river, which was a 'valuable, tradeable commodity'. That Tribunal also found that the 'just rights and property' in the river must have included a right to license others to use the river water. In the words of the Tribunal: 'The right to develop and exploit a water resource is conceptually no different from a right to develop and exploit the resources on dry land.'⁶⁵

The *Te Ika Whenua Rivers Report* found that, under the Treaty, Te Ika Whenua peoples were entitled to full, exclusive, and undisturbed possession of their properties and taonga, and that these included their rivers. As part of this, they were entitled to the full use of those assets

and the right to develop them to their full extent. When they were developed by the Crown, the Tribunal's view was that Maori had to be paid for the use of their proprietary interest.⁶⁶

The *Report on the Te Reo Maori Claim* found a development interest with regard to te reo as a taonga protected by the Treaty. That Tribunal found that it was consistent with the protection of this taonga and the principles of the Treaty that the Maori language and matters of Maori interest should have a secure place in broadcasting. Any statutory impediment to this had to be questioned, as 'in its widest sense the Treaty promotes a partnership in the development of the country and a sharing of all resources'.⁶⁷ The majority *Radio Spectrum Final Report* found that the entire electromagnetic field, and therefore the radio spectrum part of it, was a taonga for Maori. Therefore, there was a right to develop this based on new technology, including the technology that made use of the radio spectrum possible.⁶⁸ The Crown's kwanatanga right to manage the resource was not questioned, but its exclusive right to profit from it was certainly challenged. The *Preliminary Te Arawa Geothermal Report* identified geothermal taonga and an inherent right of development in them.⁶⁹

Tangible and intangible taonga and properties, therefore, can have a right of development attached to them. Are there limits to that right?

One layer of the development right – that Maori citizens have the right to develop or profit from the development of their property – depends, of course, on their having retained a proprietary interest. The Treaty of Waitangi, and the changes expected and anticipated as a result of it, may have changed the full and exclusive nature of customary rights in some taonga.

When the Ika Whenua peoples shared their rivers with settlers, for example, this sharing did not mean that all their development rights were lost, and the Crown still had to have regard to this in considering future development options. The *Te Ika Whenua Rivers Report* found that the ability of tangata whenua to exercise their Treaty development right today depends on present-day circumstances,

not on the position in 1840. That Tribunal found that the tangata whenua had shared the use of their rivers, in reasonable fulfilment of their Treaty obligations, and that this had resulted in the loss of an exclusive development right in the rivers. Nevertheless, they still had a residual property right that had to be taken into account by the Crown when considering any development options.⁷⁰ The *Report on the Manukau Claim* also noted that as a result of the Treaty a Pakeha interest in the harbour had to be recognised, and therefore the tangata whenua interest was no longer exclusive. However, the tangata whenua interest was still important and was not merely the interest of a minority section of the public, or limited to particular fishing grounds, and this also had to be recognised.⁷¹

Is the development right limited to customary rights, knowledge, and technology as at 1840? The Tribunal and the courts have generally agreed that the answer to this question is 'no'. The principles of active protection and partnership, assuming a future for both peoples and a sharing in future benefit, mean that development cannot be limited to the technology and knowledge of the parties in 1840. As the Court of Appeal explained in the *Lands* case, the Treaty is a living document and is capable of application to future changes, including the application of knowledge and technology that may not have been anticipated or foreseen in 1840.⁷² A number of Tribunal reports have taken a similar view. The *Report on the Motunui–Waitara Claim* commented that the Treaty is:

not intended to merely fossilise a status quo but to provide a direction for future growth and development. The broad and general nature of its words indicates that it was not intended as a finite contract but as the foundation for a developing social contract.⁷³

The *Muriwhenua Fishing Report* also warned against relying on the literal terms of the Treaty. Instead, the Treaty was to be construed by taking into account the twin objectives of securing settlement and protecting Maori interests, for the mutual benefit of both parties.⁷⁴

In terms of fisheries, the *Muriwhenua Fishing Report* found that, as the Treaty was meant to offer a better life for both parties, it also provided a right for iwi and hapu to develop and expand their resources, using modern technologies as well as those known at the time the Treaty was signed. In the words of that Tribunal, 'a rule that limits Maori to their old skills forecloses upon their future. That is inconsistent with the Treaty.'⁷⁵ In the case of development opportunities for fisheries, the Tribunal found that access to new technology and markets was part of the quid pro quo of settlement:

The Treaty offered a better life for both parties... Maori no longer fish from canoes but nor do non-Maori use wooden sailing boats... Both had the right to acquire new gear, to adopt technologies developed in other countries and to learn from each other.⁷⁶

This meant that the Treaty 'imposed not the slightest shadow of impediment on the use and development of those resources that Maori chose to keep'.⁷⁷

The Ngai Tahu Sea Fisheries Tribunal found the same right for Maori to develop their property and themselves, including developments made possible by scientific and technological developments.⁷⁸ In that inquiry, the Crown accepted a right of development with regard to Maori fishing, including a commercial element and the right to employ new techniques, knowledge, and equipment for commercial purposes.⁷⁹

The *Preliminary Te Arawa Geothermal Report* found that geothermal resources can be a taonga and that Treaty guarantees for these taonga include a development right. This right extends to the application of knowledge and technology that could not have been foreseen or predicted in 1840: 'the generation of electricity from geothermal energy is surely a good example'.⁸⁰ We note, however, that at the time that Tribunal was reporting the Crown had actually given up its exclusive right to generate electricity, and the Maori concerned still had a property right in some of the surface features. The *Petroleum Report* also confirmed a Treaty

development right, including a right to 'exploit a resource not extensively used in traditional times for new purposes not contemplated in those times'.⁸¹

For Maori property owners, therefore, and for Maori who have tino rangatiratanga over taonga, the right to develop and profit from property and taonga cannot be confined to customary uses or knowledge as at 1840. This does not mean, however, that it is not a uniquely Maori right. Tribunals have consistently found that the right of development encompassed a tribal as well as an individual development right. This is based on the guarantee of tino rangatiratanga in the Treaty and on principles of partnership, mutual benefit, and reciprocity. The Muriwhenua Fishing Tribunal commented that the 'settlement profit' that Maori expected to gain from European settlement derived from tribal access to new technologies and markets, from opportunities for Maori to adopt Western ways, and from a combination of both. The Treaty provided for all options, with Maori having the choice to develop along customary lines from a traditional base, to assimilate in a new way, or to walk in two worlds. However, this choice could not be forced, and in the circumstances of the time a tribal right was clearly in the minds of both Treaty partners, with Maori seeking and gaining recognition of protection at a tribal level. Lord Normanby's instructions to Hobson provided that each tribe should retain sufficient land for their needs.⁸²

The *Muriwhenua Fishing Report* noted that the guarantee of tino rangatiratanga was crucial, 'because without it the tribal base is threatened socially, culturally, economically, and spiritually' and that 'the exercise of authority was not only over property, but of persons within the kinship group and their access to tribal resources'.⁸³ The *Ngai Tahu Sea Fisheries Report* similarly found that a tribal right of self-regulation or self-management is an inherent element of tino rangatiratanga.⁸⁴

In part II of this report, we explained how Maori autonomy and authority was central to the Treaty and to the rights of Central North Island Maori. This guarantee of rangatiratanga, or Maori autonomy, has been found to extend to

Maori control of the exercise of their right of development, including their right to develop on a tribal basis if they so choose. The *Report on the Orakei Claim* found that:

rangatiratanga denotes the mana not only to possess what one owns but, and we emphasise this, to manage and control it in accordance with the preferences of the owner.⁸⁵

The *Mohaka ki Ahuriri Report* confirmed that the Maori text of article 2, in guaranteeing tino rangatiratanga over land and other properties, provided for 'more than mere possession of those properties'. It provided for chiefly control and management of those properties, with kawana-tanga or governance being tempered by respect for chiefly rangatiratanga.⁸⁶

Recent Tribunal inquiries have also considered tino rangatiratanga outside the traditional tribal context, and have noted that the guarantee still provides for Maori to exercise control of their own tikanga and development. In its *Tē Whanau o Waipareira Report*, the Tribunal commented that in the urban context rangatiratanga provides for Maori:

control of their own tikanga, including their social and political institutions and processes, and, to the extent practicable and reasonable, they should fix their own policy and manage their own programmes.⁸⁷

(c) The interface between kwanatanga and tino rangatiratanga in respect of development

The Tribunal and the courts have considered the matter of the balance between the Crown's right to govern and its reciprocal obligation to recognise and protect rangatiratanga in terms of the right to development. They have agreed that achieving this balance is not an easy matter. Given that it has to be achieved in circumstances that are subject to change and cannot always be foreseen, it fundamentally requires the application of the Treaty principles of partnership and good faith. The courts have consistently found that the Crown's right to govern should not be

unreasonably shackled, and that it is required to act in the national interest and for the benefit of all New Zealanders. However, these obligations also need to be considered in the context of Treaty guarantees, and this requires good faith and reasonableness. The *Lands* case recognised that the test of reasonableness is necessarily a broad one and has to be applied in a realistic way, and that the parties owe each other cooperation.⁸⁸

The Ngai Tahu Sea Fisheries and Muriwhenua Fishing Tribunals, for example, accepted a Crown right to legislate to protect the sea fishery resource in the national interest, but warned that this exercise still had to take account of Maori interests in the resource. The Ngai Tahu Sea Fisheries Tribunal commented that:

The Crown in the exercise of its powers of governance in the national interest clearly has a right, if not a duty, to make laws for the conservation and protection of valuable resources. . . . But such power should be exercised with due regard to the interests of the owners of such resources. . . .⁸⁹

The Tribunal found that this required the Crown to consult with Maori on proposed fishery conservation measures and to ensure Maori interests were not adversely affected, 'except to the extent necessary to conserve or protect the resource'.

The *Turangi Township Report* confirmed the Crown's right to legislate for conservation of a resource, commenting that to do so also protects Maori resources and is therefore compatible with article 2. However, the Tribunal found that, where the Crown considers appropriating a resource or property in which Maori interests are protected by the Treaty, there is a critical difference between the control or management of a resource, on the one hand, and the expropriation of property rights on the other. The Tribunal found that appropriation can only be justified in exceptional circumstances in the national interest.⁹⁰ Where such an infringement of rights is necessary in exceptional circumstances, appropriate redress is required.

This approach has been confirmed in a number of Tribunal reports. The *Te Ika Whenua Rivers Report*, for example, found that when the Crown exercised its legitimate kawanatanga rights to develop hydro generation on rivers in the public interest, it nevertheless failed in its Treaty obligations to protect the development interest of Te Ika Whenua peoples in their rivers. It failed to consider and compensate the tribes for their proprietary interests in the rivers (which included a right to develop or profit from the resource). The Tribunal found that if kawanatanga rights are to be exercised, then such exercise should be fair and made with proper consultation. If property rights are affected, 'then full compensation should be paid'.⁹¹ The Tribunal found that it was likely any compensation negotiations today would have to consider compensation for past use, compensation for loss of rights or loss of the ability to share as a partner in power production, and payment for the future use of the proprietary interest of Te Ika Whenua in their rivers.⁹²

Similar examples of appropriation in our inquiry region, as we shall see in chapters 16, 18, and 20, include:

- ▶ the rights and authority of Taupo Maori over their lake and rivers, which were altered by the Native Land Amendment and Native Land Claims Adjustment Act 1926, vesting ownership of beds, banks, and the right to use the waters in the Crown; and
- ▶ the rights and authority of Rotorua, Taupo, and Kaingaroa Maori over their geothermal taonga, which were affected by the nationalisation of the resource in the Geothermal Energy Act 1953.

In terms of a balancing of interests, it has been established by the Tribunal and the courts that the legitimate kawanatanga role of the Crown to take action in the national interest, including conserving natural resources for the future good of all, does not mean that the Crown can thereby deny Maori Treaty interests or reduce them to matters of mere procedure or convenience. The Treaty guarantees (including the Treaty development right inherent in them) remain a constant obligation on the Crown and cannot be balanced out of existence. What it

is reasonable for the Crown to do, however, will change according to circumstances. The *Whanganui River Report* explained that:

Maori rangatiratanga is not therefore to be qualified by a balancing of interests. It is not conditional but was expressed to be protected, absolutely. It is rather that governance is qualified by the promise to protect and guarantee rangatiratanga for as long as Maori wish to retain it.⁹³

We make no further comment here. In chapter 17, we consider in more detail the question of how (and in what circumstances) the Crown is required to balance interests.

(d) The Treaty right of development in the changing circumstances of the mid-to-late twentieth century

In this section, we consider the right of development in the ‘modern’ circumstances of the mid-to-late twentieth century, when new knowledge and technology enabled the development of the energy and exotic forestry industries on properties owned or controlled by the Crown in the central North Island.

Background: From 1935, the Labour Government’s emphasis on article 3 rights, Maori employment, and Maori land development became recurring themes for the rest of the twentieth century. In 1938, for example, the *Evening Post* reported the view of the Prime Minister, Michael Savage, that:

The Government recognised that the welfare of the Maori was inextricably bound up with his land and that the development of the Maori people could best be achieved through effective land settlement. The Government was doing all it could to encourage and assist the Maori in whatever field he desired to apply his talents, but since it was through the land that a new form of Maori life was being created, it was in that field that the principal effort was being made.⁹⁴

The National Government of the 1950s continued Labour’s policy emphases in this respect. Its policy was to ‘develop the land and the Maori people’, and it sought to

achieve both objectives through extensive farm training.⁹⁵ The purpose of the Maori Affairs Act 1953, for example, was described by the Minister of Maori Affairs, Ernest Corbett, as ‘to help in the economic development of the Maori to equality with the Pakeha.’⁹⁶ His aim was to provide equality in employment, education and housing, and to:

assure for Maori settlers a good title to their farms, to assist them to develop the land, to teach them modern methods, and to establish farming as a way of life that can be regarded as economically and socially rewarding.⁹⁷

As we will see in chapter 14, land development alone was never going to support the growing Maori population of the Central North Island after the Second World War. Modern industrial development in the region encompassed two other major opportunities: the utilisation of waterways and geothermal fields for the generation of much of the nation’s power; and the planting of enormous areas of Crown (and other) land in exotic forests. New technology created opportunities for the massive expansion of these industries after the Second World War, and they generated wealth alongside continuing efforts to develop the lands of the volcanic plateau for farming.

Urbanisation was another feature of this era. Many Maori from the Central North Island migrated to towns within the region or to the major cities. What was required of the Crown, in Treaty terms, was the fulfilment of its ongoing obligation that rural communities retain and develop their land and resource base, such that they could prosper in a material, social, and cultural sense. They would then form a home base for those who had moved to the cities, maintaining a strong marae culture – a *turangawaewae* – for those who had left to relate to and return to.

In 1958, the Department of Maori Affairs noted:

In spite of the emphasis on urbanisation, the value of having prosperous and sound rural communities cannot be overlooked. . . It remains as essential as ever to plan for the best utilisation of Maori-owned land and to continue steadily with

the development of idle portions, so as to strengthen the basis of Maori rural communities.⁹⁸

This kind of thinking was not out of step with what Maori required. As we noted in chapter 11, Joan Metge's 1964 study of urbanisation, *A New Maori Migration*, pointed out that ownership of land was valued because it gave urban Maori an attachment to 'home' and speaking rights on their marae. The process of urbanisation did not need to be traumatic or disintegrative for them, she argued, if a strong rural society allowed the maintenance of social and cultural relations between the towns and the home communities.⁹⁹ Increasingly, however, there was a disjunction between the Crown's policy of integration and the maintenance of rural links and *turangawaewae* (see chapter 11).

Throughout the 1960s and 1970s, governments continued to develop the natural resources of the Central North Island, alongside commitments to Maori land development and employment and social security, as the way to provide economic equality for Maori. Governments of this era were concerned that Maori were becoming an 'impoverished under-class', and saw integration and employment as the solution. Development for the Maori people as a distinct group, therefore, was still a priority for governments, but they remained focused on farm development and on providing jobs.

In introducing the Maori Affairs Act 1967, the Minister of Maori Affairs, Ralph Hanan, claimed that its purpose was to 'further the progress of the Maori people' by promoting agricultural development 'by the Maori people for the Maori people', and to 'release Maoris in many respects from the economic straitjacket that they have been in for many years'. The Government's goal was to 'help the Maori people to march forward as equal citizens'.¹⁰⁰ The National Government's premise was still that 'the development of Maori as a people was tied to the development of their land', alongside the provision of jobs and housing in the towns and cities.¹⁰¹ Although his policies were very differ-

ent, Labour's Maori Affairs Minister, Matiu Rata, noted in 1973 that his Government considered:

land as necessary not only for the social advancement of the Maori people, but also for their economic and cultural advancement... every encouragement should be given to the Maori people to develop their land.¹⁰²

In the Central North Island, however, forestry jobs took prominence in regional – and Maori – development.¹⁰³

It was not until the 1980s, with Labour's massive restructuring of the State sector, that tribal development, tribal autonomy, and Maori business (rather than a Maori workforce) became part of Government policy. This strand of Labour's thinking stood alongside the divestment of State assets and the privatisation of the valuable Central North Island industries that had hitherto employed Maori (among others) under State management and for State profit. At the same time, the return of Maori assets to Maori control became a theme. The commercial fisheries settlement of 1992, for example, stands in contrast to the exclusion of Maori from any share in the privatised electricity or forestry industries of the Central North Island region at that time.¹⁰⁴

Although their policies and approaches differed enormously, it appears, from the evidence available to us, that from the 1940s until the 1980s governments were broadly consistent in their belief that:

- ▶ Maori had a right to develop economically, socially, and (to an extent) culturally as a people;
- ▶ governments should assist (or sometimes direct) that development; and
- ▶ Maori land must be developed in the interests of both Maori and the nation.

Since the 1990s, the belief that the Government should direct Maori development has declined in relative terms, but assistance is still provided through Te Puni Kokiri and other agencies. In our inquiry, the Crown submitted that Maori did not have a Treaty right to assistance with development, but nonetheless claimed to be providing such assistance in tourism and other fields.¹⁰⁵ This brings us to

the question of what Treaty rights applied to development in the 'modern' era (the mid-to-late twentieth century), so that we may assess the Crown's actions in that respect in chapters 14 to 16. We turn now to examine how the courts and the Tribunal have characterised the development right for this period.

The Treaty right of development during the 'modern' period: As we have seen, there is general agreement that there is a right of development inherent in the rights guaranteed by the Treaty for properties and taonga, and a corresponding Crown duty of active protection of that right. There has been less agreement, however, over properties or taonga not specifically identified in the wording of the Treaty texts, and over some uses not reasonably foreseeable in 1840, and whether these arise from or have an associated right of development. As we have seen, the Crown and Maori agree that the Treaty protects and guarantees lands, forests, and fisheries, and enterprises that have developed from them, including the application of new technologies and knowledge. At the same time, after hearing evidence from Maori and the Crown, Tribunals have found that rivers and geothermal taonga (examples of particular importance for our inquiry) are or can be taonga guaranteed by the Treaty, and as such they are subject to full rights, including a right of development. This approach has been accepted to a limited degree by the courts, where *te reo* and culture, although not specified in the Treaty, have been accepted as taonga in which there is an inherent development right and a corresponding Crown obligation of active protection, including active protection of that development right.

As the Radio Spectrum Tribunal explained, the courts have tended to take a more limited approach in some cases where the property or use was not clearly linked to aboriginal rights and usages as at 1840. In such cases, they have tended to limit consideration of a more modern Treaty development right (that is, a right which can be applied to new technologies and knowledge) to what could be considered aboriginal rights and usages at 1840 or what could reasonably have been foreseen at that time. This has

similarly limited the Crown's duty of active protection in this regard.

In his minority report on the Radio Spectrum inquiry, Judge Savage took the view that the Treaty development right is actually 'a right to develop a right; for example, fisheries or *te reo* Maori'. In some respects, claims of a bare, general right to develop are more a matter for social conscience, social equity, politics, and article 3 of the Treaty, issues that were beyond the expertise of that Tribunal.¹⁰⁶ Any general 'principle' of development per se cannot exist independently of any other Treaty principle or right.¹⁰⁷ For resources not known about at 1840, his view was that Maori have the same rights as everyone else.

Nonetheless, Judge Savage's minority opinion confirmed that Maori had a Treaty right to develop resources in respect of which they had customary rights and usages prior to the Treaty. The judge considered, however, that while 'it is beyond argument that economic development was a high motivator for Maori in entering the Treaty', the Treaty does not 'make promises of economic outcomes' and it cannot be read as a promise of economic outcomes down through the generations. Even so, he agreed that Maori have a general Treaty right to develop as a people, including to develop their culture, language, and social and economic status, using whatever means are available to them. In some circumstances, such as with culture and language, the Crown has a positive duty to foster and assist development.¹⁰⁸

This view that a modern Treaty right of development might need to be limited by links to other rights has been raised in a number of Tribunal inquiries and court cases. It includes the issue of whether a modern development right must, under the Treaty, be derived from known aboriginal rights or usages as at 1840 when it was signed. This issue has also been raised by parties before us for our consideration, particularly in the context of the Treaty development claims taken by the *Te Ika Whenua* peoples for their rivers. One of the *Ika Whenua* rivers, the *Rangitaiki*, forms part of the eastern boundary of our Central North Island inquiry region.

We have already explained a number of cases where the courts have previously agreed that Treaty principles and expectations are important factors in considering obligations of the Crown, including those involving development issues. This is in addition to, and a further means of clarifying the meaning of, the Treaty texts and what might have been understood and expected from 1840. The courts agree that the Treaty must be regarded as a living document capable of being applied in new and unforeseen circumstances.

Following the passing of the Energy Companies Act 1992, Te Ika Whenua peoples pursued urgent claims about their authority and development rights in the Rangitaiki, Wheao, and Whirinaki Rivers, both through the Tribunal and through the courts. This legislation provided that local electricity companies (as owners of the assets) could transfer the assets in hydro schemes and the water rights associated with them (including hydro dams located on Te Ika Whenua rivers) to third parties.¹⁰⁹ The Tribunal held an urgent inquiry and issued an interim report, *Te Ika Whenua – Energy Assets Report*, recommending that the Wheao and Aniwhenua power schemes and associated water rights should be retained in their present ownership, or held by the Crown, until the substantive claim to Te Ika Whenua rivers was heard. Te Ika Whenua claimants then took court action, seeking to prevent any proposed transfer. Part of their case was based on their claim to the rivers and the preservation of their rights by section 354 of the Resource Management Act 1991. Interim relief was declined by the High Court and the matter was appealed.

Having heard this case, the Court of Appeal explained that in spite of ‘very elaborate argument’ it was actually declining the appeal on one quite short ground. This was because there was no realistic prospect that the Crown would vest complete or partial ownership of the hydro dams in the tangata whenua. Any Maori claims, therefore, to remedies other than the ownership of the dams would not be affected by the proposed transfer of the dams’ ownership.¹¹⁰ Part of that judgment has been widely cited

(the Crown did so in this inquiry). This was the Court of Appeal’s view that:

however liberally Maori customary title and treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power. Such a suggestion would have been far outside the contemplation of the Maori chiefs and Governor Hobson in 1840.¹¹¹

The court explained that no authority from any jurisdiction had been cited to it to suggest that aboriginal rights extended to the right to generate electricity. The appellants had not argued that way; nor had they contended that the dams themselves were taonga.¹¹² The court went on to state that:

neither under the common law doctrine of aboriginal title, nor under the Treaty of Waitangi, nor under any New Zealand statute have Maori, as distinct from other members of the general New Zealand community, had preserved or assured to them any right to generate electricity by the use of water power...¹¹³

The court explained that while it had to make its judgment on the quite narrow ground of the likely impact of proposed transfer of ownership of the dams, the way was still open for Te Ika Whenua peoples to seek a remedy with the Waitangi Tribunal. It commented that:

if any claims to compensation or interference with Maori customary or fiduciary or treaty rights to land or water can be mounted, they will not be diminished or prejudiced in any real sense by such transfers...¹¹⁴

With regard to eels in the rivers, the court found that if control had been assumed without consent there might well have been breaches of the Treaty of Waitangi, as the Crown acknowledged. But, as to the two dams, non-Maori control had been an accomplished fact for a decade and more. The clock could not be put back; ‘the Maori remedy lies in the Waitangi Tribunal claim, or conceivably in Court action based for instance on Maori customary title

or fiduciary duty'. The court further stated that if the claimants had meritorious claims:

their most practicable remedy may well lie through the Waitangi Tribunal... the reason why the present appeal does not succeed is simply that rights to or in the dams themselves are not held by Maori, nor is there any substantial prospect of a change in that regard; yet Maori claims to remedies not extending to the ownership of the dams will not be affected by the proposed transfers...¹¹⁵

The matter was then taken to a further Tribunal inquiry. The Ika Whenua Rivers Tribunal stated:

We do not disagree with the comment of the Court of Appeal that Maori, as distinct from other members of the community, have not had preserved or assured, through customary title, any right to generate electricity by the use of water power. What we do say is that under the Treaty Maori were entitled to the full, exclusive, and undisturbed possession of their properties, which would include their rivers. As part of that exclusive possession, they were entitled to the full use of those assets and to develop them to their full extent. This right of development would surely include a right to generate electricity. The ability to exercise that right, however, depends on present-day circumstances, not on the position as at 1840.¹¹⁶

For the Tribunal, therefore, the key was the proprietary right that Maori retained in their rivers, and whether the Crown could use their taonga to generate electricity without consulting them and without paying for the use of that property. However, the Tribunal also found that the tangata whenua had shared the use of their rivers, as was expected of a reasonable Treaty partner. As a result of this and other matters, Maori no longer had the sole and exclusive right to generate hydroelectricity on their rivers. The Tribunal found, nevertheless, that although Te Ika Whenua had given up part of their interest by sharing the resource, they had still retained a residual proprietary interest that was subject to Treaty guarantees. The Crown was obliged to protect that interest and allow Te Ika Whenua the full

use and enjoyment of it, including their right of development of it. The Tribunal also found that this interest had to be taken into account, even if the Crown decided that, for matters of compelling national interest, it would develop the rivers for hydroelectricity purposes. In such a case, full compensation would need to be paid for the use of the remaining proprietary interest held by Te Ika Whenua people.

The Tribunal found that, in the circumstances of the 1970s, the Government's decision to take control of electricity generation on these rivers was a reasonable exercise of kawanatanga, so as to protect and develop the resource for the benefit of all New Zealand. However, where the Crown failed in its Treaty obligations at that time was in omitting to consult with Te Ika Whenua Maori and take account of their remaining interests in the rivers, and the importance of this to their economic and cultural well-being.¹¹⁷ The Tribunal found that if kawanatanga was to be exercised, then such exercise had to be fair and with proper consultation. If this involved infringing property rights, then full compensation had to be paid.

The Tribunal also found that if circumstances changed, as happened in the 1980s and 1990s with the transition from cooperative use to commercialisation of power production, the Crown was obliged to consider the continuing Te Ika Whenua interest in their rivers, including their remaining development interest. A move from cooperative power generation for the public benefit of all, to the privatisation of the industry where private profit was also possible, opened new opportunities for Te Ika Whenua in their rivers. The Crown, in fairness to its Treaty partner, was bound to take that into account.¹¹⁸ The Tribunal found that: 'It seems quite unacceptable that commercial profit can be made from Te Ika Whenua's interest in the rivers without any form of compensation or payment.'¹¹⁹

The Ika Whenua claim thus ranged over a series of twentieth-century circumstances of great relevance to our Central North Island inquiry. First, there was the initial legislation, from 1903 onwards, by which the Crown established its 'sole' right to use water for electricity. Secondly,

there was the decision to develop these particular rivers for that purpose in the late twentieth century. Thirdly, there was the policy decision that it was no longer necessary for the nation to be the sole owner or operator of power production and supply, and that private parties could acquire both the assets and the profits. In each of these circumstances, there were Treaty tests for the Crown to meet.

We note the Court of Appeal's view that a Maori right to generate electricity, over and above the right of any other citizen, is not guaranteed by the Treaty. The Ika Whenua Rivers Tribunal added that where Maori had a proprietary right in their rivers the Crown had to consult and to pay for any use of that taonga, including for the generation of electricity.¹²⁰ As Sir Apirana Ngata put it in the 1930s, the national interest might require a resource such as petroleum for fuel, but there was nothing that required the profits to go to the Crown instead of to Maori owners.¹²¹

We also note the Ika Whenua Tribunal's view that the policy change of the 1980s and 1990s created a new development opportunity for the tribes whose taonga had been used in the national interest and for profit. The facts in our inquiry are different from the Ika Whenua case in some respects, as we will see in chapter 16, but the broad findings of the court and Tribunal assist in setting the Treaty standards by which the actions of the Crown should be judged.

As well as its relevance to hydroelectric power issues in our region, the Tribunal's view is also pertinent to the privatisation of forestry assets in the 1980s and 1990s. As with the big power projects, exotic forestry came from an era in which the Crown actively sought the economic development of the Central North Island, its Maori land, and its Maori people. Mr Walzl's 'Maori and Forestry' report includes many references to statements to that effect by officials and ministers in the 1960s and 1970s, and to a form of partnership between the Forest Service and the local tribes (and others).¹²² In 1987, forestry lease arrangements were reviewed, and the resultant report stated:

Maoridom's stake in the forestry sector of New Zealand is now substantial and ways in which this investment in land and trees should be used as collateral to finance the peoples [sic] aspirations for economic development should be explored...¹²³

Of course, much forestry development involved jobs on former Maori land:

Despite it being seen by officials that these Ngati Whaoa people were living on Forest Service land in Forest Service buildings, the people themselves had a different viewpoint. As Peter Staite notes: 'The significance to me, is that they lived and they died there as their tupuna had.' The people continued to see this land as their land, as they were living on it. When Peter Staite's grandfather and grand-uncles went to Waiotapu to work in the forest they saw that they were working on their own lands. There was an unbroken chain of occupation. 'They never lost their mana to the land; their occupation was continuous.'¹²⁴

Inevitably, Maori who saw things this way felt that they had a special role and stake in exotic forestry development. The Crown could have given real effect to this in its restructuring during the 1980s. We will consider this point in chapter 16. Here, we note that there are a variety of connections between Maori and some properties or resources which have come under the ownership or control of the Crown. Where there is a strong whakapapa and spiritual connection, and where the land or resource may have been obtained in breach of the Treaty or to the detriment of its former owners, the Crown's obligation to provide Maori with a share in new opportunities arising from that land or resource is correspondingly greater.

(e) Applying the Treaty right of development in current circumstances

In this section, we consider the application of the Treaty right of development today. The Crown has asked for some guidance as to how Maori rights of development should now be delineated in practical terms. We begin with a

further case in the Court of Appeal, which has elaborated on the Treaty development right in modern circumstances. In 1995, shortly after it heard the *Ika Whenua* appeal, the court heard *Ngai Tahu Maori Trust Board v Director-General of Conservation*.¹²⁵ The case has been cited by claimants and the Crown in our inquiry.

In this case, the Court of Appeal was able to consider the wider context of Treaty expectations and principles because of the Conservation Act 1987, which requires the Director-General of Conservation to consider Treaty principles when administering the Act. This applies to regulations issued under the Act that allow permits for whale-watching enterprises.¹²⁶ The case arose when Ngai Tahu took legal action to try to prevent the director-general from issuing further permits for commercial whale-watching in the Kaikoura area. The High Court recognised that the director-general was exercising a legitimate aspect of *kawanatanga* under the Conservation Act in considering and issuing permits. It also acknowledged Ngai Tahu concerns about the proper exercise of his duty to consult, and granted a declaration that he ought to have consulted Ngai Tahu interests before granting a permit to a competitor. However, it dismissed the Ngai Tahu claim that, by virtue of the Treaty, they should have received protection for their commercial whale-watching business for a period of (say) five years from the commencement of their business. Ngai Tahu then appealed this decision.

The Court of Appeal commented that commercial whale-watching was a recent enterprise, founded on the modern tourist trade. It was distinct from anything envisaged in (or any rights exercised prior to) the Treaty. It had very little, therefore, to do with what might be considered to be aboriginal rights at 1840. The court also commented that, as an enterprise, it was hardly likely to have been foreseen in 1840. The court commented: 'however liberally Maori customary title and treaty rights might be construed, tourism and whale-watching are remote from anything in fact contemplated by the original parties to the treaty'.¹²⁷ This was similar to what had been found with regard to aboriginal rights in *Te Runanganui o Te Ika Whenua Inc v Attorney-General*.

The court also found that the commercial whale-watching business could not be construed as a *taonga* or a fishery property right as contemplated by the Treaty. Nevertheless, the court found that in applying Treaty principles and expectations, this enterprise could be regarded as so intimately linked to *taonga* and fishery rights 'that a reasonable treaty partner would recognise that treaty principles are relevant'.¹²⁸ The Treaty principle of active protection of Maori interests had to be considered. The court confirmed, as it had in earlier cases, that in the wider context of considering a Treaty development right, the Treaty principles were not to be approached narrowly.

In assessing all these factors, the court found that it was relevant that the commercial use or exploitation of coastal waters for viewing whales had some similarity to fishing or shore whaling. Commercial whale-watching, although neither a *taonga* nor the subject of *tino rangatiratanga*, was nevertheless 'analogous' to them. It was additionally significant and 'a further analogy', that, 'historically, guiding visitors to see the natural resources of the country has been a natural role of the indigenous people'. In addition, the Ngai Tahu commercial whale-watching activities were essentially tribal rather than those of a few individual Maori. Ngai Tahu also had a special interest in the enterprise, having been pioneers of the whale-watching industry off Kaikoura. They had taken the initiative to find capital for, and devote energy to, this use of the waters.¹²⁹

In taking all these factors into account, the court found that while the legislation required priority to be given to the conservation objective for whales, and consideration to be given to the standard of service being offered, nevertheless a 'residual factor of weight' had to be the 'special interests that Ngai Tahu have developed in the use of these coastal waters'. The court found that 'a period of complete protection sufficient to justify the development expenditure incurred by Ngai Tahu may be part-and-parcel of this'.¹³⁰ For these reasons, the court found that while it could not accept the entire Ngai Tahu case, they were still entitled to succeed in their appeal to a limited extent.¹³¹

The court also found that some of the Crown's arguments in the case had been extreme and unacceptable. The Crown had accepted the relevance of Treaty principles, given their incorporation into legislation, but had argued that this meant no more than a duty to consult Ngai Tahu, and that the consultation had had no bearing on the ultimate decision about a new permit. The court found there was 'an absence and even a repudiation' of any notion that Ngai Tahu's representations could materially affect the ultimate decision concerning the permit.¹³² The court found that a reasonable Treaty partner could not reduce consideration of Ngai Tahu interests to 'mere matters of procedure' or 'an empty obligation to consult'.¹³³ Iwi had to be considered as Treaty partners in administering the Act and Ngai Tahu were entitled to a 'reasonable degree of preference' in considering permits.¹³⁴

In this case, the Court of Appeal confirmed that consideration of a Treaty development right did not have to be limited to 1840, or even to those properties and taonga specifically mentioned at 1840, or to foreseeable uses of them. The court was willing to consider Treaty development rights, and Crown obligations to protect these, in modern enterprises that appeared particularly suitable to the development expectations of Ngai Tahu. Relevant factors included that the enterprise was located off the Kaikoura coast within the rohe of Ngai Tahu, and that the enterprise was at least 'analogous' to traditional practices and rights of Ngai Tahu. These included the tribe's development of its coastal resources, the indigenous practice of guiding visitors to see natural resources in their rohe, and their fishing history. In addition, the right was stronger because a tribal development initiative was involved, where the iwi had committed resources and energy to the enterprise, and where it had been a pioneer or significantly involved in the new industry. As a result of all these factors, an extension of the Treaty right of development in modern circumstances was reasonable, as was Crown protection of it. This included 'a reasonable degree of preference', such as an agreement to grant an operating monopoly for a set period to give the iwi the opportunity to further establish itself in the enterprise.

The Court of Appeal commented that this combination of factors might well be unique, and therefore of limited precedent value. After considering the facts of our inquiry, we consider that similar combinations of circumstances have occurred in the Central North Island region, as we will discuss in chapters 15 and 16, especially with regard to forestry and tourism. The application of a Treaty development right to modern enterprises is therefore relevant to our consideration of development opportunities. The parallel between modern tourism ventures and customary practices in the Central North Island is even stronger than that in the whale-watch case. In our inquiry region, the evidence of Maria Tini, Cybele Locke, Professor Boast, and many others demonstrates a practice of guiding foreign visitors to see the natural wonders of the region (and profiting therefrom) that is unbroken from 1840 to the present day. It has, of course, changed and developed with the times.¹³⁵

The right to profit from touring visitors and to develop tourism was confined to Maori before the signing of the Treaty in 1840, but it is now shared with others. On one level, it is related to the right to develop properties, because the relevant natural features were possessed exclusively by Maori in 1840. Some of those taonga have been alienated with consent, others have been expropriated or acquired in breach of the Treaty, and yet others remain in Maori ownership. Where tourism depends on ownership of and access to such resources, the Crown's Treaty obligations include:

- ▶ ensuring that Maori retain a sufficient land and resource base for development (we note that geothermal taonga were seen by everyone as vital in this respect, from at least the time of the Fenton Agreement in 1880 and the Thermal Springs Districts Act 1881); and
- ▶ providing equal access to development opportunities on this type of property.

The modern development right in tourism, however, goes beyond the development of properties or the development of tribes from a sufficient resource base. Treaty



An early postcard showing tourists at Tikitere. Its caption reads: 'The native guide explaining the wonderful boiling mud - cauldrons - known as Hells gate'.

principles must be applied to the Crown's decisions about the tourism industry:

- ▶ where Maori are exercising a customary right or, as with tourism in the Central North Island, the legitimate outgrowth or development of one;
- ▶ where it is something analogous to a customary right or practice;
- ▶ where it is in their rohe;
- ▶ where it involves their taonga;
- ▶ where they have been pioneers or have had a long history of involvement; and
- ▶ where it is a tribal initiative.

In our view, this delineation of the modern right should assist the Crown in future in the Central North Island, whenever there are opportunities in Crown-owned or Crown-controlled resources. Modern tourism ventures, profits from the generation of electricity, and exotic forestry are all obvious examples of where it applies (see chapters 15 and 16).

A modern development right includes the opportunity for Maori to participate in new development opportunities involving Crown-owned or controlled resources, so long as at least some of the above criteria are met. Where it owns or controls resources itself, the Crown's obligation to actively protect that right is to give full effect to it. This

may include, as it did in *Ngai Tahu Maori Trust Board v Director-General of Conservation*, positive assistance by means of a temporary monopoly. It must also include opportunities for the exercise of tino rangatiratanga. It is not enough, in other words, for Maori to benefit as workers on a project in their rohe – they must have an appropriate involvement at all levels of the operation.

Even more importantly, the Crown should consider its obligations to Maori groups in terms of the principle of mutual benefit, and whether those groups have yet obtained the benefits anticipated in the Treaty. Even if Maori do not have a 'right' in a resource, the Crown should, by the reasoning of the minority report of the Radio Spectrum Tribunal, consider whether the resource is a development opportunity through which it could assist Maori, their culture, their language, and their future as a people.¹³⁶

This brings us from modern industries which profit from taonga such as land, lakes, and geothermal energy, to new or recently-discovered resources. A number of Tribunals have found that in cases where resources were not known in 1840, or were not used traditionally, neither Treaty partner can claim monopoly rights in a new resource. This arises from the well-established principle that the Treaty is not to be fossilised at 1840, but interpreted to meet new and changing circumstances in light of the overarching Treaty

principles of partnership, good faith, and mutual benefit. In the case of the electromagnetic spectrum, for example, this meant that the Maori interest in the newly-discovered spectrum was greater than that of the general public. The spectrum could also be regarded as a taonga shared by the tribes and all mankind. Neither Treaty partner could claim monopoly rights.¹³⁷ These rights included a development right, and this was especially important where other factors combined, such as the close links between use of the spectrum and taonga such as language and culture.

This view was put by the Radio Frequencies Tribunal in 1990 and confirmed by the Radio Spectrum Tribunal in 1999. Both panels confirmed that the Crown was entitled to use its kawanatanga authority to manage the spectrum in the public interest, for example to regulate the use of frequencies to international standards. However, it could not sell management rights without consideration of Maori interests.¹³⁸ As noted, the minority opinion in the Radio Spectrum inquiry rejected this aspect of a Treaty development right, although it accepted that there was a right to develop properties and a right to develop as a people.

In addition to the Crown's obligation to provide the means of fulfilling the principle of mutual benefit, the principle of redressing past Treaty breaches is also relevant. Where there is a need to redress past breaches, active development assistance from the Crown may form part of an appropriate remedy. The *Maori Development Corporation Report* found in 1993, for example, that the Government's initiative in establishing the corporation in 1987 was consistent with the Treaty, in that it was a recognition of the need for positive economic assistance for Maori and provided this assistance in the form of development banking services. This was seen as consistent with the Crown's duty of active protection inherent in the Treaty. Where Maori have lost properties and taonga and, as a result, have been unable to participate in the national economy, and where the disparity between the rate of economic progress of Maori compared with other New Zealanders can be attributed in some measure to breaches of the Treaty, then the

Crown's promotion of Maori business is part of honouring its Treaty obligations.¹³⁹

As noted, the Radio Frequencies Tribunal found that the radio spectrum is so intimately tied up with the use, protection, and development of the taonga of Maori language and culture that Maori must be given greater rights of access to this spectrum and its management than the general public. That Tribunal also noted evidence of a 'development gap' between Maori and non-Maori as a result of the long-term negative impacts of colonisation and loss of Maori resources. This was a factor to be taken into account in the development of Maori broadcasting. An equitable share of the spectrum could help correct the imbalance.¹⁴⁰

Redress and the ability to provide it were also factors for the *Radio Spectrum Final Report* in 1999. There, the Tribunal found that the Crown could not decide to privatise the use of the spectrum and sell it off for commercial purposes without reasonably consulting its Treaty partner, especially as to the implications of this for Maori interests.¹⁴¹ The report noted that:

the Crown was entitled to use its kawanatanga authority to manage the spectrum in the public interest... However, it was not entitled to sell management rights without consideration of Maori rangatiratanga rights.¹⁴²

This would include whether, under the principle of active protection, the Crown might need to consider the impact on its ability to assist Maori to overcome damage caused by past Treaty breaches. Further, and as part of the general principle of development, the Crown was required to consider whether the rights proposed for sale might be useful in addressing Maori social and economic disparities. As noted, the minority opinion in the Radio Spectrum inquiry also accepted the Treaty right of Maori to develop as a people and a positive Crown duty to assist in fostering and developing the taonga of Maori culture and language.¹⁴³

For the assistance of the parties in delineating the contemporary right, therefore, we conclude that the modern Treaty right of development extends to enterprises in

which a reasonable Treaty partner would find that iwi and hapu have a development interest. This carries with it an obligation of Crown protection which may in some cases extend to an obligation of positive assistance. In our view, this is not the same as guaranteeing a successful economic outcome from any enterprise, but rather the obligation is to facilitate participation in the enterprise, if necessary with positive assistance. We accept that this does not impose on the Crown a Treaty obligation in respect of every modern enterprise involving land or resources it owns or regulates. Rather, the obligation exists where a combination of factors makes it reasonable. It is not for us to prescribe an exhaustive list of these, because the Treaty relationship anticipates that both partners will address new circumstances as they see best, based on principles of good faith, reasonableness, and mutual benefit.

We can, however, point to the factors that have been identified as important. These include, of course, whether the modern enterprise utilises properties and taonga of the community concerned. That is a key factor. In one sense, it is immaterial whether exact aboriginal rights or usages existed as at 1840 or could have been in reasonable contemplation then, so long as the modern enterprise is in some way 'analogous' to them. If other factors are considered more relevant by the Crown and Maori, then not even an analogy may be necessary.

Such other important factors include whether the enterprise is located in traditionally important areas or resources of the rohe, whether the enterprise involves a tribal initiative, and whether iwi and hapu have been significantly involved in this kind of enterprise, such as for lengthy periods or as pioneers. Also, if the enterprise may contribute to the remedying of past Treaty breaches, or is important for overcoming the vulnerable state of a taonga, then such factors should also weigh with the Crown. This, of course, requires reasonable consultation with the community over what is needed and preferred, both in terms of the enterprise and in terms of their participation in it.

The claimants have not mentioned any resources unknown at 1840 in our inquiry. Should such be discovered in the future, we note that the Tribunal (including the minority Radio Spectrum opinion) has recognised that a Treaty development right extends to Maori as a people to develop their culture, language, and social and economic status using whatever means are available. This is especially important for modern enterprises in circumstances where economic disparity, historical disadvantage, or unfair barriers to participation in development opportunities have been identified. It is also of relevance where the enterprise, as with the link between the radio spectrum and Maori broadcasting, may enable vulnerable taonga to be assisted, restored, or developed. The Crown's obligation of protection in this respect is again to enable participation, including positive assistance where necessary. Outcomes for specific enterprises cannot be guaranteed, nor is the Crown obliged to do so except in so far as it has to protect taonga in partnership with their kaitiaki or guardians.

The above conclusion refers to the modern Treaty development right in terms of Crown-owned or Crown-managed resources. But there is another aspect to this right. Maori are still entitled to develop and profit from the lands, resources, and taonga that they own. This has been accepted by the Crown, claimants, the courts, and the Tribunal. In our view, the principle of active protection requires the Crown to assist Maori today to develop their properties, where that is their wish. Such assistance should take the form of facilitating equal opportunities to develop, and in particular by removing obstacles to Maori development, such as title and governance problems, that have been created by past actions of the Crown (see part III of this report). It may, depending on circumstances, extend to other forms of positive assistance. Further, the Crown ought to consider and carry out the findings and recommendations of earlier Tribunals, and compensate Maori for its use of properties that they possessed under the Treaty and that have been developed and used without payment. In our inquiry region, this could include the use of their proprietary interest in waterways and

HE MAUNGA RONGO

geothermal taonga for the generation of electricity without compensation.

Moving away from a strict rights-based analysis of the question, we also reiterate our view that the Treaty created a new bargain for two peoples to live and prosper in this country. That required some change to exclusive customary rights over time, in order to allow for settlement and for the sharing of some resources in good faith and partnership. The expectation of new opportunities and shared benefits as a result of settlement means that a focus on aboriginal rights as they existed at 1840 cannot fairly be used to exclude Maori from new opportunities or from rights to participate in them. To do so would be to foreclose for Maori the opportunities they were promised and reasonably expected from the Treaty. Overall, the Crown is required to honour the Treaty principle of mutual benefit.

TRIBUNAL FINDINGS

In agreement with other Tribunals, we find that Central North Island Maori have the following Treaty rights:

- ▶ As property owners, Maori have a right to develop the properties and taonga guaranteed to them by the Treaty if they so choose and under their own authority (tino rangatiratanga).
- ▶ They have a right to develop their properties and taonga by any means that they consider appropriate. This includes new uses or technologies that were unknown in 1840.
- ▶ They have a right to retain a sufficient land and resource base to develop in the Western economy, in accordance with their preferences, and to be actively protected in the retention of such a base.
- ▶ They have a right to share in the mutual benefits envisaged by the Treaty and promised repeatedly by ministers and officials.

- ▶ They have a right to develop as a people in terms of their culture, language, and socio-economic advancement.

In agreement with other Tribunals, we also find that the Treaty right of development extends to:

- ▶ intangible as well as tangible taonga;
- ▶ 'other properties' not necessarily specified in either of the Treaty texts; and
- ▶ the right of Maori property owners to develop or profit from resources in which they can be shown, on the facts, to have had a proprietary interest under Maori custom (and that this is so even where the nature of that property right is not recognised, or has no equivalent, in British law, and therefore encompasses rivers, lakes, and the water resource contained therein).

We further find that this right of development includes:

- ▶ equal access to development opportunities for the above properties and taonga, on a level playing field with other citizens;
- ▶ positive assistance from the Crown where appropriate in the circumstances, which may include assistance to overcome unfair barriers to development, some of them of the Crown's making; and
- ▶ the opportunity for Maori to participate in the development of Crown-owned (formerly Maori) or Crown-controlled property, resources, or industries in their rohe, and to participate at all levels.

In our view, the Crown was required to take reasonable steps in the circumstances of the times to meet these obligations. In doing so, it was obliged actively to protect Maori in their property and their development rights. This was more than an aspiration; it was part of the full property rights guaranteed by the Treaty and was fundamental to the expectation that Maori would use their properties to participate in the new opportunities, and share in the benefits, that were brought by the Treaty and by settlement. Further, this was a tribal right, as the Muriwhenua Fishing Tribunal found, and subject to the guarantee of

Maori autonomy (tino rangatiratanga). It was for the tribes to decide the nature and pace of their development, in partnership with the Crown. The ability of Maori to participate in development opportunities as they chose, and to meet the objectives they chose, was an important part of the Treaty development right.

At the same time, the development of both peoples was implicit in the Treaty and required the sharing of resources. The alienation of resources for that purpose had to be with the full, free, and informed consent of Maori, and proper compensation had to be made. Where the Crown found it necessary to develop Maori-owned resources itself in the national interest, its first obligation was to consult and to obtain consent to any required use or alienation. It was required to infringe tino rangatiratanga as minimally as possible and to pay compensation for the use of tribal taonga.

In some circumstances, the sharing of a resource by Maori as a reasonable Treaty partner may have lessened their exclusive customary interests, including their exclusive development interest. The Treaty guarantees, however, still apply to the remaining Maori interests in these taonga, including the remaining development interest. By the same token, the principles of partnership, mutual benefit, and reciprocity mean that the Treaty right of development cannot be confined rigidly to links with aboriginal rights and usages as at 1840. Maori expected and were promised the ability to participate in new opportunities and to develop themselves as a people. This includes participation in modern enterprises and opportunities not contemplated in 1840.

We accept that it was neither possible nor necessary for the Crown to guarantee Maori commercial success in ventures, with the exception that the Crown must protect Maori retention of taonga (where that is their wish) and their relationship with their ancestral lands and waters. The Crown's obligation was to enable participation, not to ensure success. On the broader question of ultimate outcomes for Central North Island Maori, however, we find

that the Crown was obliged to provide the conditions in which they could prosper and obtain the mutual benefit envisaged by the Treaty. While factors such as international markets are outside the Crown's control, it actively assisted other sectors of the community to economic success in the nineteenth and twentieth centuries. As we will see in our next chapter, the Crown's witness, Professor Hawke, accepts that governments set the parameters within which economic development and progress could take place. At a minimum, those parameters ought to have been fair to Maori as well as to other citizens. In Dr Loveridge's evidence for the Crown, they were not. We will explore the detail of the Crown's obligations in this respect in chapters 14 to 16.

At the Crown's request, we also offer our view of how the Treaty right of development applies in today's circumstances. In conjunction with the above findings, we further find that the Crown must apply the principles of the Treaty when development opportunities arise in respect of Crown-owned or Crown-regulated resources or industries. In our view, a reasonable Treaty partner would consult Maori and inform itself as to whether the Treaty right of development applies in any particular instance. Although we do not wish to be prescriptive, we note that Central North Island Maori may have a right to participate in development (at all levels) where some or all of the following factors apply:

- ▶ there is a customary right or a legitimate outgrowth or development of one;
- ▶ the development or activity is analogous to a customary right or practice;
- ▶ the development or activity is in their rohe;
- ▶ the development or activity involves their taonga (whether still in their legal ownership or not);
- ▶ they have had a long association or history of involvement in the development or activity;
- ▶ a tribal initiative is involved or contemplated;
- ▶ the development or activity may contribute to the redress of past Treaty breaches;

- ▶ the development or activity may assist their cultural, social, or economic development;
- ▶ the development or activity may assist in the preservation or development of a taonga in a vulnerable state.

In the following three chapters of this part of our report, we consider in detail whether the Crown met its Treaty obligations in respect of the development of farming, tourism, forestry, and power generation in the Central North Island region.

SUMMARY

Central North Island Maori have a Treaty right of development. It includes:

- ▶ the right as property owners to develop their properties in accordance with new technology and uses, and to equal access to opportunities to develop them;
- ▶ the right to develop or profit from resources in which they have (and retain) a proprietary interest under Maori custom, even where the nature of that property right is not necessarily recognised, or has no equivalent, in British law;
- ▶ the right to positive assistance, where appropriate to the circumstances, including assistance to overcome unfair barriers to participation in development (especially barriers created by the Crown);
- ▶ the right of Maori to retain a sufficient land and resource base to develop in the new economy, and of their communities to decide how and when that base would be developed;
- ▶ the opportunity, after considering the relevant criteria, for Maori to participate in the development of Crown-owned or Crown-controlled property or resources or industries in their rohe, and to participate at all levels (such criteria include the existence of a customary right or an analogy to a customary right, the use of tribal taonga, and the need to redress past breaches or fulfil the promise of mutual benefit); and
- ▶ the right of Maori to develop as a people, in cultural, social, economic, and political senses.

Notes

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19. Karen Feint, submissions in reply on behalf of Ngati Tuwharetoa, 1 November 2005 (paper 3.3.142), pp 11–16
20. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 1, p 31
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FARMING OPPORTUNITIES

In this chapter we consider Treaty development claims for iwi and hapu who retained lands and wished to utilise them to take advantage of farming opportunities, particularly the opportunities that opened up in what became the modern farm industry from the late nineteenth century. This new industry changed the shape of agricultural land use in the North Island hill country – and throughout New Zealand. It enabled a new class of independent farmers to emerge, who were to make a significant contribution to the development of rural communities and national economic growth through most of the twentieth century.

Governments identified some kind of settled agriculture or farming as a preferred form of land use from the earliest period of colonisation. Maori were encouraged to participate in this for the benefit of their communities. In the first decades after the signing of the Treaty of Waitangi, many iwi and hapu began to engage in new forms of agriculture and farming encouraged by missionaries, successive governors, and Government officials. They achieved some early success in trading and exporting large quantities of agricultural produce, especially wheat, fruit, and vegetables. They also entered allied enterprises such as coastal shipping and milling. However, these opportunities declined in the mid-to-late 1850s, with warfare causing further economic dislocation in the 1860s. The focus of economic opportunity had also begun to shift to extensive pastoralism, initially utilising areas of open tussock and natural grasslands. By the 1880s, farming in New Zealand

had become characterised by the growth of large estates, on the one hand, and struggling small farmers relying on a mix of seasonal work and small-scale agriculture, on the other.

This changed with advances in refrigeration technology in the 1880s. These enabled small farmers to produce dairy products and meat to be chilled or frozen for export, predominantly to Britain. It was the catalyst for the development of the modern farm industry. More marginal lands, including those in the North Island, were now potentially able to be improved and developed for economically viable farming. This new farming industry developed very rapidly from the 1890s to the 1920s, contributing significantly to national economic growth.

Governments were quick to recognise the potential economic, social, and political benefits of this new farm development and responded with significant encouragement and interventions, including measures to enable landowners of limited means to participate. This assistance became targeted to more specific groups by the 1920s, such as returned servicemen. Attention also began to turn to state development of more difficult lands for farming by this time, especially Crown lands. This was extended to marginal and undeveloped Maori land from 1929, beginning in the Rotorua district. The intention was that the State would develop the land, farm it until development costs were repaid, and then return it to Maori owners as working farms.

An Overview of the Issues

The claimants' case

Claimants submitted that, from the beginning of European settlement, utilising land for settled forms of agriculture and farming was regarded as an important economic development opportunity. Government policies encouraged this form of land use. Maori – including Central North Island Maori – were persuaded that by participating they would obtain significant benefits from European settlement. Given that the Crown identified this form of land use as likely to be economically significant, it had an obligation to ensure that sufficient lands were protected for the present and future benefit of iwi and hapu of the Central North Island region, as part of its duty of active protection of their Treaty development right.

As new opportunities emerged in farming, and as the State continued to actively encourage and promote it, the Crown was also required to take reasonable steps to identify and address the recognised barriers faced by Maori that were hindering their ability to utilise their lands for farming, and to provide similar kinds of encouragement and assistance as was offered to other sectors of the community. These reasonable steps included: monitoring what the needs of iwi and hapu might be and addressing barriers, such as title difficulties, that prevented them from participating to the same extent as other landowners; providing the same or equivalent forms of assistance as were made available to other landowners, such as equivalent access to state lending finance; and positive assistance in areas where it was recognised that Maori faced disadvantage relative to other landowners, such as in knowledge about farming needs. A further requirement was that the Crown should refrain, as far as possible, from implementing policies that undercut or infringed on Maori efforts to utilise their lands for farming.

In this inquiry region, and as late as the early twentieth century, the Crown failed to protect some iwi and hapu in retaining sufficient lands for likely agricultural

opportunities. This foreclosed on their opportunities to participate in expected developments in farming and agriculture, and contributed to their economic marginalisation. Where iwi and hapu were able to retain significant lands in this region, these were (in many cases) of a marginal and isolated nature, limiting their usefulness for agriculture. Thus, any supposed ability to be able to support communities through agricultural and pastoral pursuits on these lands was largely illusory.

Claimants submitted that the Crown failed to assist iwi and hapu in this region to overcome the recognised barriers they faced in utilising their lands for farming, and that this was critical in the early phase of the development of modern farming. Government inquiries warned, from the early 1890s, that Maori would need assistance if they were to successfully take advantage of emerging farming opportunities. These warnings were continued in the early twentieth century by the Stout–Ngata commission of 1907 to 1909, and applied to the situation in our inquiry region. Despite this information, the Crown failed to provide adequate mechanisms to enable Maori to transform the individual and scattered shares in land that had been created by the Native Land Court into economically viable blocks that could be effectively managed for farm purposes.

The Crown also failed to provide Maori landowners with similar or equivalent access to lending finance and state advisory and research services as were made available to other landowners for farm development.¹ This was particularly critical during the period of rapid growth in modern farm development from the 1890s to the early 1920s. The iwi and hapu who were denied these forms of assistance at a critical period of farm development suffered serious and long-term impacts.²

The Maori land development schemes established in this inquiry region from 1929 onwards were a welcome and important Government initiative to assist Maori to overcome barriers to utilising their land for farming. Some owners had land developed by the State and returned as

economically viable farm operations.³ In the Rotorua district, some hapu were able to use schemes to repurchase previously alienated lands.⁴ The schemes also had the overall result of retaining land in Maori ownership.⁵ However, in some cases these schemes were of too little use, and came too late. In other cases, land was left out of the schemes without any alternative forms of assistance being offered to overcome continued barriers to farm development.

The way the Maori land development schemes were implemented also had the effect of significantly limiting the Treaty development rights of iwi and hapu of this region. Maori sought to participate in farming to meet the objectives and needs they had identified for their communities. Yet in order to overcome difficulties with governance, and to provide access to capital, the Crown significantly infringed their property rights and their right to decide how their land would be farmed or otherwise utilised. While infringing these rights and asserting far-reaching decision-making powers, the Crown failed to ensure adequate consultation with landowners, and adequate protection of landowners' property rights, interests, and powers of decision-making.⁶

The Crown used the Maori land development schemes in this region to pursue its national interest objectives, which included bringing all farmable land into this particular kind of production, ensuring that state investments in land development were protected and recovered as far as possible, and assimilating Maori. It placed these objectives ahead of adequate consideration of or protection of Maori rights to set and pursue their own objectives for developing their lands.⁷

In pursuing its national interest objectives, the Crown also failed to undertake its duty to minimally infringe or avoid undermining Maori rights to develop their land for farming. Examples of this failure include the Crown's pursuit of land purchase policies and its acquisition of land and resources for public works purposes. This undermined Maori efforts to engage in farming in support of their communities.

The claimants submitted that all these breaches of the Treaty contributed to 'underdevelopment' for iwi and hapu, severely limiting and undermining their ability to utilise their properties to take advantage of new economic opportunities that could have benefited their communities.⁸

The Crown's case

The Crown agreed that productive land has been regarded as important for economic development opportunities in New Zealand. However, it submitted that much of the land in this inquiry region was regarded as having limited agricultural potential, especially before the resolution of the 'bush sickness' cobalt problem in the 1930s.⁹ Consequently, the Crown could not have been expected to ensure iwi and hapu retained sufficient land to take advantage of farm opportunities in this region during this early period. Nor could the Crown have been expected to foresee the developments and technical breakthroughs that would later make farming in this region more feasible.

The Crown agreed that there were other factors, in addition to land ownership, that were widely understood to be important for successful participation in farming. These included adequate land title, access to lending finance, and access to appropriate skills and knowledge. However, the Crown submitted that prevailing views about the proper role of the State limited the assistance it could provide in the nineteenth century. The Crown relied on evidence from Gary Hawke, presented at the Tribunal's Gisborne and Hauraki inquiries, that, at this time, the legitimate role of the State was to do no more than establish a framework within which economic development (or, in the language of the day, 'progress') could take place. It would not have been considered appropriate for the Crown to offer any more in the way of positive assistance to Maori than encouragement and advice.

The Crown submitted that the marginal lands of this region were not considered suitable for forms of Government encouragement for farming before the 1920s.

Once it had been decided to attempt to develop these marginal lands for farming, Maori lands were included in the development assistance offered. The Crown's major response was the Maori land development schemes. These schemes addressed the problems Maori faced in farming and were particularly prominent in this inquiry region.

Key questions

As a result of the submissions and evidence before us, we have identified the following key questions:

- ▶ Before 1929, did the Crown's obligation to actively protect iwi and hapu in our Central North Island inquiry region extend to identifying farming as a significant development opportunity? If so, did the Crown take reasonable steps to protect iwi and hapu in sufficient lands for this opportunity?
- ▶ Before 1929, did the Crown take reasonable steps to enable hapu and iwi with retained lands to participate in emerging farming opportunities?
- ▶ Were the Crown's Maori land development schemes after 1929 a Treaty-consistent response to its obligation to actively protect the Treaty development rights of iwi and hapu to utilise their lands?

FARMING AS A SIGNIFICANT DEVELOPMENT OPPORTUNITY

KEY QUESTION: BEFORE 1929, DID THE CROWN'S OBLIGATION TO ACTIVELY PROTECT IWI AND HAPU IN OUR CENTRAL NORTH ISLAND INQUIRY REGION EXTEND TO IDENTIFYING FARMING AS A SIGNIFICANT DEVELOPMENT OPPORTUNITY? IF SO, DID THE CROWN TAKE REASONABLE STEPS TO PROTECT IWI AND HAPU IN SUFFICIENT LANDS FOR THIS OPPORTUNITY?

We have already considered (see part III) the general Crown obligation of active protection of iwi and hapu in

the retention of sufficient lands for their present and future needs. We noted that, in general, 'sufficient lands' includes: lands reasonably required for those customary usages that iwi and hapu might wish to continue; lands required for the immediate support of a community; and lands that might reasonably be required for both the present and future economic opportunities expected to arise from settlement. We begin this section by considering whether the need to protect Maori in retaining a sufficiency of lands extended to a reasonable obligation to consider farming as a likely economic opportunity – and therefore sufficient lands for this – in this inquiry region before 1929.

The claimants' case

Claimants submitted that Maori were encouraged to participate in some form of settled agricultural or pastoral uses for their lands from an early period of settlement. In turn, iwi and hapu participated with some success, trading as far as Australia. They were significant contributors to the State by way of taxes on goods.¹⁰ When the Crown began to take an interest in Maori land in the Central North Island, this included identifying land that might be useful for a variety of settlement purposes, including agriculture and pastoral farming. This is illustrated in reports by Crown officials and purchase agents, even from an early period. As early as the 1850s, for example, officials had identified fertile land near Mount Tauhara, to the north-east of Lake Taupo, as having agricultural potential.¹¹

By the 1860s and 1870s, leasing land for pastoral run-holding had become identified as a major economic opportunity. Bruce Stirling's evidence was cited, of settlers seeking to enter lease agreements with Maori in this region on easily-grassed and affordable open country, including the tussock and natural grasslands of northern Taupo and Kaingaroa.¹² Anticipating the development of a pastoral economy, iwi and hapu entered into leases, including some with the Crown, in these districts.¹³ These leases reflected the widespread assumption that some form of agricultural

or pastoral land use would be important in the new economy, even if its exact nature was not yet fully established. It was anticipated that, as settlement increased, markets were developed, and new advances in scientific knowledge were exploited, land would continue to be useful for various forms of agricultural and pastoral production. This, in turn, required prudence on the Crown's part when it pursued turning leases into land acquisitions, so as to ensure that iwi and hapu were protected in a reasonable sufficiency of land for their present and future needs, including for anticipated developments in agriculture and farming.

When the Crown began reviewing lease and purchase arrangements in the early 1880s, the reviews revealed that large parts of the region were now recognised as marginal for intensive agriculture and even, in some areas, pastoralism. This meant, however, that the Crown needed to ensure that its protection took account of the quality as well as the quantity of land, so that expected farming and agricultural opportunities were not closed off. The Crown failed to take reasonable care to ensure that iwi and hapu were protected in sufficient quality land for these anticipated opportunities. As a result, some iwi and hapu had insufficient land by the early twentieth century.¹⁴ There were severe consequences for their ability to participate in later farm opportunities when these became available. The lack of a sufficient land base contributed to the marginalisation of these communities throughout the rest of the twentieth century.

The claimants submitted that it was evident to Crown officials, from a relatively early period, that land protection mechanisms, set at minimum acreages and without regard for the quality of lands, were especially unrealistic in this region. In more marginal areas it would require large areas of land to support any reasonably profitable form of farming. A 'sufficient endowment' might, therefore, involve not only a reasonably extensive area of land for likely pastoral and agricultural purposes, but also the continued protection of those additional lands and resources required for community support. Access to mahinga kai, for example, remained important. In the Central North Island, however, such land protections as were implemented were set

at unrealistic subsistence levels rather than what was considered practically necessary for Maori 'to fully participate in the commercial economy as Treaty partners'.¹⁵

Claimants submitted that, by the early twentieth century, and even where iwi and hapu did retain relatively large areas of land in this region, they were generally left with the most marginal and least useful of their lands. In assuming that quantity alone meant that they retained ample for their needs, the Crown failed to recognise this fact. The lands immediately useful for farm purposes in this region were generally considerably smaller than overall acreages implied, which meant that the economic land base for farming was much smaller than was often assumed at the time. There was considerable anticipation that future developments in farming and land use might make even the more marginal lands productive, but in the meantime the possibilities for iwi and hapu were severely limited. This was reflected in their continuing reliance by 1900, especially in the interior of the region, on lifestyles based on subsistence cropping, limited farming, hunting, fishing, and seasonal work.¹⁶

Claimants submitted that, while the Crown placed pressure on Maori to properly utilise their lands for farm purposes, it failed to properly audit the impacts of land alienation or what their future needs might be to adequately participate in farming. The Stout–Ngata commission, established in 1907, came too late for a number of iwi and hapu in this region who no longer had sufficient lands for their likely agricultural and farming needs. In any case, the commission was too narrowly focused to properly audit the land needs of all iwi and hapu in this region. It was concerned largely with Rotorua lands, and was not required to thoroughly consider iwi and hapu requirements in the Taupo and Kaingaroa districts.

This focus reflected the Government's preoccupation with what were considered 'idle' Maori lands, and making them available for settlement, without sufficient concern for what iwi and hapu of the region now required. The claimants submitted that this reflected the Government's vision of Maori at this time as a rural workforce, reliant

on seasonal farm work and public works, supplemented by small areas of land and mahinga kai for their immediate subsistence. This was not a vision of Maori as potential farmers who required sufficient lands for new farming opportunities. The claimants submitted that this failure to consider their needs as potential farmers contributed to a renewal of Government purchasing of their lands from 1905, in spite of warnings that, in this region, high acreages did not necessarily mean surplus lands. This renewal of purchasing without sufficient consideration of iwi and hapu needs for farming further reduced the claimants' opportunities to participate during a critical period of farm development.

The Crown's case

We have already noted the Crown's concession that: 'Viewed overall, and in Treaty terms, there was a clear failure by the Crown to ensure a sufficiency of land base for a number of CNI iwi.'¹⁷ The Crown also agreed that nineteenth-century retention of Maori land in this region varied significantly among hapu and iwi. For example, Ngati Pikiao appear to have retained relatively significant land holdings by about 1900, while others 'retained minimal land' by this time.¹⁸

The Crown submitted, however, that while productive land was clearly regarded as critical to economic growth in New Zealand in the period up to 1929, we need also to take account of what was considered possible in terms of farming in this inquiry region. The Crown noted that many areas of the Central North Island were recognised as having only marginal potential for farm development purposes. Much of the region was regarded as relatively infertile and of limited agricultural potential. As a result, large areas of land would be required to support relatively few people. At the same time, the Crown admitted that it was less 'discriminating' than private buyers, and that it was intent on buying up as large an estate as possible in order to provide for close settlement in the form of small, family farms. In any case, the Crown could not reasonably

have been expected to ensure that iwi and hapu retained sufficient land for future farm opportunities that it could not have foreseen.¹⁹

The Crown submitted that, even so, in some parts of the region there was significant retention of Maori land. Even with later purchases of 'considerable' areas of land in the south and west of the Taupo district in the early twentieth century, Taupo Maori still retained significant areas of land.²⁰ The Crown submitted that when it began purchasing again in Taupo much of the land was classified as 'unprofitably occupied'; and that it is therefore not surprising that the area became the focus of renewed Crown purchasing in the 1920s.²¹ The Crown also reminded us that land alone was not an 'economic panacea'; other critical factors were also required.

The Crown agreed that the Stout–Ngata commission's 1907 to 1909 audits were limited and specific to only some parts of our inquiry region. Lands in our Taupo inquiry district were not included.²² However, it submitted that it was neither reasonable nor realistic for the Government to have carried out such an audit earlier. The Stout–Ngata commission was the best that could have been expected in the circumstances of the time. It was a genuine effort to discover whether Maori had retained sufficient lands, including lands for farm purposes. The commission did not consider the Taupo district in depth, because it was apparent that efforts were being made to develop a forestry industry there in which there was little need for Government intervention.

The Tribunal's analysis

We accept that, when it first began to negotiate significant purchases in the Central North Island region in the 1870s, the Crown had no way of knowing how modern farming would develop from the 1890s, or how successful this would prove to be. We also agree that there is significant evidence that Government ministers and land purchase officials recognised, from an early period of purchasing, that some of the lands in the interior of our region, in

particular what became known as the pumice lands, were unsuitable for close agricultural settlement. As we note in chapter 15, this made alternative economic opportunities in this region, such as tourism and timber milling, all the more important.

Nevertheless, the evidence makes it clear that, in common with other parts of New Zealand, some form of farming or agriculturally-based industry was anticipated as likely to be important in the economy of this region, from the earliest period of settlement. Understandings of how this might work out in practice changed over time and as new opportunities emerged. In addition, it was recognised that extensive pastoralism, rather than close agriculture, was likely to be more important for more marginal lands. This expectation continued through much of the main period of nineteenth-century purchasing in this region, even while it was becoming increasingly evident that many of the marginal lands were proving more stubbornly resistant to pastoral development than had been anticipated. The idea of settlement based on a rural, agriculturally-based economy was pervasive in the nineteenth century, reflecting not only economic expectations but also social and political ideals for the development of a new society. This remained the case in this inquiry region, even if pastoralism would have to be carried out on a more extensive scale than usual, supplemented by other economic activities such as tourism and forestry. It remained a strong factor in land settlement and land purchase policies for the region.

The twin sirens of civilisation and economic benefit – expected from settled forms of farming and agriculture – were held out to Maori to encourage them to participate. It was presented as a major means of developing and progressing their communities and of sharing in the benefits and prosperity expected to result from colonisation. These expectations also underlay assurances to Maori, including those in our inquiry region, that they could alienate lands for colonisation without harm to themselves. Land sales would result in settlement, which in turn would bring new markets and innovations, and new, more productive forms

of agricultural and pastoral land use. Maori would prosper even if they parted with some of their lands.

As the evidence available to us makes clear, Maori themselves were not slow to see economic opportunities emerging in farming and agriculture, as new markets were created with settlement. The history of these emerging opportunities in our region in many ways reflects developments in the colony generally. The nature of early iwi and hapu participation varied across this large region, extending as it does from the rich soils, congenial climate, and relatively easy access to markets in the coastal Bay of Plenty to the harsher climate and poorer soils in the much less accessible interior. Nevertheless, this did not prevent enthusiasm and experimentation with cropping and agriculture throughout the region. Future success was widely expected.

This expectation seemed well founded at first. In the years immediately following 1840, hapu and iwi of this inquiry region were among those who began to expand their economic focus from trade in resources such as flax to more active participation in growing and supplying mainly agricultural produce to the new markets of Auckland and Australia. Even in the interior of our region, iwi and hapu received positive support and encouragement from Government officials and missionaries to participate in these new enterprises. We note the example of the early farm mission stations established by the missionaries Thomas Chapman and Thomas Grace, at Te Ngae in our Rotorua district and Pukawa on the edge of Lake Taupo, respectively. We also note the encouragement and advice to develop farming in the region that was given to Maori of the area by early governors, notably Sir George Grey. Historian Hazel Petrie records, for example, Grey's visit with Thomas Chapman to Rotoiti and Ohinemutu in 1849, where he promised assistance and advice to local Maori eager for a water mill.²³

As a result, Maori communities in our region participated with some enthusiasm in what historians such as Dr Petrie have termed the 'golden age' of Maori enterprise in the years from 1840 to the late 1850s, when Maori supplied the bulk of produce to the Auckland markets.²⁴ As

we described in chapter 10, there is some evidence that this extended even into the interior of the region. Dr Petrie describes the efforts of Ngati Pikiao, who, having paid for their millstones, then rolled them along a track from Maketu to Otaramarae, before transporting them to their mill site at Rotoiti. The community at Tapuwaiharuru [Tapuaeharuru] at Lake Taupo built sledges and drays to drag their millstones and other machinery more than 160 kilometres from Matata. Ngati Whakaue built sledges to drag millstones for their mill at Ohinemutu over some 46 kilometres of rugged country, with the men carrying the rest of the necessary machinery on their shoulders. The stones and machinery for the Tuhourangi mill near Tarawera were shipped to Matata and then transported by river, before being carried the rest of the way overland. Visitors described this mill as fully operational in 1864.²⁵

While the success of these efforts varied, it is clear that Maori communities in this region and elsewhere were willing participants in such enterprises and adapted rapidly to the requirements of trading and agricultural production. Dr Petrie notes how Maori communities, including some in our region, took part in shipping enterprises associated with trading during this time, to the extent of owning and sailing their own vessels. The Attorney-General, William Swainson, reported in 1857 that the Mataatua and Tuwharetoa tribes, believed to number more than 8000 people, were that year estimated to have 'upwards of 3000 acres in wheat, 3000 acres in potatoes, nearly 2000 acres in maize and upwards of 1000 acres in kumara'. They:

owned nearly 2000 horses, 200 head of cattle, 5000 pigs, four watermills, 96 ploughs, 43 coasting vessels. . . more than 900 canoes and they had supplied 46,000 bushels of wheat to Pakeha traders that year. . .²⁶

The wheat alone was estimated to have a market value of £13,000.²⁷

The national decline in Maori participation in this phase of commercial agricultural development by the 1850s also appears to be reflected in our region. To some degree, this reflected difficulties that had become apparent in parts



The old mission house at Te Ngae where Thomas Chapman and his wife Ann were based from 1840 to 1851. The dwelling was no longer a mission house when John Kinder made this drawing of it in 1858.

of the Central North Island, with continued cropping of poor soils, the limitations of a harsh climate, and difficulties associated with isolation from areas of new settlement. However, this did not entirely undermine confidence that the lands themselves would become useful for future pastoral or agricultural enterprises. Other major reasons for the decline were overall falls in market prices, reduced demand for the relatively narrow range of crops then being grown, and uncertainty in the lead-up to the wars. For example, in the Taupo district, Thomas Grace reported that by the late 1850s poor soils had led to a decline in wheat production. He also noted, however, that meetings and concerns about the possible outbreak of war were further limiting the planting of wheat.²⁸

As happened nationally, new opportunities in extensive pastoralism were beginning to be recognised in this region by the 1860s. As we noted in chapter 10, runholding – based, at first, on leasing land from Maori – was recognised as a new opportunity. The region's open tussock country and natural grasslands offered opportunities to make profits from sheep, and in particular from their wool. As we found, this new leasing economy suffered

dislocation through war and was then undermined from the mid-1870s as the Government sought to shut out private competition for lands. The development of a runholding economy was limited to those with the knowledge and persistence to persevere in spite of the Government, such as the land speculator Thomas Morrin, and John Grace, whose family had close links with Ngati Tuwharetoa and whose brothers were involved in land purchasing at this time. Morrin and Grace were both involved in taking up leases and then freeholding them in northern Taupo and Kaingaroa.²⁹

As we noted in chapter 10, the Government's review in the 1880s of early purchase negotiations concluded that some lands in the interior of our region were 'worthless' for agriculture and farming. Some purchases were abandoned. In other cases, purchases were continued where land was identified as potentially useful for agricultural purposes. We noted advice on the Paeroa block, for example, that the valley lands had agricultural potential with 'rich alluvial and flax flats and swamps easily drained', as well as timber and hot springs.³⁰

Government purchasing in the Central North Island continued to follow a clear pattern of targeting those lands identified as having the most economic potential, including for possible agricultural purposes. These lands included the richly fertile coastal area of the Rotorua district, where there was heavy purchasing for agricultural purposes, as well as the more open country of the Kaingaroa Plains and parts of northern and south-western Taupo, which were identified as having potential for pastoralism. We also received evidence indicating Maori efforts to become involved in pastoral activities, not just through leasing land but also by running sheep on their own account. We note, for example, the evidence of the Crown's historian, Michael Macky, of Ngati Manawa efforts to stock Pukahunui block with a flock of 2000 sheep for farming purposes.³¹

Nevertheless, runholding did turn out to be much more difficult than expected in some parts of our region, especially in the interior. In these areas, runholding came under severe pressure from introduced pests; runholders'

flocks were forced to compete with rabbits for food and were preyed on by wild dogs. The indigenous grasslands provided little nutrition, and many areas were subject to the then little-understood problem of mineral deficiencies. At higher elevations, the climate was harsh. Runholding required significantly more capital than might have been expected, and in parts of the interior it became clear that only very large runs could be economically viable; even these struggled.³² The geographer R G Ward described sheep stations in the Taupo district as generally very large by the late nineteenth century, and Maori appear to have entered this form of pastoralism on only a small scale. The official records of Maori-owned flocks at the southern end of Lake Taupo indicate that they tended to be considerably smaller than the norm and were in decline by the 1890s.³³ As we noted in chapter 10, the combination of difficult lands and Government policies which shut out private competition proved unattractive to settlers and further limited the development of a leasing economy.

Runholding did not develop on the scale first anticipated. Farm settlement was, for the moment, limited to large-scale enterprises, but there was still considerable anticipation that settlement based around small farms would eventually be possible in the district as a transport infrastructure was developed, further scientific knowledge was gained, and new farming techniques became available. It was also assumed that forested land was naturally more fertile and, once cleared, would be suitable for long-term agricultural use. During the 1890s – and even when land purchasing began to be undertaken again early in the twentieth century – this remained a factor in Government purchase decisions.

As with other districts, the advances in refrigeration technology from the 1880s gave cause for further optimism that even the more marginal lands might be made viable for the new farming industry, and that further new advances in technology and scientific knowledge, more suitable animal and plant breeds, and improved land development techniques would enable this to happen. We note evidence, for example, of attempts to develop a small farm



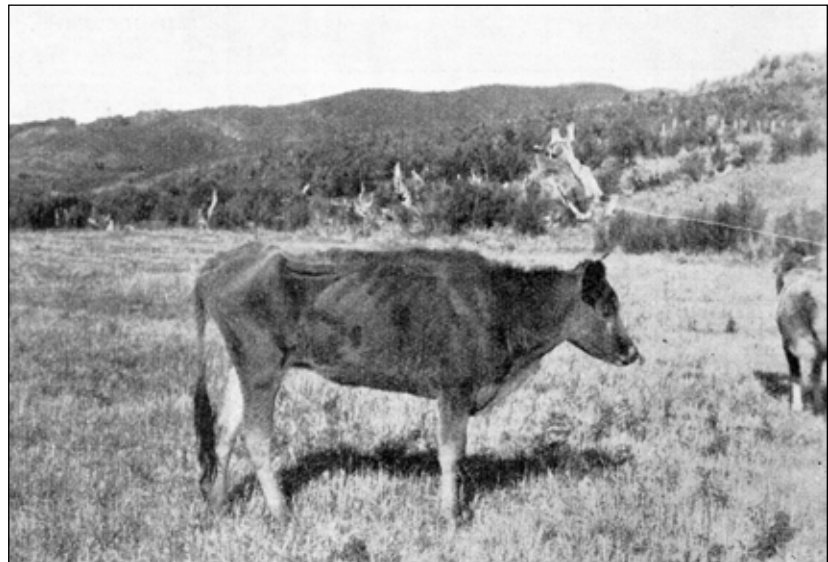
The Waihi Dairy Factory (undated)

settlement for European settlers on Crown lands in the Mamaku area of Rotorua from 1898.³⁴ Maps were also prepared for the Taupo district in 1891 and 1892 in the expectation that some form of farm settlement would be possible. These showed areas identified as having potential for small farm settlement and dairying, in blocks of less than 2000 acres, in the southern Taupo area from Pukawa and Tokaanu around to the Tauranga Taupo River.³⁵ As well as the potential for dairying in this relatively small area near the lake, it was expected that sheep farms of around 2000 to 3000 acres could be viable in much of the rest of the Taupo district, while the poorer pumice lands required pastoral runs of tens of thousands of acres.

Attempts at more intensive farming in our region threw into greater relief

the then mysterious failure of sheep and cattle to thrive (although crops and horses seemed unaffected). The problem was known at first as bush sickness, as it was thought that the tawa and rimu forests that had been cleared for farming were somehow linked with the condition.³⁶ It was not until the 1930s that it was linked with a deficiency of cobalt in the region's soils, by which time land development schemes were already being tried. In the meantime, even with this difficulty, attempts at farming continued, although once again it was often the large stations, with more extensive tracts of land and the advantage of being able to rest stock on apparently healthy areas, that fared better. We received evidence that extensive pastoral runholding continued in

Photograph of a cow with 'bush sickness'. In the 1930s, the cause of the disease was traced to a deficiency of cobalt in the soil.



the Rotorua and Taupo districts during this period, such as the Lichtenstein station on leased Ngati Pikiao lands.³⁷ There was also continued pressure on Maori to either participate in utilising their lands for farming or have them alienated as being 'idle'. As we noted in chapter 10, this led to new Government policies providing for the purchase of 'surplus' Maori lands.

We are of the view that, even though various forms of farming did prove difficult in many parts of this region – the pumice lands that cover much of the interior were identified by the later nineteenth century as being particularly poor in this regard – this did not undermine expectations that a rurally-based economy would eventually become important. This was substantially reflected in Government land purchasing policy, whether in areas identified for intensive agricultural purposes, such as the coastal Bay of Plenty, or areas identified for more extensive pastoralism, such as the Kaingaroa Plains and the open northern and south-western areas of the Taupo district. This was also underpinned by expectations of scientific and technological advances, increased settlement, and the provision of road and rail infrastructure. In some respects, this view was overly optimistic. However, this is to rely on the benefit of hindsight. The commitment to a rural economy during this period was such that governments went to great lengths to encourage even poor lands into agricultural production. This expectation and commitment to the development of a rurally-based economy was something the Crown had an obligation to consider during purchase negotiations. Determining a sufficiency of lands for iwi and hapu encompassed not only what was immediately required for their subsistence, but also what might reasonably be needed for the agriculturally-based opportunities that were expected from settlement.

It is clear to us that deciding what might be a reasonable sufficiency of land for these purposes was not an easy matter. It required the consideration of a number of factors, including the known quality of lands, other identified opportunities at the time, iwi and hapu populations, and access to likely markets. However, at the very least, the

standard had to be more than subsistence needs. In the Central North Island, where it was known that the quality of land could be so variable, the consideration of the immediate usefulness of lands for farming or agriculture, over and above mere acreages, required some prudence. We have already considered the Crown's failures to actively protect iwi and hapu lands in chapter 10. In terms of sufficiency for anticipated agricultural and farming purposes, it is clear that protections such as reserving a minimum acreage of 50 acres per head, even if they had been properly implemented, bore little relationship to contemporary understandings of the size of property needed for practical farming. As we noted, purchase negotiations were first begun in the 1870s when pastoralism clearly required significant acreages. In 1891, senior official TW Lewis still considered 50 or 100 acres appropriate for individual needs.³⁸ This was clearly unrealistic in large parts of our inquiry region, and it made no allowance for collective hapu and iwi needs.

By the 1890s, as modern farming practices developed, there was considerable public discussion about what kinds and acreages of land might be needed to develop viable farms. This discussion extended to the still-undeveloped country of the North Island. In parliamentary debates in 1894 on the Land Improvement and Native Lands Acquisition Bill, for example, there was general agreement among settler politicians that most of the land left for farm development in the North Island was poorer quality, more marginal country which often remained in Maori ownership. Even on better quality bush lands, 500 acres was still likely to be too small, once cleared, to form an economically viable farm.³⁹ It was generally agreed that even the better hill country, once cleared and grassed, required at least 500 to 600 acres. On the poorer quality, more marginal Maori lands, anything from 2000 to 20,000 acres might be required for a viable farm. The member for Waiapu, James Carroll, agreed that most retained Maori land was now of only marginal quality and required considerable development for farming.⁴⁰ Yet, even as this seemed widely known and agreed, reserve requirements for Maori at time

of purchase, at least on paper, remained at around 50 acres per head.

There was some movement in new legislative measures to at least take quality of land into account. For example, as we noted in part III, the Native Land Purchase and Acquisition Act 1893 (although it never seems to have been implemented) proposed that, in requiring Maori to either lease or sell their land, protections would be set on the basis of 25 acres of what was considered first-class land, 50 acres of second-class land, or 100 acres of third-class land per owner. However, these assumptions still fell well short of what was considered viable for marginal Maori lands. The Land Act 1892 set maximum acreages for general land-owners acquiring or aggregating farm lands at 640 acres for first-class land, 2000 acres for second-class land, and 5000 acres for third-class land. Although these were maximums, they were more realistic in terms of viable farm size.

The Stout–Ngata commission also came to the view, from 1907, that Government protections for Maori land were set at bare subsistence levels rather than what was considered practical for viable farming, even on average lands. The commissioners noted that Government policy, adopted from 1905 when purchasing of Maori land resumed, was that Maori needed to be protected for their ‘maintenance’ at 25 acres of first-class land, 50 acres of second-class land, or 100 acres of third-class land per owner.⁴¹ The commissioners compared these acreages with Government protections for compulsory acquisition of large pastoral estates under the Land for Settlements Acts. These entitled owners subject to the Acts to select land for themselves up to 1000 acres of first-class land, 2000 acres of second-class land, and 5000 acres of third-class land. These were maximums, but, as the commissioners noted, if Maori were protected in their land at only half these rates, there would be only a ‘very small’ area of Maori land left in the North Island for settlement purposes.⁴² At the same time, Maori were coming under considerable pressure during this period to properly utilise their lands for farming and other purposes. In Parliament in 1893, for example, the Minister of Lands, John McKenzie, observed that Maori were being ‘called

upon to make up their minds as to whether they will make good use of their land, or allow good use to be made of it by the Government.’⁴³

We are of the view that Government protections for Maori land retention were set at bare sufficiency during this period and not at what were clearly acknowledged to be practical standards for enabling Maori to utilise their lands for farming purposes. This was a breach of the Crown’s obligation of active protection of their Treaty development right to be protected in sufficient lands for what were anticipated farm purposes.

One impact of this failure was that, as we have shown in chapter 10, those iwi and hapu with interests in the Kaingaroa district who had been eager to participate in a leasing economy had lost most of their land base by the early twentieth century. With this loss went any possibility of taking part in future opportunities, including pastoral or other farming opportunities. The high rate of land alienation through sale in this district by 1900, much of which occurred when it was known that large stations were the most economically viable form of farming there, reflects the lack of reasonable steps taken by the Crown to protect the ability of iwi and hapu to participate in anticipated farm development opportunities.

We have already referred in some detail, in chapter 10, to the findings of the Stout–Ngata commission regarding iwi and hapu who retained interests in the Rotorua district by the early twentieth century. That commission found that in the coastal area, which possessed the best-quality lands in the district for agricultural purposes, ‘comparatively little’ land had been left to Maori as a result of Crown and private purchasing. Most coastal iwi, in fact, retained barely sufficient land for even their present needs.⁴⁴ The commission noted that Ngati Rangitihī, for example, were reliant on fishing and on seasonal rural work for Pakeha farmers.⁴⁵

The commission found that most iwi and hapu who had retained lands in the Rotorua district were now located in the interior, where the country was much more marginal for close farm settlement. There, the pumice lands



An unidentified Maori group outside a whare still under construction, sometime between 1892 and 1910. The information accompanying this photograph by Edward George Child describes the location as 'an unidentified swamp area at Lake Taupo' – some of the Maori-retained land marginal for farming at that time.

were suitable only for large pastoral runs.⁴⁶ The commission warned the Government that Maori generally had 'ample' land that was 'not suitable for close settlement' and had limited potential development uses. The area of good-quality land retained by Maori that could meet their present needs, their prospects as 'settlers', and the needs of their descendants 'is not as great as is generally supposed'.⁴⁷ As we have previously noted, the commission found that, taking the quality as well as the quantity of remaining land into account for present and future needs, especially for anticipated farming, the hapu in the interior of the Rotorua district, with the exception of Ngati Pikiao, 'cannot in our opinion be fairly said to have surplus lands for sale'.⁴⁸ The commission assumed that some of the best-quality land that remained was under forest that was yet to be milled,

although in some areas the trees might well be 'the most valuable crop the land will ever grow'.⁴⁹ It noted, however, the willingness of hapu and iwi to participate in farming and, on the best of the remaining lands, it recommended Government assistance in establishing large hapu farms of some 2000 to 3000 acres each – equivalent, presumably, to what were generally regarded by this stage as third-class farm lands. These were to form one farm each for the major hapu of Ngati Whakaue, Tuhourangi, and Ngati Uenukukopako, and two for Ngati Pikiao.⁵⁰ Otherwise, as noted, the remaining pumice lands were useful only as pastoral runs.

To summarise: in the Rotorua district, as in Kaingaroa, iwi and hapu were now severely limited in their ability to participate in farm opportunities as a result of Government failures in protecting them in retention of suitable lands. Those iwi with interests in the richer coastal lands had suffered significant

losses with little protection. Most retained lands were concentrated in the poorer and least accessible interior regions. In these circumstances, while farming was possible, options were limited and in some cases would have to wait until forest clearing was completed.

We do not have the benefit of a Stout–Ngata investigation for the Taupo district. However, the evidence we do have indicates a similar pattern, by the early twentieth century, of a failure of Crown protection for iwi and hapu. Some were subject to heavy land purchasing, for example in north-eastern Taupo, as a result of interest in possible pastoral runholding in the 1870s and 1880s. On the other hand, other tribal groups had been able to retain significant lands where purchasing had proved too difficult and their lands were either inaccessible or for the time being

unsuitable for farming. However, much of what was assumed to be better land, suited to long-term farm opportunities, was not immediately available for that purpose, being forested or lacking road and rail access. As we have already noted, much of this land, apart from a relatively small area for dairying around the southern part of Lake Taupo, required relatively large farm sizes of 2000 to 3000 acres to be viable, while tens of thousands of acres were required for large pastoral runs on the pumice lands.

From the early 1890s, Ngati Tuwharetoa leaders periodically informed the Government of the position as they saw it. Tureiti Te Heuheu told the Rees–Carroll commission in 1891, for example, that he believed that by then Ngati Tuwharetoa retained about 1.5 million acres of land. Laurence Grace gave evidence of his latest census, revealing a tribal population of about 2000 people.⁵¹ Assuming reasonable accuracy, this averaged at around 750 acres of retained land per individual over the whole district. This was not a large amount of land for possible farm development in such marginal country, where for most of the district average farms on the better land required around 2000 to 3000 acres to be economically viable, and poorer areas required much larger stations.

Tureiti Te Heuheu gave further evidence to the Native Affairs Committee in 1905.⁵² He noted that general provisions concerning classes of land, of up to 640 acres per farm for first-class, up to 2000 acres for second-class, and up to 5000 acres for third-class land, were completely unrealistic for the pumice lands of the district, which, relatively speaking, could be considered more like ‘tenth class’. He believed, nevertheless, that these lands could produce good quality sheep meat and wool, but that this generally required around 10 acres ‘all round’ for each sheep or, on the best of the pumice land, five acres per sheep.⁵³ It is clear from this estimate that, even with relatively large areas of land, farm units had to be substantial to be economic on the pumice land, with some runs needing to be 10,000, 20,000, or even 30,000 acres in size.⁵⁴

The pumice lands held little attraction for settlers who could find alternative farm land elsewhere. This was

possibly why the Stout–Ngata commission did not bother to investigate land uses in the Taupo district, apart from timber agreements. In 1909, Apirana Ngata described the large areas east and north of Lake Taupo as ‘poor pumice areas’ and considered that there was little likelihood of any great demand for such land for settlement in the near future.⁵⁵ In 1911, the Crown also considered most of the remaining large areas of Maori land in the Urewera and Taupo districts as generally unfit for close settlement (family farms). Small grazing runs or large pastoral runs were considered possible.⁵⁶ It was anticipated that such lands, lying to the north, east, and south of Lake Taupo, might after much experimenting eventually be made profitable, even if for the present they could only be classed as pastoral runs.⁵⁷ As we have seen in chapter 11, the Crown resumed its purchases of Taupo lands from around 1918, both for future land settlement purposes and to control the timber resource. This was in spite of variable land retention rates among Maori communities in this district and consistent information by this time that they were going to need large quantities of land for practical farming opportunities.

The Tribunal’s findings

We agree that, when the Crown began purchasing Maori land in the Central North Island, from the 1870s, it could not have predicted the exact ways in which modern farming would develop from the 1890s. It is also clear that large parts of the interior of this region proved stubbornly difficult to develop for farming in the years before 1929. However, Governments remained convinced that some form of settled agricultural or farming development was going to be a major economic opportunity in New Zealand – and in this region – throughout the late nineteenth and early twentieth centuries, either at the time or in the future as settlement progressed. The Crown purchased large areas of land in the region based on this assumption, especially in the coastal Rotorua district where lands were most fertile, and in Kaingaroa and northern Taupo when runholding appeared to become a significant opportunity in those

areas. Land purchase officials took the quality of land for possible agricultural purposes into account when negotiating purchases. There was also a strong assumption that advances in knowledge and technology would make even marginal lands more useful for agricultural purposes in the longer term, and governments purchased extensively, in anticipation of this, to make land available for settlement. The Crown also had an obligation, therefore, to protect iwi and hapu in sufficient lands to be able to participate in these anticipated opportunities.

We agree that determining what were sufficient lands for possible farming and agricultural purposes in this region was not an easy task, and that it required the consideration of a number of factors. The Crown wanted to prevent Maori landlessness, but it defined this inappropriately and without regard to the facts and advice available to it. The Crown defined sufficiency on the basis of subsistence needs for Maori, but on the basis of farming needs for settlers, and therefore protected and empowered each set of citizens differently. The Crown also failed to adequately monitor iwi and hapu needs, preferring instead to define protections only for individuals even while Maori still lived as tribal communities. This was in breach of Treaty principles of partnership, autonomy, active protection, and equity.

The Stout–Ngata commission revealed that this situation had already had significant impacts for some iwi and hapu by 1907, limiting them to a marginal subsistence role in any new farm opportunities. A similar pattern of events appears to have occurred in Kaingaroa and northern Taupo. We agree that it is sometimes difficult to make a direct link between insufficient lands and economic loss or marginalisation (prejudice), especially in those parts of the Central North Island region where lands were poor for farming. We follow previous Tribunal reports in noting that, even though it is difficult to be exact about the nature of this link, there clearly is one, especially when land was expected to be a fundamental economic asset for Maori, and farming was expected to be a major development opportunity. The development implications for iwi

and hapu who were left without a sufficient land base by the beginning of the twentieth century were serious. This was especially the case for those hapu and iwi whose lands were particularly suitable for the farm opportunities that were being identified.

There were still opportunities, after 1907, for the Crown to provide active protection of iwi and hapu to participate in farming on their retained lands in the more limited ways open to them. This was the case for Ngati Tuwharetoa, for example, and for the inland Rotorua iwi and hapu identified by the Stout–Ngata commission. We turn now to consider such opportunities.

PARTICIPATION IN FARM DEVELOPMENT OPPORTUNITIES

KEY QUESTION: BEFORE 1929, DID THE CROWN TAKE REASONABLE STEPS TO ENABLE HAPU AND IWI WITH RETAINED LANDS TO PARTICIPATE IN EMERGING FARM DEVELOPMENT OPPORTUNITIES?

We have found that governments identified some form of agricultural or farm-based land use as likely to be a major economic opportunity through the nineteenth and early twentieth centuries. Land settlement and land purchase policies were based on this belief, even for the more marginal lands of the interior Central North Island region. We turn now to consider to what extent it was reasonable for the Crown to have assisted iwi and hapu to participate in farming opportunities in the region before 1929, and to what extent it fulfilled any such obligation.

The development of modern farming in New Zealand from the 1890s, and especially in the critical period to the 1920s, finally seemed to offer the very real possibility that the social, political, and economic goals of economic growth based on the development of a closely settled, rurally-based economy might be achieved.⁵⁸ The new style of farming, based on the export of chilled meat and dairy



Queens Wharf, Auckland, in the 1890s, bustling with activity. With the advent of refrigeration, the export of chilled meat and dairy products from New Zealand rose from zero to 100,000 tons in the space of 20 years.

produce, grew rapidly, quickly eclipsing existing farm staples such as wool and enabling the spread of farming onto lands previously regarded as marginal. In 1881, for example, New Zealand produced no exports of refrigerated meat, cheese, or butter. Within two decades, by 1901, New Zealand's exports of such products had reached 100,000 tons a year and were still growing.⁵⁹ According to the historian, James Belich, between 1891 and 1911 the number of recorded dairy farmers in New Zealand jumped from 452 to 15,000, and continued to grow more slowly after that.⁶⁰ Dairy exports to Britain grew from 4000 tons in 1891 to 15,000 tons in 1901, and 123,000 tons by 1921. Frozen sheep meat exports grew from 50,000 tons in 1891 to 93,000 tons in 1901, and 216,000 tons in 1921. Growth in the later part of this period was helped by wartime commandeering.⁶¹ Many of the new farms produced a mix of wool, beef, and pork, as well as sheep and dairy, but the dominant farm products rapidly became butter, cheese, and sheep meat.

The new methods and more intensive style of farming that developed during this time were accompanied by an increase in the rural population of the North Island and a massive transformation of its environment. Although many new farms struggled initially, this period has also been identified as a time of major economic development opportunities. This was especially the case for those landowners with limited capital and land. They were now able to take advantage of sources of affordable and accessible mortgage finance, as well as advances in scientific and technical knowledge, to develop and transform their lands so that they could produce large quantities of export-quality produce. A new class of independent farmers was created based on these new forms of economically-viable, modern farm production.⁶²

Regional participation in these new farm opportunities varied. Some North Island districts grew much faster than others. Nevertheless, even more marginal lands

were considered potentially useful for farming, even if it meant larger, less intensive farms. Those who were able to enter the farming industry during the earlier part of this period gained the benefits of high commodity prices and guaranteed markets during the war years from 1914. Opportunities and benefits became more limited again in the 1920s, as general farm growth slowed and opportunities to enter farming became more restricted.

The rapid success of the new form of farming has been attributed in large part to active Government support and encouragement to landowners and settlers of limited means to participate. This included active assistance to remove barriers to using lands for the new form of farming, and positive encouragement for farmers to improve their methods and farm practices to produce quality produce for the export market. All parties before us agreed that, in addition to land ownership, a number of important factors were widely acknowledged in the nineteenth and early twentieth centuries (as they still are today) as prerequisites for successful participation in farming. These were secure forms of land title and governance, access to farm finance, and access to skills and knowledge.

The claimants' case

The claimants submitted that the Crown had a duty to actively protect the Treaty development right of iwi and hapu to utilise their lands in the New Zealand economy. The Crown had an obligation, therefore, to address identified barriers to Maori using their lands for such opportunities as farming. The obligation included:

- ▶ addressing title and governance issues, as identified at the time, to enable Maori land to be used for farming;
- ▶ assisting with the skills and experience that iwi and hapu needed to participate equally with other sectors of the community in farming; and
- ▶ assisting with forms of lending finance for improving Maori lands for farming that were equivalent to what was offered to other sectors of the community.

The duty of active protection also required the Crown to refrain from undermining iwi and hapu efforts to participate in farming or, if this was not possible, to impact on those efforts as little as possible.

The claimants submitted that the Crown failed to adequately address the barriers of title and governance for Maori land, which were limiting their ability to begin farming. This had long-term impacts for iwi and hapu. It resulted in increased pressure on their lands, and vulnerability to having control of their lands removed to others. It also contributed to the continuing and long-term reluctance of private lenders to provide the necessary investment finance for farm development.⁶³ Counsel for Ngati Tuwharetoa alleged, for example, that the Crown's failure to respond to requests to improve the Maori title system severely hampered their efforts to develop dairy farming in the 1920s.⁶⁴

Claimants also alleged that the Crown failed to offer iwi and hapu of this region the same or equivalent kinds of positive assistance that were provided to other sectors of the community to use their lands to participate in farming opportunities. This included a failure to offer access to inexpensive farm finance, which was offered to other landowners of limited means from 1894. The lending that the Government provided did not address the needs of Maori communities, and it was implemented in ways that effectively excluded most Maori. This failure was especially critical during the years of significant development in farming from the 1890s to 1929. The exclusion of Maori from this development was discriminatory and had long-term consequences.

The claimants submitted that the Crown also failed to provide assistance that had been identified as necessary to enable iwi and hapu of the region to gain the skills and knowledge necessary for the new style of farming. These needs were consistently made known to the Government through such official channels as commissions of inquiry.⁶⁵ In contrast, the Government took active steps to provide expertise and advice to Pakeha farmers in the ways that would be most useful to them.

In the claimants' view, there were serious consequences from the Crown's failure to assist iwi and hapu to overcome the barriers they faced to participating in farming. Effectively, they were excluded at a critical period, and this deprived them of the significant benefits that accrued from early entry into the industry. These benefits included significantly greater Government assistance, and high market prices which could provide a cushion for later downturns. Claimants submitted that they were disadvantaged by their effective exclusion from practical farm business experience, debt management skills, land development experience, and the specially-directed Government assistance that was available. In particular, disadvantage occurred when they attempted to utilise their lands and resources in later development opportunities. They were disadvantaged in terms of experience, skills, and confidence, and in the loss of land and resources they might otherwise have been better able to retain to support communities in tribal areas. In entering farming later, they faced significantly greater regulatory and environmental controls than had been the case for those who entered farming earlier in this period.⁶⁶

In the claimants' view, early exclusion also contributed to disadvantage in less tangible but still important ways. For example, it helped to entrench and prolong stereotypes that Maori were generally lazy, uncooperative, and incapable business people, that all Maori land was unsafe for lending on, and that it was not safe to allow Maori control of their land and resources. These stereotypes influenced the views of officials and the general public when it came to Maori participation in development opportunities, and even today they continue to restrict access to private lending sources.⁶⁷

It was submitted to us that this failure to assist Maori to overcome barriers to participation in economic opportunities, along with Crown policies targeting their lands and natural resources at a time when critical industries in the Central North Island region were developing, locked iwi and hapu into underdevelopment of their retained properties and taonga. The pattern of underdevelopment

established in the region in the period before 1929 continues to have serious consequences for hapu and iwi today.⁶⁸

The Crown's case

The Crown agreed that there is clear evidence that iwi and hapu of this region wished to participate in the new economy and develop their land in order to improve their social and economic circumstances.⁶⁹ The Crown noted that, even when land was not in development, there was still the problem of dealing with the costs of land ownership. Development itself often brought tensions over the nature of development and who would benefit from it.⁷⁰

There is also the vexed question of whether Maori owners prioritised accumulation of assets and reinvestment of funds for development purposes. The Crown cited the view expressed in the report of the Stout-Ōngata commission, 1907 to 1909, that many Maori still favoured consumption over accumulation and reinvestment. The Crown acknowledged evidence from Terry Hearn that, in the Taupo context, there was a proposed interrelationship between the Tongariro Timber Company royalties and the cooperative dairy company. The Crown noted, however, that what happened to the purchase moneys following the collapse of the forestry scheme is not known in any detail.⁷¹

The Crown also agreed that landholdings alone were not sufficient for economic well-being. Important additional factors included finance, skills, secure tenure, a diverse range of economic investment, and appropriate governance structures for land. Also, wider economic and political environments have influenced and shaped Crown and Maori views.⁷²

However, consistent with its view that the pre-1929 period was not of major importance for farming in this region, the Crown focused mainly on the twentieth century in its submissions on farm opportunities. In this context, it noted that its major response to the iwi and hapu of the region who wished to enter farming was the land development schemes established from 1929, and that these were 'fundamental' to assessing Crown actions during the

twentieth century.⁷³ The Crown described these development schemes as a principal Crown initiative to address such issues as title, access to finance, skills, and governance structures.⁷⁴ They were also vital in this region in developing the land and in provision of employment relief.⁷⁵

The Crown also questioned whether it was required to undertake any positive action to protect Maori in exercising their Treaty right to utilise their lands in farming in the nineteenth century, over and above normal protections for property owners in exercising their rights of ownership in modern circumstances. The Crown submitted that claims of inadequate positive assistance need to be considered within the context of sound economic principles and what was appropriate for the role of the State at the time. There were also complex tensions within communities about whether land should be used for development or traditional purposes, and the best means of achieving a balance with this. The Crown submitted that, in this context, claimants overstate the issues and under-emphasise the Crown's responses to identified difficulties.⁷⁶

Nevertheless, the Crown submitted that, while there is little evidence to illustrate the practical experience of these issues in our inquiry region, in general it was already taking some steps by the late nineteenth century to address difficulties with title and governance for development purposes. The Crown noted, in particular, the system of incorporations introduced from 1894.⁷⁷ The Crown agreed that governance structures were linked to title reform, finance, and development. It accepted that nineteenth-century land laws can be fairly criticised for failing to provide for more effective corporate or communal governance mechanisms and that, in Treaty terms, this may be one of the principal failings of the native land laws generally.⁷⁸ However, the Crown submitted that corporate ownership models in the form of incorporations were made available from late in the nineteenth century and that it took steps, over time, to enhance their viability.⁷⁹ The Crown also submitted that claimant submissions over-emphasise the problems with title structure as a cause of Maori problems in accessing

finance.⁸⁰ There are many aspects to the issue of Maori ability to participate in the developing colonial economy apart from the issue of title options.

The Crown also noted a number of legislative initiatives, from the 1890s onwards, that addressed the difficulties faced by Maori in obtaining lending finance for farm development.⁸¹ The Crown agreed that the ability to raise finance was intimately linked to development, and that issues of Maori access to finance were an ongoing concern throughout the twentieth century. The Crown submitted that there were 'a number of complex and interacting reasons for this.' These included the nature of multiple title to land and lenders' perception of risk.⁸² The Crown submitted that it undertook a number of legislative measures intended to increase the ability of Maori to access development finance, beginning in the 1890s when new farming opportunities were opening. It explained these in some detail.⁸³ In the Crown's view, this showed its serious efforts to assist Maori in overcoming barriers to using their lands for farming. These efforts have not been adequately recognised by claimants. Further, it is necessary to assess them in terms of what was possible and reasonable at the time.

The Crown acknowledged that factors such as skill and knowledge were important to successful land development. It did not, however, respond directly to claims that it failed to provide adequate assistance for iwi and hapu in gaining access to the training and knowledge required for modern farming in the years before 1929.

The Crown also submitted that tensions were evident in this region between those owners who wanted to develop lands for economic returns and those who wanted them used for traditional purposes, and that these were often not easy to resolve. The Crown had to take note of differing views within Maoridom as to the appropriate balance between economic development of land (which often required the freehold to be used as security) and the retention of land for economic use. The Crown submitted that much claimant evidence in this inquiry reveals tensions over economic or other uses for land.⁸⁴ These included

difficulties, noted in evidence, in achieving a balance between social and economic goals, and the tension for Maori owners between what some saw as appropriate land development initiatives and what others saw as a separation from their land as a result of development initiatives.⁸⁵

The Crown submitted that, overall, its policies during this period were reasonable responses to differences of opinion and tensions within Maori communities over whether land should be utilised and how it should be done. The Crown noted, for example, that in 1900 it developed a policy which acknowledged that Maori should retain ownership of their remaining land base but allowed for the availability of that land for settlement through leasing. The termination of Crown purchasing and the establishment of a new system of leasing land were seen as part of the same package by the Government of the time.⁸⁶ However, the Crown had to take account of the fact that land was a principal asset for Maori who considered economic development to be a valid reason for alienating their land. Central North Island Maori wanted, and were entitled to have, the right to alienate their land. For example, Tureiti Te Heuheu declared, in 1909, that Ngati Tuwharetoa wanted the power to dispose of their land by sale or lease, and wanted to open land for settlement as quickly as possible.⁸⁷

The views held by Maori and the Crown about what was appropriate in land administration changed over time. This happened as part of a discussion between Maori and the Crown, and between Maori themselves.⁸⁸ As a result, by 1906, it had become Crown policy to resolve Maori title difficulties as soon as possible through the Native Land Court, set aside sufficient lands for the maintenance of Maori, and as far as possible give Maori a start in farming their lands and in guiding them in making them productive, while throwing open the balance of Maori lands for settlement and cultivation by a variety of means, including Crown purchasing and various forms of leasing.⁸⁹ The Crown submitted that this policy was implemented through an audit by the Stout–Ngata commission, which (in Rotorua, at least) determined what land was required

by iwi and hapu and what could be disposed of. The later Native Land Act 1909 bore a ‘strong resemblance’ to the Stout–Ngata commission’s recommendations, which were, in turn, a compromise between the wishes of the different groups involved.⁹⁰ The Crown also agreed that, in spite of policies expecting further leasing, a considerable amount of land was sold in the years following the 1909 legislation. This was mostly in the Taupo region and was purchased by the Crown.⁹¹

With regard to alleged impacts in terms of claims of exclusion from development opportunities in this period, lost opportunity costs from foregone development initiatives, and loss of potential investment capital from failure to pay fair market value for lands and resources, the Crown submitted that these issues also need to be considered in an economically sound manner. Crown counsel noted that much of the region was ‘historically infertile and of limited agricultural potential’, and that farming development ‘was not possible in substantial inland areas until a resolution of the cobalt problem in the twentieth century’. Claims of underdevelopment need to be considered in light of this fact.⁹² A consideration of what could reasonably be expected of the Crown in this region needs to take account of what was understood and considered possible at the time in terms of farming.

RELATED ISSUES

Based on the submissions and evidence presented to us, we have identified two related issues that we need to consider in more detail before we can answer our overall question about participation in farming opportunities:

- To what extent was the Crown’s ability to take active steps to assist Maori in overcoming barriers to participation in new opportunities, such as farming, constrained before 1929 by prevailing views about the proper role of the State?

- Before 1929, did the Crown take reasonable steps, in the circumstances of the time, to actively protect iwi and hapu of this region by assisting them to overcome the barriers to their participation in emerging development opportunities such as farming?

Although these issues have been raised before us mainly in the context of farming, the parties also recognised that they are relevant to our consideration of other development opportunities in this region. We agree, and we note that, although we consider these issues in this present chapter on farming, they also provide context for subsequent chapters that discuss other development opportunities.

THE PROPER ROLE OF THE STATE

TO WHAT EXTENT WAS THE CROWN'S ABILITY TO TAKE ACTIVE STEPS TO ASSIST MAORI IN OVERCOMING BARRIERS TO PARTICIPATION IN NEW OPPORTUNITIES, SUCH AS FARMING, CONSTRAINED BEFORE 1929 BY PREVAILING VIEWS ABOUT THE PROPER ROLE OF THE STATE?

The claimants' case

The claimants submitted that it has been well established that the Crown duty of active protection of Maori in their properties and taonga, including their rights to develop these, includes an obligation of positive assistance. The Crown has recognised this obligation, even if it has not always been adequately implemented. For example, the Crown undertook to protect them in sufficient lands and at times offered some iwi and hapu positive and practical assistance to enable them to participate in new development opportunities.

The claimants submitted, however, that the Crown increasingly chose to direct its assistance and encouragement towards what it perceived to be the national interest, and that this meant it was settler landowners who benefited rather than Maori communities who wished to participate

in farming. This was particularly so during the late nineteenth and early twentieth centuries, just when iwi and hapu were recognising that they needed assistance from the Government in order to overcome barriers to their entry into farming, and to enable them to participate on equal terms with European settlers. They were willing to cooperate with the Government to achieve these ends, but wanted to retain their right to significant decision-making power over their lands so as to provide for the interests and preferences of their communities. They clearly articulated their concerns and needs to the Government through a variety of channels, and they continued to seek to be consulted over the implementation of Government policies. This included consultation about the extent and unmanaged nature of land alienation, as well as about barriers to using those lands they retained. The claimants alleged that the Crown was well informed about those barriers by the late nineteenth century. Claimants also noted the view of the Crown's historian, Donald Loveridge, that a policy of active support of Maori agricultural development was required by the late nineteenth century because of the large loss of Maori land by that time for little benefit.⁹³

The claimants submitted that, while the Crown was active in intervening to promote European settlement and in implementing policies and programmes designed to assist the perceived national and settler interest, it failed to similarly identify and address Maori needs in developing their lands for farming. It also knowingly implemented programmes that effectively undercut iwi and hapu efforts to participate in farming in this region. This included the renewed Crown purchasing of Maori land after 1905 without proper regard for Maori requirements, the reintroduction of Crown purchase methods that undercut Maori efforts to rationally manage their land for farming, and the continued use of proclamations preventing alienations other than to the Crown, which had the effect of preventing development initiatives. For example, in their closing submission Ngati Whaoa stated that they had retained the better-quality Rotomahana Parekarangi 3A block by 1900. However, from 1907, this land was subject to further

persistent Crown purchasing, often for inadequate prices, and to takings for scenery purposes, leaving Ngati Whaoa with insufficient lands for their 'continued survival and prosperity'.⁹⁴

The claimants alleged that the Crown actively intervened in development opportunities at this time, but with the aim of alienating Maori land and encouraging Pakeha land-owners into farming rather than positively assisting Maori to participate.⁹⁵ Ngati Tutemohuta, for instance, alleged that the Crown was more interested in alienating land from Maori than addressing the barriers to Maori when they first became apparent.⁹⁶ It was also alleged that, in the Taupo district, in the early twentieth century, the Crown adopted a 'rival development plan' to meet the perceived interests of settlers and the 'national interest' at the expense of the development interests of iwi and hapu, (including their wish to develop some land for farming). This rival plan stifled Maori development aspirations from an early period.⁹⁷ It included developments in the 1920s that damaged Ngati Tuwharetoa lakeside lands required for farming, and a new and extensive land purchasing programme from 1909 and during the 1920s that undermined their efforts to manage their lands rationally, retain those lands they required for long-term farm development purposes, and gain access to assistance for their own land development.⁹⁸

It was alleged that the Crown benefited from withholding positive assistance for Maori farming. Continued barriers to development assisted in the transfer of land out of Maori ownership, as selling land became the only means of raising investment capital.⁹⁹ In their generic submission on land administration, for example, Michael Sharp and Jolene Patuawa alleged that, in the early decades of the twentieth century, the Crown legislative framework did little to promote, and in fact tended to detract from, the development of Maori land in our inquiry region.¹⁰⁰ Instead, the focus of Crown policies with regard to the development of Maori land for farming during this period was to do so by removing it from Maori ownership and control.¹⁰¹

The Crown's case

The Crown accepted, in submissions to us, that there is clear evidence that iwi and hapu with retained lands in this inquiry region wanted to utilise some of those lands to take advantage of new economic opportunities. The Crown accepted evidence that Maori were keen to engage in the commercial economy and improve their economic and social circumstances. They were also under pressure to utilise their land for productive purposes in order to meet the costs of retaining it.¹⁰² The Crown also agreed that land ownership alone was not enough for successful entry into a new development opportunity such as farming. Other important factors, in particular knowledge and skills, security of tenure and forms of governance for land, new technologies, and capital, were also likely to be a prerequisite for development and economic advancement. So, too, was a diverse range of economic investment.¹⁰³

The Crown submitted that, when examining farming opportunities, claims about what could reasonably be expected in the way of active protection from the Crown need to be considered and analysed in an economically sound manner. The Crown relied to a large extent on the economic framework for analysis presented in the evidence of the economic historian, Gary Hawke, before the Tribunal's Gisborne and Hauraki inquiries. The Crown placed copies of this evidence on the record of this inquiry and asked us to consider it carefully, although Professor Hawke was not asked to appear before us.¹⁰⁴

We note that this evidence was produced in the context of the Hauraki and Gisborne inquiries, although Professor Hawke also makes general comments about the role of the State in the nineteenth century. The Crown appears to have relied on these at a generic level in our inquiry.¹⁰⁵ Professor Hawke argued that the accepted role of the New Zealand Government at that time was to act in a manner complementary to the markets in encouraging 'progress'. What was seen as an appropriate balance in this regard changed over time. However, in the nineteenth century, the prevailing view was that the appropriate role for the Government was to act as a facilitating mechanism for private business,

not as an active participant. It was not appropriate for the Government to take responsibility for economic strategy or the course of economic development. Nobody, in fact, was in 'control' of the New Zealand economy.¹⁰⁶

According to Professor Hawke, this meant that the only Crown role regarded as appropriate with regard to Maori (or indeed settlers) was to:

try and ensure that Maori knew what opportunities existed and to encourage [them] to consider the long-term consequences of the choices they made, and even to consult individuals who could be expected to provide sound counsel.

Ultimately, however, 'it was not for the Government to substitute its judgement for private ones'.¹⁰⁷

With regard to the extensive loss of Maori land in the Hauraki district, Professor Hawke argued that this prevailing view meant that the most that could be expected of even the most benevolent of governments was to:

regret that [Hauraki] Maori were not being more successful in participating in 'progress' and to reflect that little more could be done even in the way of providing information and advice before leaving them to make their own decisions.¹⁰⁸

In other words, Maori were given licence, not 'active cultivation', in line with similar social attitudes towards individual Pakeha at the time.¹⁰⁹ This view extended to the positive assistance the Crown could be expected to undertake.¹¹⁰ Therefore, it is Professor Hawke's view that it is:

almost inconceivable that it would have seemed proper, let alone wise, to go beyond advising Maori to consider their own decisions carefully. . . . [E]ven if the Crown had behaved in an absolutely exemplary fashion, but within the constraints of nineteenth century views of the role of the State, the outcome [a significant loss of land for Hauraki Maori] would not have been much different from what was experienced.¹¹¹

On the question of whether the Government could have done more to facilitate Maori farming in the nineteenth century, the Crown also relied on the evidence of Professor Hawke, when he wrote that this gives rise to the familiar

problem of persuading ourselves that governments could have 'struck balances which would have been better in terms of the various competing interests within Maoridom, and between Maori and others'.¹¹² In his evidence to the Gisborne inquiry, Professor Hawke further explained the context for this view, saying that the role of nineteenth-century governments was essentially to focus on establishing frameworks for economic activity rather than engaging directly in it. Governments made market transactions possible and were complementary to markets, but otherwise had a very limited role. In establishing a scheme such as the Government Advances to Settlers programme, the Government was actually imposing itself as an intermediary between lenders and borrowers and was not a provider of largesse.¹¹³

Professor Hawke was critical of claims by historians that this scheme was aimed at Europeans and not Maori. He explained that the problems of successful development of land and resources are complex.¹¹⁴ The Crown relied on this explanation when it noted that there are complex contextual issues surrounding claims regarding particular types of farm assistance, and it submitted that these have not been fully acknowledged by claimants. For such factors as skills and knowledge, and access to finance, acquiring and using these involved complicated issues that could not always be easily resolved. Achieving a desired balance between social stability and economic development required much more than land tenure change. Successful development required a wide range of skills in addition to those required for farming, including the ability to manage debt and to invest rather than dissipate revenue. The Crown submitted that 'it would have been unusual for the State to involve itself' in this area, although it acknowledged that by the end of the nineteenth century some models were beginning to emerge.¹¹⁵

The Crown noted that, in this inquiry region, Maori had already embarked on several reasonably ambitious and large-scale development projects before the advent of opportunities in modern farming. These included activities arising from the Fenton Agreement, and the establishment

of a township at Rotorua. The Crown submitted that such projects were found to require considerable skills and capital, which at that time many Maori communities lacked, and also inevitably involved some surrendering of control over resources. This, the Crown told us, raises another contextual issue. Using land in enterprises such as farming often involved some loss of control over the land and some risk of loss of land. The Crown submitted that Maori were not always willing to accept this. Professor Hawke observes that using land to raise finance inevitably involved some risk to that land when it was used as security. In the Crown's view, this raised issues and at times tensions within communities as to the appropriate balance between the economic development of land (which required freehold to be used as security) and the desire to retain ancestral land for traditional uses.

The Crown submitted that a number of claims concerning Crown assistance at this time, especially those made by Ngati Tuwharetoa, fail to acknowledge the fundamental economic principles expressed by Professor Hawke. In the Crown's view, there has been a 'great deal of overstatement' in terms of Maori inability to access capital and the failure of the Crown to render assistance with this, and in the claim that 'the Maori land tenure system made it impossible to raise capital'.¹¹⁶ The Crown submitted that 'there were difficulties with the Maori land tenure system but the problem of developing resources, including the crucial contribution and need for skills and finance, was a great deal more complex'. The wider context must be considered when assessing the Crown's role.¹¹⁷

The Crown also had to take note of differing views among Maori when setting policies. Crown counsel noted that there were many different views among individual Maori owners as to whether land should be developed or not. The status of some land as taonga created tensions within hapu as to whether this could be used for economic development and gain.¹¹⁸ Once decisions to develop were taken, tensions could also arise regarding the extent to which traditional use practices should continue. The Crown submitted that this inquiry has received a range of evidence of this kind of

tension and of Maori views and preferences, which themselves changed across the twentieth century.¹¹⁹ A fundamental tension throughout the twentieth century has been the changing balance between social and economic goals, and the differing emphases placed on them in relation to land both by Maori themselves and by the Crown and its officials. The Crown also noted the frustration expressed by some tangata whenua witnesses at what they saw as the distance between themselves and their land in cases where development initiatives have been implemented.

The Tribunal's analysis

We accept the general agreement of claimants and the Crown that more than land ownership was required to participate in the development opportunities that arose as a result of colonisation. Other critical factors were identified as important at the time, as was acknowledged by the parties before us. These included land tenure and governance, appropriate skills and knowledge, and reasonable access to finance. In considering what was reasonable for the Crown to have done with regard to these factors, we need to take into account three concerns: fundamental economic principles; the context of the time, including contemporary views about the proper role of the State; and whether the Crown was required to consider possible tensions within Maori communities about how development pressures might be resolved.

We accept that some of the fundamental economic principles articulated by Professor Hawke apply to successful economic development. We also accept his view that, in the nineteenth century, the political and economic orthodoxy held that it was acceptable for governments to encourage all forms of 'progress', including economic growth, and to focus on establishing frameworks in which entrepreneurs and businesses could flourish. It was not widely contemplated until later that the State should have a role in intervening to provide welfare to identified needy individuals. We also agree that a consideration of the way economies work and what constitutes successful development is a

complex task that must take into account many complex and interlinking factors.

We will take this context into account in our consideration of the claims before us. However, we do not feel that this stage one inquiry requires us to undertake a full investigation of the economic factors and processes involved in development generally. We are not required to measure the economic success of Maori participation in every opportunity they undertook. Instead, we need to examine what it was possible for the Crown to consider, in the way of active protection, to enable Maori, alongside other sectors of the community, to participate in achieving progress for themselves, their communities, and New Zealand as a whole. We do not accept that prevailing views of the role of the State meant that it was 'almost inconceivable' that nineteenth-century governments would have contemplated any more active protection of Maori than, at most, providing advice on long-term opportunities and encouraging Maori to consider the long-term consequences of their choices, before leaving them to their own efforts in their economic endeavours. This is not consistent with the historical evidence. In advancing this argument, the Crown has placed too much reliance on extrapolating what was possible from Professor Hawke's general comments, without also taking into account his acknowledgement of the pragmatic stance that governments, especially those in new colonies, often adopted in new circumstances.

The evidence available to us indicates that New Zealand governments have a long history of promoting economic development opportunities more actively than the supposed theoretical norm would suggest. Further, as we have already discussed, the British and later the New Zealand Crown accepted that more active protection of Maori was required than simply the provision of advice.

We agree that what is commonly referred to as *laissez faire* economic theory was influential in the nineteenth century. This view has been traced to the eighteenth-century English thinker Adam Smith, and was articulated and elaborated by a number of nineteenth-century political economists, including John Stuart Mill. *Laissez faire*

thinking was based, as the historian of the New Zealand Treasury, Malcolm McKinnon, explains, on the tripod of free trade, the gold standard, and a balanced budget.¹²⁰ However, as Dr McKinnon observes, and as Professor Hawke agreed in evidence placed on our record, it was also widely accepted that colonial governments would adopt somewhat wider economic responsibilities than might be considered respectable by supporters of *laissez faire* policies in England.¹²¹ As Professor Hawke explained in his evidence, *laissez faire* policies at the time did not mean minimal government as such, but were more concerned with what was regarded as the 'appropriate allocation of roles between government and non-government activity'.¹²²

Dr McKinnon and Professor Hawke agree that there was some debate in the nineteenth century about how these roles might be best allocated, and that, in practice, there were accepted departures from orthodox thinking. In particular, it was accepted that in the colonies *laissez faire* doctrines could be adapted to colonial circumstances.¹²³ In New Zealand, historians and economists agree that, on many occasions, pragmatism triumphed over doctrine, and that governments showed a considerable willingness to actively intervene to assist the economic progress of the colony when this seemed necessary.¹²⁴ The evidence available to us indicates that this pragmatism extended to considerably more than offering advice and setting frameworks within which markets could operate. The creation of a small-farm economy, for example, by actively promoting and even forcing 'closer settlement', was assiduously planned and promoted by late-nineteenth-century governments.

There is also evidence that in this period provincial and central governments took active steps to identify and promote what were believed to be likely economic opportunities, and offered assistance and encouragement to identified groups to participate in and grow those opportunities. It was common, for example, for governments to offer rewards and prizes to those who led the way in economic opportunities that it was thought were likely to promote the growth of the colony. Governments also took an active

role in identifying likely barriers to economic participation and growth, and attempted to remove or ameliorate these in some situations. How much this intervention was a matter of framework, and how much of active strategising and attempts to take a lead in economic direction, may be a matter of debate, but there can be no doubt that it was pursued at a much more active level than simply offering advice.

Historians and economists have noted many examples of this active intervention. In his book *Making Peoples*, Professor Belich shows how, from the 1850s onward, governments tried to kick-start various industries in the new colony during the nineteenth century. This included offering bounties to the first producers in a variety of industries, including paper, tableware, woollen cloth, preserved meats, and dairy products. 'A flax boom in the 1870s was stimulated by a government reward . . . for effective processing machinery', and even gold mining received state support, with rewards for discoveries. The State also became involved in the ownership of businesses from the 1860s, when the State Life Insurance Office and the Post Office Savings Bank were established. From the 1870s, the State took a leading role, with support from private industry, in developing the national transport and communications infrastructure. That contribution, in turn, helped to subsidise business profits and boost business activity.¹²⁵ Professor Hawke has noted this pragmatic use of state power, while pointing out that governments tried hard to ensure that they 'did not frustrate private enterprise'.¹²⁶

The historian of land settlement, William Jourdain, has outlined how various forms of provincial, local, and central government were actively involved in promoting and encouraging a variety of schemes to encourage immigration and land settlement, reflecting a consistently-held belief that farming of some kind was likely to be a major source of economic development and prosperity. Numerous schemes for encouraging entry into farming were tried, and subsequently extended or abandoned according to their success or perceived necessity.¹²⁷ A major focus of these schemes was to encourage immigrants of modest

means to take up and develop land as farms. During the 1850s, for example, provincial governments offered immigrant land grants to assist with land purchases. In some cases, grants of free land were awarded to those willing to settle in isolated areas. Other schemes offered ways to purchase land by instalments, or ways to turn rental payments into land purchases. In return for living on the land for an agreed period and cultivating a set proportion of the land taken up, governments made land available to settlers on cheap or easy terms. These included offers of deferred payments, homestead, village, and special settlement grants, and numerous land improvement schemes. Leasehold and freehold tenures were offered, depending on the needs and preferences of those groups the Government was trying to attract and encourage.¹²⁸ As suitable land became scarce, the Government began to promote closer settlement and the uptake of under-utilised land. By the early 1890s, in what Professor Hawke has described as 'a clear triumph of pragmatism over doctrine', the Government was even willing to set aside fundamental rights of private property ownership and compulsorily break up large estates in order to encourage and assist closer farm settlement.¹²⁹

Our most prominent historians have consistently noted the pragmatic and active role taken by the New Zealand Government in the colonial economy. John Beaglehole wrote as early as 1946 that, from the very beginning of colonisation, New Zealand was never an individualist society, but instead the 'individual and the State (or some tantamount body such as a form of local or provincial government) worked together' for economic progress. He described an acceptance of the State as 'the only organisation large enough', with the necessary power and resources, and with a long enough life to 'act in alliance with the individual':

Farmer or townsmen, labourer or employer or rentier, all have been included in this partnership, and all, at different times and in different language have called for its extension.¹³⁰

Half a century later, and in more modern terminology, Professor Belich also observed the very important role of

public enterprise in what he has described as the 'progress industry' in nineteenth century New Zealand. He explains how private companies, together with 'local authorities, imperial, colonial and provincial governments mounted and funded the various military, public works, immigration and propaganda campaigns' designed to promote the colonial economy. As a result:

Public and private providentially converged and were closely allied; twentieth century tensions between them should not be read back into the nineteenth. Both were run by the same people, and both were locked into the progress industry.¹³¹

We are persuaded that nineteenth-century governments were able and even expected to not only establish frameworks facilitating economic growth but also take positive action to assist, where practical experience indicated it was necessary. This went considerably beyond offering advice and encompassed active involvement in development opportunities that were identified as significant. What we need now to consider is the extent to which governments during this period extended this framework (and the various forms of active assistance it entailed) to pragmatic assistance and encouragement of Maori. Did the State have a 'partnership', as Professor Beaglehole put it, with Maori, in the same way that it did with the settlers whose interests successive governments actively protected and promoted?

The evidence available to us indicates that it was well within the contemplation of governments to consider and offer active assistance to Maori in areas thought to be significant for Maori. Again, this assistance was not restricted to offering informed advice and leaving Maori to get on with development. We have already noted (see chapter 13) that it was accepted from the beginning of European settlement that the Crown would need to take an active role in ensuring that Maori retained sufficient land and were not unduly harmed as a result of settlement. Lord Normanby's 1839 instructions to Hobson stipulated that Maori were to be prevented from entering contracts injurious to their interests, and that government land purchases were to be

confined to areas that Maori could alienate without distress or serious inconvenience. The establishment of the office of Protector of Aborigines was another measure of active assistance. Later measures intended to ensure that Maori retained sufficient lands included provisions to implement minimum acreages, appoint trust commissioners, make official reserves from purchases, and prevent mortgages on Maori land. While these measures have all been criticised for their ineffectiveness, they are clear evidence that the Government could at least contemplate taking active steps to protect Maori, so that they could have opportunities to participate in the developing economic use of their land.

We have noted, in our consideration of 'sufficiency' earlier in this chapter, that there is evidence that the Government took active steps to offer practical assistance to Maori to assist them to participate with other sectors of the community in what were identified as significant development opportunities for their lands. One major development opportunity that was recognised from an early period was for Maori to utilise land for settled farming and agricultural pursuits. We have already noted the assistance that Governor Grey, in the 1850s, felt it was reasonable and possible to offer Maori communities, including those in our inquiry region, in the pragmatic pursuit of peace, the integration of Maori communities into colonisation, and economic growth. This included assistance to selected communities to purchase flour mills and trading ships.

These direct and active forms of assistance were curtailed in the latter part of the century, when the Crown was often actively involved in competing to acquire Maori land and resources for settlement. Nevertheless, this does not mean that active steps to encourage and assist Maori in new and possibly lucrative forms of land use, including farming and agriculture, was beyond contemplation. We note, for example, evidence supplied by Vincent O'Malley of the Government's efforts to encourage Maori involvement in a silk industry in the early 1880s.¹³²

We have already referred to the joint-partnership projects the Government entered into with Maori in our region, through the Fenton Agreement and the subsequent

development of Rotorua township, and the native townships at Tokaanu and Rotoiti. Again, although these projects have been criticised for what they actually achieved, they were, nevertheless, active attempts to generate economic growth by starting small townships that could then attract farm development around them. They were represented at the time as joint development efforts between Government and Maori that would enable Maori to participate in and share the benefits of increased settlement. The Government also agreed to take an active role in native townships by managing the reserves and collecting rents for the owners. Regardless of how effectively the Crown carried out its duties, these projects make it clear that active involvement to encourage enterprise and further development in ways that included Maori landowners was not beyond the contemplation of the governments in the 1880s and 1890s.

Governments also showed that they could identify and respond to particular barriers affecting the ability of Maori communities to participate in development opportunities. This formed part of the overall legislative and institutional framework that enabled and encouraged participation in new economic development opportunities in the later nineteenth century. The decision of the Native Minister, John Ballance, to consult with Maori through a series of district meetings in the 1880s – including some in our region – is one such example. Again, regardless of how effective these reforms turned out to be, it was clearly within the contemplation of governments to respond to Maori concerns about land utilisation.

The historical evidence clearly shows that it was not beyond the limit of what could be contemplated for the Government to take active steps to identify and promote participation in economic activities, to remove or ameliorate identified barriers for certain groups to enable participation, and to take an active role in encouraging economic enterprises. We follow the Hauraki Tribunal in noting that Government interventions during this period went much further than establishing a framework within which businesses or individuals could operate.¹³³ We also follow that Tribunal in observing that, from the very beginning of

colonisation, the Crown accepted that its interventions would have a massive impact on, and would need to take account of the needs of, its Maori Treaty partners. From the outset, the British Crown deliberately positioned itself between the forces of colonisation and Maori, with the purpose of protecting Maori from the fate that had overtaken other indigenous peoples under European colonisation.¹³⁴ British politicians and officials recognised that specific efforts were needed not merely to grant Maori legal equality with settlers but also to help them become 'equal in the field'. This included equal ability to utilise properties and resources to participate in new economic opportunities.¹³⁵ The need for active Government assistance to enable Maori to participate in new opportunities continued to be recognised throughout the nineteenth century, even if the effectiveness of the results can be questioned.

In considering the opportunities that opened up in the 1890s, therefore, to use land in the 'modern' farming industry, the major issue is not whether the Government could have taken an active role in promoting participation and growth in the industry, but whether it would include Maori landowners among those other landowners it actively encouraged and assisted. The issue was 'for whose benefit the Crown intervened, and whether it could not have done so more determinedly, or more adroitly, on behalf of Maori'.¹³⁶

Historians agree that the Liberal Government of the 1890s recognised the potential for new farming developments to support its economic, social, and political objectives of closer rural settlement and individual family farms. The potential for closer rural settlement coincided with political pressures to address the challenge of a growing settler population at a time of restricted economic opportunities in many areas, reduced government spending, and fears of social unrest in urban areas. It also supported the long-held settler and Government vision of economically viable rural settlement that had driven much initial immigration to New Zealand. The Liberal Government therefore took an active role in encouraging landowners to develop their land for the emerging farm industry. This included

establishing a policy and legislative framework designed to facilitate entry into farming, as well as taking steps to assist certain groups of landowners who had been identified as facing barriers to developing their land.

A major group of landowners thus identified as requiring assistance were those Pakeha settlers who had undeveloped North Island lands, and limited capital and farm experience, and who could not afford or gain access to existing private sources of lending finance to develop their land into productive sheep and dairy farms.¹³⁷ Various forms of advice, encouragement, and assistance were developed to meet the recognised needs of this group of potential farmers. For example, the Government took an active role in ensuring that new farm districts were provided with infrastructure such as roads and bridges, so as to enable landowners to concentrate on developing the blocks they had acquired for farming. In some cases, new settlers were helped to clear and grass their land, in order to reduce the time before the farm became productive. Funds for development were provided through legislation such as the Lands Improvement and Native Lands Acquisition Act 1894. The Government also allowed would-be farmers to take up land on a variety of tenures, according to their needs and preferences, including leasehold, freehold, and deferred payment systems. In addition, a system of state-sponsored lending finance was created, most notably under the Government Advances to Settlers Act 1894, to enable landowners with limited capital and little or no credit history to gain affordable lending finance to develop their land. The Government also began to actively promote and sponsor research and development, and it established agencies to provide technical advice and assistance to farmers, for example by establishing a separate Department of Agriculture in 1892.¹³⁸

What were considered to be deserving sections of society with limited means were also encouraged to participate in farming. These included, for example, workers who had been contracted to build the North Island main trunk railway, who were expected to be looking for land to settle on and support themselves as their contracts finished.¹³⁹



Tureiti Te Heuheu Tukino V (1865/66?–1921), ariki of Ngāti Tuwharetoa. In 1905, he gave important evidence to the Native Affairs Select Committee on a range of issues affecting the development of Ngāti Tuwharetoa's lands.

Another group were the substantial numbers of struggling semi-farmers who, by the late 1880s, could manage little more than a subsistence existence, supplemented by other forms of seasonal and off-land work.

A large part of this effort was directed at providing a supportive framework for those identified as most likely to be in need of encouragement, in order to create the kind of rurally-based economy governments and settlers regarded as ideal. Nevertheless, it involved more than simply providing advice or creating a framework. The Government actively identified a new form of farm enterprise that it believed would promote settlement and economic growth. It then set about identifying those groups it believed required assistance and encouragement to participate in

the new form of farming, and designed, implemented, and delivered policies and programmes to meet their needs.

The success of the new farm industry was not entirely within the Government's control. Clearly, success depended on a number of complex and interlinking factors, including external factors such as overseas markets. Nor could the Government determine which farmers failed and which eventually succeeded. However, the Government did take a significant and influential role in enabling certain groups to participate in farming. In our view, this is where its Treaty obligation to protect the development right of Maori lay. A major issue for Maori in the Central North Island was whether they would be included in this vision. Inclusion would require active encouragement and assistance to develop their lands for farming, identification of the barriers they faced, recognition of their limited access to finance (and, in many cases, to suitable lands), and targeted assistance. Maori communities would then have opportunities to move from struggling subsistence to participation in the modern farm industry, and to receive the benefits that might be expected from this.

We accept the Crown's submission that there could be tension within Maori communities over striking a balance between utilising land for development purposes and its continuing use for traditional purposes, and concerns about the continuing maintenance of their relationships with their land once development was under way. The Crown did have some responsibility to take account of this. However, as other Tribunals have found, Maori had a long history of development and modification of their environment and resources, and they had developed tikanga and other ways to balance tensions between utilising and protecting their environment. Maori communities looked forward to new development opportunities following the signing of the Treaty and expected the Treaty guarantees to help resolve the new tensions these would bring.

We note, for example, evidence of careful decision-making about development by Ngati Tuwharetoa. In 1905, Tureiti Te Heuheu gave evidence before the Native Affairs Committee about requested reforms to the 1900 Maori

land council system. The committee was told that Ngati Tuwharetoa wanted to set aside certain areas of their land for a tribal inheritance that would remain entirely inalienable. These lands would be for customary purposes and for those people who were unable to take part in commercial activities. The tribe wanted to set aside other areas for commercial uses, including farming and exploitation of resources such as timber, flax, and gravel. Ngati Tuwharetoa were willing to have this land made free of legislative protection and restrictions so that it could be treated in the same way as European-owned land, thus allowing them to raise mortgages and even make some sales of land to accumulate investment capital, as long as they were able to make sale decisions deliberately themselves, through their committees.¹⁴⁰

The Stout–Ngata commission investigated the Rotorua district (and other districts outside our region) from 1907 to 1909. There was no difficulty for the commissioners to ascertain the views and wishes of iwi and hapu about the utilisation of their land. There is clear evidence that Maori communities accepted that development required balancing and choices, and they were willing to do this if they could make such decisions themselves and have them respected. Government policies based on the promotion of individual land tenure and the undermining of tribal forms of decision-making, however, only served to encourage tensions within Maori communities during this period and made their resolution more difficult. Pressure from the Government to 'properly utilise' land or face having it targeted for acquisition is also likely to have increased tensions.

Tensions are also likely to have been exacerbated by the Crown's failure to ensure that Maori retained sufficient lands for all purposes, including customary purposes and new development opportunities. When a choice had to be made between draining land for farm operations and conserving it for traditional mahinga kai, for example, it was always going to be more difficult if insufficient land had been retained for either purpose. We note, too, that much of the evidence of tensions referred to by the Crown is

contemporary, given in the context of difficulties described by witnesses who, having retained very little land, were forced to consider it for multiple and sometimes conflicting purposes.

We agree that tension within Maori communities over development decisions provides some important context in any assessment of what might have been reasonable steps for the Crown to have taken to enable iwi and hapu in our inquiry region to exercise their development right to utilise their lands for farming. However, we do not accept that this made it impossible or too difficult for the Crown to contemplate any such steps.

The Tribunal's findings

We agree that participation in development opportunities such as farming required more than land ownership. As the parties before us have agreed, other important factors identified at the time included security of tenure and adequate governance for lands, appropriate skills and knowledge, and reasonable access to finance. We also agree that it is necessary to take account of fundamental economic principles and the overall context of the time when considering development opportunities. Determining reasons for economic success involves a range of complex and inter-linked processes and factors. However, we are not required to analyse these in detail in order to consider the extent to which the Crown fulfilled its Treaty obligation to facilitate Maori use of their lands for development opportunities in farming.

The Crown's duties under the Treaty do not extend to an obligation to ensure that Maori achieve commercial success in whatever venture they choose. Rather, we need to consider, in the light of contemporary evidence, what it was practically regarded as possible for the Crown to do and whether it reasonably included Maori within this.

We agree that contemporary views on the proper role of governments in promoting progress in the nineteenth and early twentieth centuries tended to focus on how the State might establish and regulate frameworks in which

economic activities could take place. However, in practice, and especially in new colonies, this did not prevent governments from taking active and at times leading roles in strategising, promoting, and assisting significant economic developments, and in encouraging and assisting identified sectors of society to utilise their properties in such developments. This required identifying and addressing the barriers to participation faced by particular groups. It involved substantially more, in practice, than just offering advice or establishing the legislative or economic framework in which individuals or companies might operate. The issue we have to consider, therefore, is not so much whether positive Crown intervention was possible – for clearly it was – but for whose benefit the Crown acted and whether it took reasonable steps to ensure that Maori could participate on an equal basis with more favoured sectors of the community. This issue is particularly relevant to the case of farming opportunities from the 1890s.

OVERCOMING BARRIERS TO FARMING

BEFORE 1929, DID THE CROWN TAKE REASONABLE STEPS, IN THE CIRCUMSTANCES OF THE TIME, TO ACTIVELY PROTECT IWI AND HAPU OF THIS REGION BY ASSISTING THEM TO OVERCOME THE BARRIERS THEY FACED IN UTILISING THEIR LAND FOR FARMING?

The claimants' case

The claimants submitted that, during the 1890s, the Crown took positive steps to encourage some landowners to utilise their lands for farming. This included assistance to some of those identified as facing difficulties with lending finance, and to those who lacked the skills and knowledge to engage in the new type of farming. Claimants submitted that the Crown was also well aware of the difficulties Maori faced in utilising their lands for farming, which included gaining access to finance to develop land, ensuring secure title and governance of land, and developing the

skills required for new methods of farming. For example, submissions to the 1891 Commission of inquiry into Native Land Laws – the Rees–Carroll commission – clearly identified major barriers to Maori farming, including the general inability of Maori landowners to gain access to finance to enable them to develop their lands.¹⁴¹ The claimants alleged that, throughout the early twentieth century, subsequent official inquiries continued to identify these barriers to Maori entry into farming. They submitted that Stout and Ngata, reporting on the Rotorua district in 1908, for example, clearly identified the need for Maori to have access to suitable farm finance, land title, and skills training.¹⁴²

Claimant counsel also referred to advice on these matters from Maori leaders to the Government during this period, including their evidence to select committees and other forums in the late nineteenth and early twentieth centuries.¹⁴³ Claimants also submitted that they had been willing to support the national interest through farming and the expansion of farm settlement generally, as long as Maori were fairly included within the active assistance and encouragement programmes that the Government developed for farming. Counsel for Ngati Tuwharetoa, Karen Feint, submitted that Maori leaders had been willing to agree to land being made available for Maori and Pakeha farm settlement, as long as adequate steps were taken to ensure that Maori could participate and prosper. She referred to the conference held at Tokaanu in 1909, for example, where Tureiti Te Heuheu agreed that settlement suitable both to Maori and to Pakeha should be encouraged. However, he also requested that the Government ‘perfect the system for settling the Maoris upon their own lands’ and that it provide financial assistance to do so.¹⁴⁴

Claimants submitted that the Crown failed to take reasonable steps to meet Maori needs in respect of the barriers that had been identified during this period, such as adequately responding to title problems, even though the Crown was identifying the barriers faced by other sectors of the community and designing and implementing programmes designed to meet their needs. The Crown’s failure to effectively reform title and governance systems for

Maori land meant that Maori owners continued to find it difficult to manage their land for farming enterprises, and also continued to find it difficult to raise private investment finance to develop their land.

Claimants also alleged that the Crown failed to take reasonable steps to ensure that initiatives to assist landowners identified as having difficulties with private finance were extended to include Maori. In particular, they referred to finance provided through the system of Government Advances to Settlers established in 1894. In the claimants’ view, this system was deliberately designed to help small Pakeha landowners to develop their lands, and contributed significantly to their participation in large numbers in the modern farming industry. However, claimants submitted that it did not provide adequately or equivalently for the needs of Maori landowners. Maori were effectively required to cut up their multiply owned land, in which the interest of each owner was not ascertained on the ground, into ownership in severalty, where each owner’s interest was so defined and was divided out. This was against their wishes and, as a matter of practice, rarely occurred in the Central North Island region. The requirement for this kind of strict individualisation of title before receiving equal treatment with settlers was in breach of article 2 protections.

The claimants submitted that the Crown failed to adequately address Maori problems in accessing such funds. These practical difficulties were made known to the Government, especially by Apirana Ngata in 1905 and 1906. However, the Government failed to take reasonable steps to either remedy these problems or provide an equivalent system of lending finance for Maori that could meet their needs. It was alleged that the Crown’s failure, before 1929, to provide Maori with similar access to farm development finance as was offered to other sectors of the community was discriminatory, and seriously limited iwi and hapu participation in the farming industry. The claimants submitted that the Crown’s failure in this respect helped to perpetuate discriminatory views concerning Maori land and contributed to the long-term reluctance of lenders to provide investment finance for farm development.¹⁴⁵ The

events of this period, therefore, were alleged to have had long-lasting consequences for Maori farming.

The Crown's case

As we have seen, the Crown agreed that, in addition to land ownership, factors such as governance and title, skills and knowledge, and access to lending finance were all closely linked to farm development opportunities.¹⁴⁶ The Crown submitted that it did respond to governance and title difficulties, most clearly through systems of trusts and incorporation for Maori land which were provided from the 1890s. The Crown also agreed that the problems Maori landowners faced in gaining access to lending finance were an ongoing issue throughout the twentieth century. However, the Crown submitted that there were complex and interacting reasons for this, and that the wider context of finance for land development has to be considered when assessing the Crown's response to Maori concerns and wishes.¹⁴⁷ Crown counsel suggested that claimant allegations simplify and overstate the difficulties Maori had in raising capital. In particular, counsel disputed the claim by Ngati Tuwharetoa that the Maori land tenure system made it 'impossible to raise capital'.¹⁴⁸ Claimant submissions over-emphasise title problems as a cause of the problem of Maori access to finance.¹⁴⁹

The Crown submitted that the underlying economic context had to be kept in mind when considering finance for Maori land. The State 'came to play a significant role in financing the rural economy' in the last quarter of the nineteenth century and in the first part of the twentieth century, but private sources of finance such as stock and station firms, banks, and private concerns including firms of solicitors 'held considerable control over the flow of credit to this sector'.¹⁵⁰ Business decisions to lend money depended, in part, on whether adequate security was available. This meant, ultimately, that the freehold of land had to be available as security for lending. The Crown submitted that private lenders were (and continue to be) vitally

interested in security of title, and it noted that Alan Ward also agreed that this was the case.

Beyond minimum thresholds of security, a number of factors were likely to be important, including the perception of lenders, how much money financiers had available, competition between borrowers with varying risk ratings for available funds, and, more generally, the risk tolerance of the lender. 'Greater returns have always been demanded from investments attracting greater risk of loss'.¹⁵¹ The Crown relied, in this regard, on what it saw as the compelling evidence of Professor Hawke to the Tribunal's Gisborne inquiry. Professor Hawke explained that lenders are interested in what borrowers do with their finance, so they can be confident that they will be repaid:

Lenders have an interest in the real intentions and the management skills of borrowers, and many Maori and Pakeha would not qualify. . . . In either case, disappointed intending borrowers would consider themselves to be subject to discrimination and lack of access to 'development finance'.¹⁵²

In Professor Hawke's view, 'it would be difficult to distinguish discrimination against Maori from an assessment by lenders that particular potential borrowers lacked educational skills' and were therefore too great a risk.¹⁵³

The Crown adopted Professor Hawke's observation that lenders' willingness to loan has long depended on an assessment of a potential borrower's risk. A number of factors are considered in any such assessment, including capital, character, credit worthiness, capacity to repay, and credit history. Maori landowners had difficulties with several of these factors. They were not alone in this, and other sectors of the community of modest means and without capital or a credit history faced barriers to accessing development finance. By 1894, when the Government began to make credit available through the Government Advances to Settlers scheme, availability of credit for rural land development was a considerable problem.¹⁵⁴ The Crown submitted that factors 'such as the wider perceptions of lenders, are not directly within the control of the Crown'.¹⁵⁵

The Crown submitted that borrower reluctance, when raising finance involved a risk to the retention of land, was also an issue.¹⁵⁶ Another relevant contextual issue was the range of views among Maori in relation to raising finance and land development. Twentieth-century Maori had differing views on the development of their land. The tangata whenua evidence suggests that some Maori simply were not willing to risk losing their land.¹⁵⁷

In practice, the Crown implemented a number of legislative measures to increase the ability of Maori to access development finance. The ability to mortgage Maori freehold land was restricted in the nineteenth century, as a result of concern over how Maori were managing their mortgages. Although there is little research about Maori responses to this restriction, the Crown noted that, in 1886, James Carroll expressed support for the 1878 prohibition on mortgages. The ability to mortgage Maori freehold land was briefly reinstated between 1888 and 1894. Then it was 'in a sense, tightly circumscribed' between 1894 and 1909 before being relaxed again, 'with Maori potentially enjoying a greater number of options for raising development finance'.¹⁵⁸

The Crown denied that it failed to respond quickly enough to problems with Maori access to finance.¹⁵⁹ It accepted that, until the 1880s, 'there was no systematic provision' of finance for Maori land, but pointed out that 'in the same period, the Crown did not assist European settlers with finance for land development' either. As access to credit for rural land development came to be recognised as a major problem late in the nineteenth century, the State intervened to provide financial assistance for Maori land. This included legislative developments of the 1890s, and 1897 especially, which enabled Government department lending for Maori land.¹⁶⁰ The Government Advances to Settlers Act 1894 was a general response to the barriers all landowners of modest means faced in gaining access to development finance.¹⁶¹

The Crown submitted that Maori were not legally excluded from access to the Government Advances to

Settlers scheme, although there were some practical limitations on Maori access. Maori land was eligible for advances under the Act, as long as it was freehold land held in fee simple under the Land Transfer Act or title was registered under the Deeds Registration Act. Under the Native Land Court Act 1894, all Maori land that had passed through the Native Land Court and was held under memorial of ownership or an intermediate form of title was deemed to be Maori freehold land.¹⁶² The Crown acknowledged there were still practical problems with this, however, because it seems that the relevant orders and title in the Native Land Court system still had to be transmitted to the appropriate district land registrar for the issue of a Land Transfer Act certificate of title. A further difficulty was that the consent and signatures of all owners was required to mortgage land. This meant that just one owner could prevent a mortgage. However, the Crown submitted that, by this time, owners had the option of incorporating their land, which enabled them to use voting to decide such matters.¹⁶³

The Crown accepted that, even though Maori were legally eligible for advances under this scheme, there is some evidence that the State Advances Board may have fettered itself with a policy not to lend on land with multiple owners. More research is required on this issue, the Crown submitted, before firm conclusions can be reached.¹⁶⁴ The Crown was, however, able to point us to evidence that, in 1906, the board spelt out its policy in response to inquiries from three Maori members of Parliament. 'The policy appeared to provide that the land be held in severalty', that the security was in order (there was no defect in title), and that the borrowers had sufficient other land for their support and could demonstrate an ability to service the loan. Prime Minister Richard Seddon noted 'that it was the experience of Government lending departments that it was most difficult to make Maori recognise their responsibilities' to pay rent or interest, and that consequently extra precautions were necessary. A compromise was reached, whereby a lender would be 'given power to lease the secured land in the event of a default'.¹⁶⁵

Aside from the Advances to Settlers provisions, the Crown submitted that it undertook a number of measures to improve Maori access to finance for farm development, according to contemporary understandings and perceptions of what was reasonable. In 1895, incorporations were permitted to borrow from the Public Trustee.¹⁶⁶ The Crown submitted that, from 1897, it also established provisions that enabled holders of land in multiple ownership to raise finance, while taking account of the concerns that had led to the restrictions on mortgages.¹⁶⁷ Under the 1897 rules, owners (or their incorporation) had to vest the land to be mortgaged in a competent trustee, often the local commissioner of Crown lands.

The Crown submitted that, while this 'may seem somewhat paternalistic today', it should be considered in light of the legislators' experience of Maori.¹⁶⁸ The Crown appears to be referring, in this regard, to examples such as the move by legislators to place restrictions on mortgages in 1878, as a result of concern over how Maori were managing them. The Crown referred us to evidence presented to the Tribunal's Hauraki inquiry by Robert Hayes on native land legislation in this period.¹⁶⁹

The system established in 1897, the Crown argued, 'enabled Maori who held their land in severalty to borrow on mortgage from a Government department'. The borrowers 'needed to have other land for their support', taking into account the potential for default and a forced sale of the security.¹⁷⁰ Provisions of 1897 and 1898 also empowered Maori to convey land by way of trust to the Surveyor-General or the Commissioner of Crown Lands, who were legally able to borrow money for survey and subdivision. The Crown suggested that these provisions also 'specifically contemplated that where land was held in severalty, the owner was empowered to borrow from Government departments'.¹⁷¹

The Crown submitted that it undertook a number of other measures in the early twentieth century designed to improve Maori access to farm finance. The Maori Lands Administration Act 1900 included a mortgage in the definition of alienation, and Maori land councils supervised

mortgages on the same terms as the Advances to Settlers scheme, with each council allowed up to £10,000 per annum for this purpose. An amendment to the Act in 1903 'permitted the management committees of incorporations to borrow money on livestock, chattels and mortgages'.¹⁷² The Maori Land Settlement Act 1905 permitted 10-year loans from public sources such as the State Advances Office, at 5 per cent interest, secured on one-third of the assessed value of the land. This was extended in 1906, and again in 1908, when it became legal to secure loans, albeit still only from public sources, on most Maori land. Maori were also protected from foreclosure, as 'in cases of default the State Advances Office of the Public Trustee would lease the land and collect the rents until the debt was paid off'.¹⁷³

The Crown submitted that it also responded to difficulties with governance of land, which it agreed were linked to finance and development. Its principal response was to introduce incorporations in the late nineteenth century. They continued to be used throughout the twentieth century in our inquiry region, although in the last 50 years trusts have also become significant. Both types of entity underwent a number of important changes in the twentieth century.¹⁷⁴ The Crown argued that the record of this inquiry lacks extensive evidence examining the detail of these mechanisms.¹⁷⁵ It raised concerns over the report commissioned by the Tribunal covering these matters, which it said was carried out in a short time and was limited in scope and not based on a comprehensive assessment of the legislation and regulations.¹⁷⁶ The Crown noted that incorporations were provided for nationally from 1894. From 1909, incorporations were placed under the control of Maori land boards, and they were further modified throughout the twentieth century. Regulations promulgated from an early period indicate that they were not just mechanisms for land alienation.¹⁷⁷ The Crown submitted that incorporations and trusts were serious attempts to address problems, and that they have played a significant and positive role in enabling Maori to manage their land. The academic literature is generally favourable towards trusts and incorporations, but the most fundamental assessment of success

is their continued existence and uptake by Maori. Any criticism has been directed more at modifying them than reflecting systematic protest.¹⁷⁸ The Crown also submitted that tangata whenua evidence concerning trusts and incorporations is generally positive.¹⁷⁹

Maori land boards, the Crown argued, were a form of governance designed to meet Maori needs, including finance; their longevity and an absence of protests by Maori indicates a level of acceptance that the system offered an effective way for Maori to utilise their lands.¹⁸⁰ The Crown also submitted that the two main Maori trust boards in our Central North Island region were 'very important institutions'. Maori landowners in our inquiry region now also 'use companies as management and development vehicles', although there is little evidence on them for this inquiry.¹⁸¹

Another important source of accumulating investment capital for rural development, the Crown argued, was the judicious sale of land. Finance obtained in this way could be invested in the land that remained. Land was still a principal economic asset for many Maori of this region, and iwi considered economic development to be a valid reason for alienating their land. For example, the Crown noted that, in 1909, when there were still substantial areas of Maori land in the Taupo district, Tureiti Te Heuheu favoured leasing and selling land to promote development.¹⁸² This phenomenon is especially well documented in the Taupo region in the early twentieth century, when the Crown began purchasing there again.¹⁸³

The Crown submitted that it was a complex undertaking to assess the impact of Crown purchasing on the ability of Ngati Tuwharetoa to develop their land and resources. Crown purchasing offered landowners opportunities to accumulate significant capital that could be invested productively. It was evident that, during the 1920s, Ngati Tuwharetoa made efforts to accumulate funds in this way. The Crown acknowledged, for example, the link shown by Dr Hearn between Tongariro Timber Company royalties and their support of a cooperative dairy company as evidence of Ngati Tuwharetoa's willingness to prioritise investment and collective interests over immediate

consumption and personal gain. However, the Crown submitted that there is no evidence of what happened to those purchase moneys when efforts to build a long-term dairy industry failed to materialise as a result of the collapse of the forestry scheme.¹⁸⁴ The Crown submitted that it seems insufficient finance was retained from the sale of land to allow accumulation for reinvestment.¹⁸⁵ This was despite the substantial purchase prices paid by the Crown for some land blocks, even though they had many owners. Little is known about what happened to the money from these land sales. The Crown argued that, in general, the use and distribution of purchase capital from the sale of Maori land is under-researched, and it submitted that attempting to determine whether or not Central North Island Maori gave priority to accumulating assets and reinvesting funds is a vexed question.¹⁸⁶

The Crown submitted that there is a lack of information on how attempts to address difficulties for Maori actually impacted on Maori in the Central North Island inquiry region. This includes a lack of information about the ability of Maori to gain finance. As a result, it is not possible to determine what prejudice, if any, might have been suffered.¹⁸⁷

The Crown did not respond to allegations that it did not assist Maori with training and skills for farming in the period from 1890 to 1929.

The Tribunal's analysis

We have already found that the Crown had an obligation of active protection for iwi and hapu who wished to exercise their Treaty development right to participate in farming during the nineteenth and early twentieth centuries. This duty of active protection did not extend to ensuring Maori success in an enterprise, but was an obligation to take reasonable steps, in the circumstances of the time, to enable Maori landowners to participate in new developments such as farming equally with other sectors of the community. This duty extended to active protection of the right of iwi and hapu to develop their communities, as well

as individuals, according to their preferences, objectives, and needs.

We agree that issues of land title and governance affected the ability of Maori to utilise their lands for farming. We have already considered these issues in part III of this report. Our findings in chapter 11 concerning the adequacy of the Crown's response, particularly with regard to trusts and incorporations during the period from 1890 to 1929, provide an important context for our discussion in this section. We do not intend to repeat the details concerning trusts and incorporations as a means of addressing title problems. We will, however, comment specifically on title issues with regard to the question of access to lending finance. Here, we concentrate on a consideration of the other major factors that were identified as important at the time, in particular, access to finance to develop land for farming, and access to skills, training, and experience for new forms of farming.

In the Crown's submissions, it expressed a preference for considering the twentieth century as a whole when assessing its responses to the barriers Maori faced to farming. Thus, the Crown emphasised that the Maori land development schemes established after 1929 were its fundamental response. This is consistent with the Crown's view that, before 1929, farming was not considered an important development opportunity in the Central North Island and therefore is not one that the Crown should have been expected to consider. However, we have already found that, even though much land in the interior was recognised as marginal for farming, and especially the land retained by Maori, farming was nevertheless always considered to be an important development opportunity there. The Crown's policies and programmes were based on this understanding. As a result, the Crown needed to consider farming as a significant opportunity for Maori and to protect their Treaty development right in respect of their retained lands. Central North Island Maori claim that the Crown failed to do so during the critical pre-1929 period. The Crown has responded that important initiatives were taken during that time, particularly with regard to lending finance. It

has submitted that these initiatives were reasonable in the circumstances and have not been adequately recognised. In this section, we assess the evidence and make findings on the adequacy of the Crown's actions and policies in Treaty terms.

It is generally agreed that the years from 1890 to 1929 were an important period in the development of farming in New Zealand. Even if Maori land in the Central North Island was often marginal in its suitability for new forms of farming, the expectation was that it could be further developed. Maori communities in this region faced pressure to begin using their land for what farming was possible, or lose it. The Crown's responses to the barriers to development faced by Maori during this period, especially given this pressure on them to develop their land, became critical in terms of its Treaty obligations. We will consider the development schemes of the 1930s and later years in the final section of this chapter.

Access to finance to develop lands for farming

We begin by acknowledging that, while the parties before us made a number of allegations and responses about Maori access to lending finance during this period, all agreed that considerably more research is required on a number of issues before conclusive findings can be made. There is also very little information about the actual implementation of some initiatives in our inquiry region. Nevertheless, we have been urged to give these issues general consideration because of their importance. We have not been able to undertake a full and detailed investigation within the limitations of this generic stage one inquiry. We have relied on the evidence placed before us, supplemented by official published sources, in an effort to understand the context of Crown policies and initiatives regarding lending finance for farming. Our observations and views are necessarily preliminary, but they will alert parties to where we feel more detailed research is likely to be helpful for negotiations.

In undertaking this preliminary overview, we have taken the economic context, including fundamental economic

principles, into account when considering issues of barriers to accessing lending finance. In particular, we accept that finance for investment in new opportunities, such as developing land for farming, had to come either from accumulated funds or from sources of lending finance. We also acknowledge that lending finance needs to be considered in terms of the relationship between lenders and borrowers, rather than simply as a pool of largesse.

The evidence available to us indicates that, during the nineteenth century, Pakeha and Maori landowners relied on a mix of accumulated capital and credit to engage in development opportunities, including farming. They tended to rely on bringing in expertise and then accumulating practical experience and skills in order to acquire the knowledge and experience necessary to participate in new opportunities. As we noted earlier in this chapter, Maori (including some hapu and iwi in this inquiry region) participated actively and with some success from the early period of European settlement in new agricultural and farming opportunities. This included significant involvement in growing produce for domestic and international markets and in the coastal shipping trade, before changing markets and circumstances required shifts to new forms of opportunity in the 1860s. There is also evidence of Maori communities quickly grasping and adopting new business and commercial concepts and practices, and appreciating the necessity of investing in capital goods and equipment which included, in the case of early farming and agriculture, trading ships and flour mills. Capital for investment was acquired through profits from cooperative production and trade of agricultural produce, harvesting and sale of resources such as flax, participation in coastal trading, and charging for services and labour. Maori communities also acquired necessary skills and knowledge through encouraging skilled Pakeha and missionaries to settle among them, by leasing equipment and machinery to skilled Pakeha to run in joint partnerships, and by hiring themselves out in new activities such as shipping until they acquired experience and skills they could use themselves.¹⁸⁸ The Government offered positive

assistance, including helping to fund equipment, machinery, and ships, and offering advice.

Colonisation was based on the assumption that Maori could rely to a large extent on accumulated funds from judicious land sales to engage in development opportunities such as farming. As their retained lands gained in value from settlement, further careful sales, profits from productive activities such as farming and agriculture, the sale of resources such as timber and flax, and income from leasing would allow the accumulation of profits for further opportunities as well as immediate needs. Increasingly valuable retained lands could also be used as security for borrowing and other commercial transactions directed towards land development. From 1870, Maori in our region were encouraged to alienate land on this assumption, and although motives for selling were varied and often difficult to precisely identify, some communities did attempt to use profits from land sales to invest in purchasing sheep flocks and other forms of farming investment, as we have described in chapter 10. However, by the 1880s, farm opportunities were largely confined to the great estates, and the level of investment that was required was beyond the capital resources of Maori communities – as well as most colonists.

There is evidence that, by the 1890s, and until the 1920s, Maori were facing significant barriers to accumulating or borrowing finance to develop their lands in order to enter the modern farm industry. The Government was made aware of this problem through representations from Maori leaders, as well as from official sources such as inquiries and official reports. By the 1890s, Maori communities were warning the Government that accumulating finance from such anticipated sources as land sales was proving problematic. These warnings were confirmed in evidence collected by the Government's own official inquiries. This indicated that the process of determining and settling land title was creating significant barriers for Maori trying to accumulate funds and transform their scattered interests in land into blocks that could be utilised for farming. We have discussed this in more detail in part III.

The 1891 Rees–Carroll commission received evidence from several Ngati Tuwharetoa leaders, including Tureiti Te Heuheu, Tokena Kerehi, and Ngakurute Te Rangikaiwhiria, that they were willing to begin using their lands for farming but were concerned that the Government's purchasing practices were forcing down land prices and preventing the accumulation of investment funds. Kerehi described this as Government kuhuru ('murdering') of Maori.¹⁸⁹ In his evidence to the commission, Maori member of Parliament Wi Pere also warned the Government that Maori generally required access to reasonably-priced Government credit if they were to make improvements to their land and make it productive.¹⁹⁰ This was not a plea for Government largesse as such, but a request that Maori be included within steps being considered to make lending finance more widely available for farming. The official report of the Rees–Carroll commission supported these concerns and recommended that the Government advance finance to a proposed board, so that all necessary funds could be obtained for expenses, surveys, and other improvements, with these to be charged against Maori lands.¹⁹¹

In notes which formed an addition to the commission's report, James Carroll confirmed that Maori were interested in using their lands for farming and wanted to participate with their European neighbours in agriculture and profitable stock raising, joining with them in becoming useful settlers and adding to the productive powers of the colony. He claimed that Maori fully understood that, in order to accumulate the necessary funds required for clearing, fencing, and stocking their land for profitable use, they might well need to sell some surplus land. However, they were unable to gain full value from these sales because the Government, through its policies of pre-emption, was creating a single market where they could get only very low prices. Refusing to sell at such low prices might be regarded as locking land up, but it was understandable, and Maori sought more judicious legislation that would fairly meet their aspirations.¹⁹²

In debates in 1891 and 1893, Carroll continued to tell Parliament that Maori required fair prices for their land

if they were to accumulate funds for farm development. He reiterated that if Maori were paid fair prices and could use those funds to develop their remaining land, much of which required considerable expenditure to be made productive, they would be able to settle and farm their land and in so doing contribute to the national economy as did Europeans.¹⁹³

The Stout–Ngata commission, established in 1907, also explained clearly to the Government how Maori owners were caught up in protracted and expensive processes to even bring their land to a point where they could seek further financial resources to begin to develop it for farming. The commissioners pointed out that European settlers were benefiting from a Waste Lands Board that cut up Crown land into economic farm blocks, surveyed them, fenced their boundaries, and constructed necessary access roads. This meant that, once settlers moved onto their land, they could concentrate on finding the necessary finance to improve it and turn it into a successful farm.¹⁹⁴ The commissioners explained that it was widely assumed that, because Maori owned land, they could concentrate on improving it and creating farms from it. In reality, they were faced with a much more complicated process of creating usable farm blocks from their land interests, even before they could begin to improve them. All Maori really had were paper shares in land, and these were often scattered over many blocks. The process of turning those shares into farms was expensive, and it dissipated their funds before they could bring themselves onto an equal footing with European settlers.¹⁹⁵

In part III, we made findings about the difficulties that Maori faced in gaining secure title and accumulating funds for purposes such as farming. Here, we note that, by the 1890s, as new opportunities arose to develop land for farming, information was available to the Government from a variety of sources which showed that Maori communities were facing significant financial barriers to using their land for farming. Simply accumulating income was unlikely to be sufficient for the level of investment required, and this put Maori in a similar position to many Pakeha settlers of

limited means, who owned land with the potential to be farmed but required access to lending finance to make it possible.

As we have already pointed out, one of the assumptions used to justify the alienation of Maori land was that Maori would not be harmed, because their remaining land would become more valuable and still be able to support their communities. As land values rose, not only could judicious sales continue to be made to acquire investment funds, but the increasingly valuable retained lands could be borrowed against for a variety of purposes including development opportunities. Maori communities had a long history of borrowing against expected profits from produce and against recognised interests in land. As we noted in part III of our report, many communities had developed long-standing financial relationships with lessees of their lands, storekeepers, and even land purchase agents, from whom advances were commonly used to pay for immediate necessities and debts. As we discussed in chapter 9, debts were incurred in part from taking land through the Native Land Court process and from associated activities such as surveys. In theory, Maori should also have been able to tap into sources of lending finance to improve their lands for productive purposes such as farming. However, as previously noted, they faced significant difficulties with this. Their inability to collectively control land sales meant that, in many cases, they had been left with the most marginal and least accessible lands, and therefore those least likely to have increased in value to borrow against. In addition, private lenders were unwilling to lend against land for farm development when the title was held in the form of multiple ownership. Further, many of the financial relationships that Maori built up were focused on immediate consumption or debt repayment, with lenders intent on charging high interest in the expectation that they might eventually pressure land sales.

As the Crown noted, borrowers with limited credit histories who were regarded as being poor risks tended to have access to only the most expensive and limited sources of lending finance, and that only for short-term purposes

such as bridging finance to pay debts. By the 1890s, Maori tended to fall into this category. The system of mortgage lending at the time was conducted largely through private organisations and individuals, and was not well regulated. Repayment requirements could be lax or capricious and often depended on the lender's perception of the risk of the borrower. Repayments were generally not fixed at set time periods or for set amounts when loans were entered into. Further, Maori communities tended to have relationships with the less scrupulous and most expensive of private lenders, especially where debts might result in the transfer of shares in land, and much less access to sources of finance available for development purposes such as farming.

This situation was referred to by Hone Heke in Parliament, in 1903, when he explained that Maori were still mainly obtaining mortgage finance in order to pay debts they had already incurred rather than to improve their land.¹⁹⁶ In fact, Maori were caught in a vicious circle of debt, as prejudice and title difficulties forced them, in many cases, to rely on the more dubious and expensive private lenders. The inevitable difficulties they encountered further confirmed prejudice and limited both the range of private lenders willing to deal with them and the range of lending such lenders were willing to provide.

As the Crown noted, it recognised the difficulties and harm arising from this cycle of debt at various times. Legislative prohibitions on mortgages were passed from time to time, which prevented Maori from obtaining mortgage finance at all. The Crown referred us to the evidence of Mr Hayes, whose report 'Native Land Legislation Post-1865 and the Operation of the Native Land Court in Hauraki' was placed on our Record of Inquiry.¹⁹⁷ This report outlines parliamentary concerns about debt, Maori management of debt, and the prohibition of mortgages on Maori freehold land at various periods. It describes how this prohibition was first made in 1878 and followed by a brief reinstatement of the ability to take out mortgages between 1888 and 1894. Then, 'in a sense' a more 'tightly circumscribed' right was enforced until 1909, when the restriction was relaxed

again, enabling Maori to ‘potentially’ enjoy more options for raising development finance.¹⁹⁸

While prohibitions on mortgages did offer some protection against the worst abuses of lenders, from a development point of view it prevented the raising of mortgages in situations where Maori wished to enter into more constructive lending arrangements. As with earlier proclamations imposing restrictions on dealing in Maori land – preventing owners from dealing with anyone but the Crown, including dealings in respect of mortgages – what were ostensibly meant as protections had the effect of severely limiting the potential for normal entrepreneurial business practices. This kind of prohibition limited not only Maori experience of more productive debt management, but also lenders’ experience and willingness to enter constructive lending arrangements with Maori. Reliance on rural credit was a notable feature of entry into farming in New Zealand, especially as the modern farm industry developed from the 1890s, so this became a major barrier for Maori.¹⁹⁹ The general prohibition on mortgages for owners of Maori land stands in marked contrast to the Government’s response when those Pakeha landowners who also had limited credit histories (and were regarded as poor risks by private lenders) were identified as facing problems raising capital for farm development in the 1890s.²⁰⁰

We accept the evidence of Professor Hawke, submitted to us by the Crown, that private lenders are theoretically concerned with objective economic criteria when considering creditworthiness and lending risks, for example the known management skills of borrowers.²⁰¹ It is possible that those who were refused finance on the basis of such criteria may have felt themselves discriminated against. However, there is considerable evidence that, in the nineteenth century, private lenders, like other sectors of society, were also influenced by their own prejudices and perceptions when agreeing to lend money and setting charges and terms. Professor Belich has observed, for example, that those regarded as gentry or higher up the social scale in colonial New Zealand generally found it much easier to secure loans and did so on easier terms.²⁰² As the Crown

acknowledged, there is evidence that some groups in nineteenth-century New Zealand, such as women and civil servants, found themselves less able to access private credit than other groups, regardless of objective standards.²⁰³ We are persuaded that, in practice, when making their decisions about lending, private lenders were influenced by prejudice as well as by more theoretically objective criteria of creditworthiness. We accept the Crown’s submission that it cannot be held to account for any racism or prejudice private lenders may have shown to Maori at this time. However, we note that a significant source of Government credit was made available to landowners for farm development purposes at this time and that, while private sources of rural credit remained dominant, there is widespread agreement among historians that the new system had a significant influence on private sector lending.

The need for lending finance was widely identified as a critical factor in enabling landowners of limited means to enter modern farming in the 1890s. Even with all the steps the Crown took to form economically viable land blocks and provide infrastructure such as roading, developing the rugged and often forested North Island hill country into productive farms was acknowledged to be an expensive process. The land had to be cleared of bush and scrub, and then grassed and fenced. More expensive pasture grasses were required, along with new and improved breeds of stock for meat and dairy as well as wool production. More intensive stocking required more fences, farm buildings, supplies, and equipment. Landowners had to survive periods when farms were not producing any income, especially during their initial development. Those who wished to enter the new industry had to have either accumulated significant investment capital or ready access to (and the ability to manage) reasonably-priced credit. Most relied on a combination of the two, but, for a significant number of landowners of limited means, access to reasonable credit was critical to enabling them to enter the new farm industry.

Modern farming began to develop at a time when sources of rural credit were difficult and expensive to

arrange. Private lenders were willing to take more risks on those who Professor Belich has identified as the typical start-up farmers in the North Island from the 1880s until 1911. They were sons of successful South Island farmers, with some experience and a little family money to invest.²⁰⁴ However, by the 1890s, a significant sector of the Pakeha community had emerged who, even when they could obtain land under various forms of title through Crown schemes, did not have the background or accumulated capital to be considered a good risk by private lenders. The unregulated, variable, and often expensive forms of private rural credit were also too difficult and uncertain for them to take on.

To compound the problem, private sources of rural credit grew even less inclined to lend to these would-be farmers than at earlier times, given the slowing economy from the late 1870s and a long period of falling prices through the 1880s. Historians have identified this time as one of particular strain for banks and other sources of private finance. Land bought at inflated prices during the Vogel boom years of the 1870s contributed to high national debt. As real land values became clear, banks and private lenders had to write down their value as security. Banks that had lent too easily and unwisely during the boom were badly affected. They were unable to avoid a series of crises that hit the banking industry in Australia and New Zealand in 1893 and 1894 and resulted in the New Zealand Government intervening to rescue the Bank of New Zealand.²⁰⁵ In these circumstances, private lenders became very averse to risk and reluctant to lend money for farm development based on the recent breakthroughs in refrigeration technology, even though long-term prospects for the industry appeared positive.²⁰⁶ Dairying, for example, developed slowly despite refrigeration, until more sources of lending became available from the mid-1890s.

Private lenders were particularly averse to lending to would-be farmers with limited means and experience who wanted to develop the more difficult lands of the North Island. However, the Government wanted to encourage such people and such land into farm production. These

people were considered to be the kind of hard-working and deserving settler who would help the economy grow by bringing new land into production. They were also a significant and growing sector of the settler community, who, it was feared, might otherwise drift into urban areas and foment social and political unrest. The lack of adequate rural credit facilities had been identified by the 1890s as an obvious barrier to their entry to farming. A growing popular hostility to banks and other private lenders was clear, and demands for alternative sources of cheap rural loans were increasing.²⁰⁷ The Government responded with active intervention to ensure that a reasonable quantum of state funds was built up that could provide a source of lending designed to meet the particular needs of landowners of limited means. Economic analyses, such as the studies carried out by Horace Belshaw in the 1930s, show that this fund, while eventually substantial, never exceeded private sources of rural credit, especially once this expanded as farming success also grew. Private sources, such as banks, stock and station agents, insurance companies, and law firms, remained major sources of farm finance through this period.²⁰⁸

Nevertheless, lending finance provided by the Government from the mid-1890s is regarded as crucial for the rapid development of farming at this time, and in particular for the entry of landowners with limited means. In analysing the impact of the Government's schemes on rural farm credit, Professor Belshaw confirmed that they were a relatively small part of overall rural lending, but a significant source of finance for those sections of the settler community who would otherwise have been shut out from farm development. In addition, the Government's intervention was crucial in the influence it exerted on private sector lending. This influence contributed significantly to an overall lowering of fees and charges for credit, a regularisation of the system of loan repayments, and ultimately a change in perception of the kind of farming and farmer that was acceptable for lending finance. Many farmers who began with Government advances moved

into the private lending market when further development credit was required.²⁰⁹

Given that the Crown was clearly able to identify and respond to the needs of a significant sector of landowners with limited capital, and in the process positively influence the attitudes of private lenders, we need to consider whether the Crown also took reasonable steps to respond to the recognised difficulties that Maori faced with lending finance.

Government Advances to Settlers Act 1894

The Liberal Government of the 1890s identified lending finance as a particular barrier for landowners of limited means, who were generally unable to access private sector funds for farm development. Its major response was the Government Advances to Settlers Act 1894, which set up a scheme that was later described, in 1903, as having been 'designed to afford relief to a numerous class of colonists who were struggling under the burden' of high rates of interest and heavy legal expenses in obtaining private sector mortgages.²¹⁰

The scheme has been identified as a critical factor in ensuring the successful development of New Zealand farming, not just by enabling a whole group of would-be farmers to enter farming at a critical time, but also by influencing private lenders to reform their processes and credit charges generally.²¹¹ Official sources claimed that, by 1906, the advantages of the scheme were already clear, with benefits including a general reduction in interest rates for rural credit. It was estimated that, even adopting a conservative basis for calculation, the scheme had been instrumental in saving mortgagors, directly or indirectly, more than £8 million in interest charges. This was in addition to estimated savings in fees associated with obtaining credit, such as legal costs and valuations, all of which were charged at much lower rates than were obtainable privately. It was reported that 'many thousands of deserving settlers' had benefited, and that this had led to large areas of land being brought under cultivation.²¹²

Even though state sources of funds were never the major source of finance for rural lending during this time, there is evidence that the Advances to Settlers scheme led to a substantial amount of money being borrowed from overseas sources for the purpose. The 1894 Act initially authorised the Government to raise a loan of £3 million within two years for an advances fund administered by the Advances to Settlers Office. This was successful, and later legislative amendments enabled a series of additions to be made to the fund, until it became a substantial source of farm investment.²¹³ The first meeting of the office's board, charged with considering applications under the Act, was held on 23 February 1895. By 1902, the number of advances made (excluding those turned down or not taken up) totalled 9862, and amounted to lending of £3,073,685.²¹⁴ Most loans at this time totalled £500 or less. Advances were generally pegged at between three-fifths and two-thirds of the value of the security, whether freehold or lease.²¹⁵ By 1906, the number of advances taken up totalled 16,365, and £5,331,485 had been lent. By this time, the total amount raised by the Government was £3,510,000, which, with repayments invested, provided the advances fund. According to Professor Belshaw, in its first 32 years (covering most of the period under our consideration) the Advances to Settlers Office lent around £56,200,000 (on all kinds of land) with profits of some £1,500,000.²¹⁶

The 1894 Act established the position of superintendent of the office, and a board, consisting of the Minister of Finance and senior officials, under which district boards operated. The business of the office was to advance money for first mortgages on specified classes of land, after approval by the board and on condition the land was free of all encumbrances, liens, and interests, other than leasehold interests.²¹⁷ The three classes of land specified as being those on which advances could be made were: freehold land held in fee simple under the Land Transfer Act 1885 or by deed under the Deeds Registration Act 1868; Crown land held under a variety of leases, including perpetual lease, small grazing runs, and agricultural leases; and Maori land held

under lease under the West Coast Settlement Reserves Act 1892, the Westland and Nelson Native Reserves Act 1887, and the Thermal Springs Districts Act 1881.

The advances scheme targeted a substantial sector of the settler community, who held land under a variety of freehold and leasehold tenures. Ashley Gould estimates that a pool of around 35,000 to 40,000 farmers was eligible to draw on the fund.²¹⁸ Individual loans were generally quite small, as the scheme was geared towards helping those who already had adequate land blocks and the necessary infrastructure and wanted to concentrate on developing their land for modern farming. Advances to undertake improvements were deliberately offered at a significantly lower rate than was available privately at the time. The Government claimed that the relief given to settlers by such advances made all the difference between the landowners concerned being able to prosper in agricultural or pastoral operations, and the reverse.²¹⁹

The scheme has been credited with influencing reform of the private lending sector. In particular, by lowering credit charges and prices, and implementing a more regularised, accessible, and fair system of loan repayments, the Government scheme put pressure on the private sector to make similar improvements.²²⁰ Under the scheme, mortgages could initially be granted on a fixed-term system for a period of up to 10 years, with the principal repayable at fixed periods during the term or at its end, at fixed rates of interest. Alternatively, the principal could be repaid on an instalment system over a longer period of time by fixed repayments of both principal and interest, reducing over time. Interest rates were initially set at 4 per cent, although this was adjusted over time.²²¹ The instalment repayment system proved to be by far the most popular, and the fixed flat mortgage was dropped in 1906.²²² Low fees were also set for the process of obtaining a mortgage under the scheme, which included the cost of obtaining the land valuations required. Facilities to enable mortgage payments included a system of repayments through Post Offices throughout

New Zealand which was free of any costs for remitting the money to Wellington.²²³

In the years after this, and until 1929, the Government made numerous modifications to the scheme to better meet the needs of those identified as target groups. Difficulties with the scheme were carefully monitored and responded to, with legislative changes made where necessary. In 1925, for example, an inquiry into existing provisions for rural credit resulted in the Rural Advances Act 1926 and the establishment of a rural credit branch within the Advances to Settlers Office, with farmer representation on a Rural Advances Board.

Maori and the Advances to Settlers scheme

The Crown submitted to us that Maori were included within the 1894 Advances to Settlers scheme because, by virtue of the Native Land Court Act 1894, Maori land was brought under the definition of freehold title on which advances for improvements could be made.²²⁴ We agree that this Act provided that Maori land was to be treated as coming under the Land Transfer Act as soon as it had passed through the court. Therefore, provided it had no encumbrances other than leases, Maori freehold land was technically eligible for advances from the fund established under the scheme. This is also what Professor Belshaw found, in his analysis of the system.²²⁵ Dr Gould further explained, in evidence to us, his view that, where individual Maori owners succeeded in obtaining sole title to pieces of land, they were considered eligible for advances money. He had found a Native Affairs Department ledger book dating from the early twentieth century, showing that a number of advances – ‘perhaps less than 40’ – were made to Maori in 1913, although there were apparently no details about whether any of these advances were made in our inquiry region or whether they were made for farm improvement purposes. Dr Gould told us he understood that, in 1906, the Maori members of Parliament had successfully persuaded the Government to amend the Advances to Settlers Act to make advances more likely for Maori, by enabling the

recovery of advances in the event of repayment defaults in ways that did not necessarily involve the loss of land used as security.²²⁶

Although Maori land was apparently technically eligible for Advances to Settlers lending from 1894, we were presented with evidence indicating that most Maori landowners faced significant practical difficulties, which may have restricted their access to the fund. As we saw in part III, much Maori land was encumbered with survey liens and debts as a result of the Native Land Court process, which meant that it would have had encumbrances preventing lending. Crown counsel also acknowledged that there may well have been other difficulties for Maori owners in having their land recognised. Although their land was technically subject to the Land Transfer Act, in practical terms and in spite of the apparent wording of the 1894 Act, Maori land had to be registered under the Land Transfer Act before it was regarded as freehold land for the purposes of the scheme. In its submission, the Crown confirmed that, in practice, it seemed that relevant orders and title in the Native Land Court system still had to be transmitted to the appropriate district land registrar for the issue of a Land Transfer Act certificate of title.²²⁷

It is not clear to us how far this procedure was followed in our inquiry region, or whether further charges attached to this process for owners, although the latter seems likely, especially if proper surveys were required. We note that it required, at the least, further steps by the Native Land Court or the owners at a time when litigation and processes such as succession and partition were still under consideration or in progress. As Crown counsel also noted, a further practical difficulty was that, even if such registration was made, in order to apply for an advance the consent and signature of all owners had to be obtained in order to mortgage the land and obtain a loan for improvement. This meant that just one owner, where lands were in multiple ownership, could prevent others obtaining a mortgage.²²⁸ The Crown appeared to acknowledge the practical difficulties with this in suggesting to us that owners were able to incorporate as an alternative. We have already, in

part III, discussed the limitations of incorporation (which, of course, during much of this period also required either for every owner to agree or ministerial intervention).

It seems helpful, at this point, to consider whether the technical inclusion of Maori land was deliberate Government policy, based on attempts to address the barriers Maori faced, or an accidental inclusion, and what the implications of this might have been for Maori. A brief check of parliamentary debates indicates that there was no deliberate intention on the part of the Government to make Maori eligible for the proposed scheme. In introducing and explaining the advances scheme in 1894, the Government did not mention that Maori were included, or that it was intended to address their need to develop retained lands for farming. Nor was this mentioned in debates on the Native Land Court Bill 1894, which did make some provision for the proposed new Maori incorporations to gain limited access to finance through the Public Trustee.

In these debates, Maori members of Parliament expressed concern that there was apparently no intention to include Maori landowners in the advances scheme, and they attempted to persuade the Government to rectify this. The Government did acknowledge that Maori leaders were insisting that, if it continued to exert pressure to acquire Maori lands for farm settlement purposes, it should also include Maori communities who wanted to use their lands for farming in any initiatives to help landowners into farming. During a debate on the Native Land Court Bill in 1894, for example, Prime Minister Seddon acknowledged that East Coast Maori had told him they wanted to farm their lands and had pointed out that, while the Government was finding funds to place Europeans on farms, it was doing nothing to assist Maori.²²⁹

Despite this, Seddon made no suggestion to Parliament in 1894 that the Government intended to address this matter through its advances scheme. Wi Pere, the member for Eastern Maori, who was himself involved with incorporations on the East Coast as well as running more than 18,000 sheep on family land, asked whether the Government intended to extend such positive assistance to

Maori who wished to farm their lands.²³⁰ In speaking on the Government Advances to Settlers Bill, Pere explained that he was generally supportive of the proposed measures, which would enable the Government to lend money to assist farmers who needed help, and reform the system of lending and loan repayments for rural credit. He referred to the difficulties many landowners faced in obtaining loan finance from private sources, along with the high interest rates being charged, and the insistence of banks and other institutions on calling up loans when they encountered difficulties without giving their debtors reasonable time to make repayments. He also called for Maori to now be included in such reforms. In his experience, everyone in New Zealand who improved their land borrowed money to do so, either from private companies or from a bank. He went on to explain that Maori faced considerable legal restrictions on gaining private mortgages.²³¹

Pere was presumably referring to existing restrictions, which were to be tightened further because Liberal Government policy aimed at preventing Maori from dealing in their land other than selling it to the Crown. Such dealing included mortgages. This meant that, even while private sources of finance remained important nationally for rural lending, those sources were to be closed to Maori landowners. Maori had no choice but to seek lending finance from Government sources. Pere noted that it would be a great injustice if Maori were not allowed to share in the privileges proposed by the Government's advances scheme.²³²

In later debates the same year on the Native Land Court Bill, Pere complained that the proposed provisions that would enable Maori incorporations to borrow were too limited and unlikely to work effectively in practice. He claimed that it would be useless to appoint a management committee for any incorporation unless they were able to be properly funded to carry out their work. The proposed committees also needed access to lending funds. He noted that Maori did wish to begin farming but were unable to because of legal restrictions. Then Maori were subject to claims by Europeans that they were too lazy to work their

lands. He referred to a Bill he had proposed (his Native Lands Administration Bill 1894, which was rejected by Parliament). He explained that this had attempted to assist Maori who wanted to farm their land. He wondered if Europeans were more interested in laws that were not in Maori interests and were made as complicated as possible so Maori were forced to part with their lands. He explained that Maori did want to engage in farming but that they needed better legislation to remove barriers to their entry. They also needed access to state sources of lending finance to enable them to develop their land, as they had suffered in dealings with banks and private companies. He argued that, if the Government would help Maori to obtain money and means for settling and improving their lands, then the colony would generally become more prosperous and Maori would be able to earn the money to pay rates and charges due.²³³

In speaking to the Government Advances to Settlers Bill, Pere told the House that he would support sending that Bill to committee to have amendments made to improve it in this way. He also asked the House not to apply further rating to Maori until Maori landowners also had access to advances to improve and utilise their land.²³⁴ Tame Parata, the member for Southern Maori and another successful farmer, agreed that the Government's Advances to Settlers measures were generally positive in assisting farmers. In speaking to the Bill, he, too, was unsure whether it would extend to Maori land, but he wanted to see it made available to those Maori who wished to make use of it.²³⁵

Pere and other Maori members of Parliament were clearly concerned that the proposed Government advances scheme was not intended to include Maori; they asked that it be specifically amended to do so. However, this issue was not taken up in general debates on the proposed scheme, which instead focused on the details affecting those settlers who were to be included within it. Although the possible difficulties faced by some classes of settler as a result of their form of landholding were discussed, such as manufacturers who held leases on municipal, educational, and

church properties, title difficulties that Maori might also face were not considered further.²³⁶

It appears from this evidence that the technical eligibility of Maori land for the scheme was accidental, by virtue of regarding it as covered by the Land Transfer Act, among other reasons, rather than a deliberate and carefully considered attempt to include Maori. It was not unusual for legislation to have unintended impacts for Maori land at this time, given the rapid passage of much land legislation by the Liberal Government. We will discuss this further in the next section. This also helps to explain why Maori found themselves in so many practical difficulties when it came to gaining access to the advances fund, even if their land was technically eligible, and why, as we will shortly describe, there was so much reluctance, in practice, to consider Maori landowners as appropriate candidates for lending from the fund.

We do not have evidence of Pere's efforts at the committee stage, but the Government Advances to Settlers Act 1894, when passed, made no specific mention of lending on Maori land. The only exception was to make it clear that (settler) lessees of certain types of Maori reserves were eligible.²³⁷ A brief examination of parliamentary debates also reveals that, within a year, Government members were confirming that the advances scheme was not generally intended to apply to Maori land. In 1895, Pere again asked whether the Government would extend the provisions of the Advances to Settlers Act so as to permit Maori to borrow on their land in the same way and under the same conditions as Europeans. Seddon replied that the Government had considered the matter very carefully, but did not consider it advisable to have the 'indiscriminate advancing of moneys upon Native lands' given 'the difficulty in the way of title, and one thing and another'. He was willing to consider an exception where Maori had purchased their land from Europeans and where they 'were working their lands as Europeans worked theirs'. In those cases, he said, the Government might consider an amendment to the Act.²³⁸ In other words, the Government was not prepared to lend on Maori land. This left no room at all

for Maori who wished to borrow from the fund to improve their retained lands for farming.

These debates reveal that other members of Parliament also shared the view that the advances scheme was not meant to cover Maori land. Mr Kelly expressed regret, later in 1895, that provisions 'had not been made to enable industrious Natives to borrow small amounts under the Advances to Settlers Act, or by some other means' and hoped that in another year Maori might obtain something better and that 'the Premier would see the necessity of having a Bill passed to enable Natives to borrow money'.²³⁹ Although this appears to confirm that Maori were not intended to be included in the scheme, it reveals that Parliament had considered the matter of Maori lending needs, that it was recognised that Maori required some assistance with lending, and that the Prime Minister knew that they faced particular barriers to developing their land. It was also recognised that there was a range of possible policy options to address these issues, for example by extending the advances scheme to include Maori, or by considering some 'other means' of providing equivalent access to lending funds that might be more appropriate to Maori needs.

Thus, although the Crown was aware of Maori needs and concerns relating to access to rural finance by 1895, and knew that there were options available to it to meet those needs and concerns, it failed to take reasonable steps to meet them through the advances scheme. By failing to provide state assistance equivalent to that being offered to other landowners of limited means to enter farming, the Crown was in breach of the Treaty principle of equity and in breach of its obligation to actively protect Maori in their Treaty development right to participate in farming.

The issue of Maori access to the Advances to Settlers fund was raised again in Parliament in 1903, in the context of amendments to the 1900 Maori land council system. By this time, it had become clear to Maori leaders that – whatever technical provisions the Government had made to enable state lending for farm development – state lending authorities, including the Advances to Settlers boards, were setting such strict criteria for Maori landowners that

they were effectively being excluded from lending, even if in other respects they may well have been able to repay their loans. Thus began a long series of attempts by Maori members of Parliament to adjust the provisions of the scheme so that Maori might gain better access to it, efforts that were largely frustrated by the reluctance of officials to implement changes and by a failure of Government determination to ensure that any amendments were made practically effective.

A key problem was the strict criteria that officials were applying to Maori landowners when they sought access to those few sources of state lending finance that the Government appeared to have made technically applicable to Maori land. In 1903, James Carroll, by then Minister of Native Affairs, explained that he was bringing forward an amended Maori Land Laws Bill, which he hoped would ameliorate the problem. It had been found that, when Maori applied for a loan from the Advances to Settlers Office or some other state lending institution, lending authorities strictly enforced a rule that, unless the land was already being leased out and rent was coming in, they would not entertain any loan for farm development purposes. For leased land, the authorities insisted that rentals had to be assigned to the lending department as security, and as a sinking fund. This, of course, meant that Maori landowners could not borrow to develop their own land themselves for farming. Carroll explained that he wanted to tackle this matter with a clause that would enable Maori applying for a loan to assign the rent from another block they were leasing to the lending authority, as security for land that they wished to improve and farm themselves. Carroll told Parliament that he felt this would help Maori considerably in making satisfactory loan arrangements.²⁴⁰ Earlier, speaking in the Address and Reply debate in 1903, he had appealed to members to consider land settlement issues not just in terms of reckoning how much land could be got from Maori, but also as part of 'a solemn duty' to see that Maori could 'enjoy the benefits of civilization [and] the fruits of education', and be enabled to settle on portions of their own land.²⁴¹

There was some scepticism from other Maori members as to how helpful this provision might actually be, especially in the context of wider legislative measures that appeared to be undermining the general agreement in 1900 that had ended new land purchases (see chapter 11). Hone Heke, the member for Northern Maori, objected to what he saw as the Government's 'nibbling' efforts to overturn or erode the 1900 agreement by allowing provisions that were effectively permitting new forms of alienation.²⁴²

Heke urged that, instead of continuing to allow ways of alienating Maori lands, the Government should be looking at ways to enable Maori to improve and utilise their remaining land, not just for their own benefit but for that of the whole country. He warned again that obtaining loan finance for land improvement purposes was still a major barrier for Maori wishing to develop their land for farming. He noted that, in some districts, where Maori had been able to obtain small loans from their European friends, they had shown their capacity for improving their land. He claimed that many other Maori also wished to improve their land. The difficulty was not that they did not want to work, but that they had no means of gaining capital to stock or improve their land. He confirmed Carroll's observation that this was because, in practice, state lending assistance available to Europeans was not available to Maori. He agreed that state lenders had adopted a policy of refusing to advance on Maori land unless the owners had leased the land and it was producing enough rental income to provide interest and a sinking fund on the amount to be lent.²⁴³

However, Heke was not certain Carroll's proposal would effectively overcome this problem. In many cases, he said, the land to be offered as security was all that the applicant owned. Many Maori landowners now had no spare land to lease and receive rentals from, and therefore they would remain unable to obtain finance to improve their land. Heke agreed that Maori were still obtaining loans, but he explained that these were more often loans to pay debts already incurred, not to improve the land. Maori who wanted to borrow to improve land found that they could

not get assistance from either the Advances to Settlers Office or the Public Trust Office, on account of the rule those agencies had adopted. Heke asked the Government to devise some better method of enabling Maori who wanted to work their own land to obtain financial assistance to do so.²⁴⁴

Seddon also agreed that the Advances to Settlers system was being implemented unfairly. He told the House that, even if Maori were 'to some extent responsible' for the treatment they were receiving over lending, it was still the case that in practice state lenders were treating Maori differently from Europeans. He had been told of a case where a Maori, who was farming his land as well as the settlers around him, was told that if he wanted an advance he would have to find a 'dummy' to nominally lease his land. In effect, the situation was that he could only hope to borrow if he found a European to intervene between himself and the lending department. Seddon agreed that this was 'unfair' and not what Parliament had intended. He questioned why Maori who were 'occupying and working land and maintaining themselves and their families' on that land, and had 'good security' and were capable of paying interest should be treated differently from other settlers. He agreed that they should be assisted so they might become good settlers.²⁴⁵ This indicates to us a clear recognition, by this time, that the Crown was failing in its obligations to Maori and that it was considered possible to take steps to rectify this situation.

In spite of Carroll's hopes, his 1903 provision does not appear to have materially improved the situation for Maori. Maori leaders, including those in our inquiry region, continued to warn the Government that Maori landowners were, in practice, excluded from sources of state lending. Tureiti Te Heuheu, as we have seen, explained to the Native Affairs Committee in 1905 that, in order to participate in commercial uses of their land, including farming, Maori wanted to be able to share fairly in the state assistance being offered to other settlers.

Clearly, he did not believe that practical lending finance was available at this time, for he told the committee that the 'whole Island would rejoice' if the Government were to open a channel whereby Maori could obtain monetary advances to start farming operations on their lands. Te Heuheu also told the committee that he supported the earlier evidence given by Pepene Eketone of Ngati Maniapoto, who had explained that they saw Pakeha settlers without any money at all being placed on Crown land, and that the Crown then immediately gave them access to cash to work that land to success. Maori had their own lands to begin with, but they, too, needed access to state finance to enable them to successfully work their land.²⁴⁶ He explained that, if they were able to farm successfully, they would also be able to afford to pay rates and eliminate noxious weeds.

Eketone told the committee that there was widespread support among Maori for those who wanted to farm their lands being given the same kind of monetary assistance as was now being offered to European settlers.²⁴⁷ Te Heuheu noted that the Crown had made considerable profits from purchasing large areas of land within the Taupo district, containing very valuable stands of timber, for very low prices under its market monopoly. His people, therefore, believed that the Government should be willing to pay the cost of the work required to bring their land titles to a position where land for farming could be set aside, and should also be willing to offer lending finance to Maori to enable them to develop their land for farming.²⁴⁸

Maori difficulties in accessing funds for development were referred to again in 1905, when the Maori Land Settlement Bill was being debated. Carroll, attempting to make provision in the new Bill for Maori to borrow funds for stocking, farming, or otherwise improving their land, claimed that Maori:

have never appreciated the advantage of the Advances to Settlers Act in its application to themselves, or have never

exercised their rights under it on account of difficulties in the way. They have never enjoyed the same facilities as Europeans for borrowing from the Government lending institutions, consequently they have never been able to occupy, utilise, or farm their lands on any extensive scale for their own benefit.²⁴⁹

He acknowledged the public demand for Maori land, but insisted that it was also necessary for the Government to provide Maori with assistance to obtain money for farming and improving their land, and to offer Maori as many avenues as it was able, with proper safeguards, to enable them to help themselves and rely on their own strength and energy.²⁵⁰

Carroll's proposal to open up monetary assistance to Maori landowners was supported by Heke, who, in speaking to the Bill, said:

My desire is that Natives who own large areas should be encouraged and assisted by the State, the same as you assist Europeans to become farmers. . . Give our Maoris that assistance which you give to your European settlers. We have not had it hitherto, though we have been asking for it for a number of years.²⁵¹

Heke rejected proposals that would have had all Maori land taken and leased or sold, with proceeds vested in the Public Trustee for Maori to live on the interest. He stated that Maori wanted to be able to utilise their land and to be enabled to do this through loans from the State.²⁵²

By this time, the Government was under strong settler pressure to begin purchasing Maori land again, and one of the major justifications claimed for this was that Maori were not properly using much of their retained land for purposes such as farming. Maori leaders, including those from our region, challenged the assumption that there were large areas of 'surplus' land that Maori were refusing to properly utilise, and made it clear to the Government that, if such justifications were to be used, much more effective ways were required of enabling Maori to farm

their lands. This should be achieved either by amending current forms of state lending to meet Maori needs, or by developing an equivalent system more geared to addressing the barriers they faced.

There is no doubt that Maori faced particular problems with lending and that this was clearly known to governments at the time. These problems included the form of title over their land, the prejudice of lenders, and also, for some, inexperience with debt management for development purposes. However, as noted earlier, it is evident from constant amendments to the Advances to Settlers legislation that the Government was well able to take steps to monitor the effectiveness of lending and address particular problems found to practically hamper lending for some groups of settlers, such as those developing leasehold land. What Maori leaders were requesting was a similar determination to address their difficulties in gaining access to state lending for farming development.

In response, the Government did acknowledge these problems and also an obligation that, if it was to more actively target Maori land for settlers, it should seriously consider assisting those Maori who wanted to develop their lands for farm purposes, especially those effectively excluded from state sources of financial lending. Although private lending sources may still have been dominant, the Advances to Settlers fund was substantial by this time, with Sir Joseph Ward, the original architect of the scheme, reporting in 1906 that the fund had proved a 'great boon' to numbers of worthy colonists, with the last year setting a record for business done by the advances office. The intention was to extend lending authority in the coming year to £5 million to meet demand.²⁵³ The Government also appears to have made assurances to Maori communities that it intended to take more effective steps to enable them to gain access to state lending finance to improve their lands for farming, as part of its overall policies to reopen Maori land purchases. This included assurances to Maori communities in our inquiry region. For example, Seddon

addressed Maori in the Rotorua district in early 1905, and explained these policies further. His address anticipated forthcoming changes in Maori land settlement policies, but also promised that Maori settlers would have the same access to lending as Pakeha. He hoped that this would result in more Maori land being vested in the Maori land councils for leasing purposes.²⁵⁴

The following year, 1906, the Government outlined a number of major policy objectives with regard to Maori land in its Budget. According to the evidence of Dr Gould and Dr Loveridge, these included not only setting aside a sufficiency of Maori land for Maori 'maintenance' but also providing Maori, as far as possible, with a 'start' to farm their own lands and a 'guide' in making them productive. It was intended to throw open the balance of Maori land for settlement by a variety of means, including sale and lease.²⁵⁵ The assurance that it was Government policy to help Maori farm their own land was welcomed by Maori leaders, who regarded it as reflecting earlier assurances that more effective assistance would be forthcoming, including lending to develop lands for farming.

The Government's stated intentions met with enthusiasm from the Maori members of Parliament. Apirana Ngata, by then the member for Eastern Maori, also had considerable experience with Ngati Porou's farming efforts. He told Parliament that the Maori members welcomed the Government's promise to assist Maori to make a 'start' with farming and understood that this included an intention to find some way of including Maori more fully in the financial assistance available through the Advances to Settlers scheme. They organised a deputation of Maori leaders to meet with the new Prime Minister, Sir Joseph Ward, to obtain, among other things, a scheme that would enable Maori to settle and farm their lands. They explained that Maori had been trying to begin farming, including sheep farming and dairying, without state assistance, but had been hampered by the lack of good titles and financial assistance. They wanted to be included within the financial assistance the Government was providing through the Advances to Settlers scheme. According to Ngata, Ward agreed that Maori should be

given assistance to raise themselves and the country generally, and assured the deputation that he intended to introduce a Maori land measure that would include the extended advances scheme they were asking for.²⁵⁶

The Government made a series of amendments to the original Government Advances to Settlers Act in subsequent years, to fine-tune the scheme and ensure that it met the needs of those identified as worthy to be included. This included an amendment in 1906, aimed at consolidating amendments passed since 1894 and further improving the scheme. This led to further representations to Ward by the Maori members, in an attempt to include additional measures that might better assist Maori.²⁵⁷ In Parliament, Ward confirmed that he was prepared to investigate the possibility of treating Maori the same as Europeans under the advances scheme. Although he believed that it might be beyond the scope of the scheme to try and apply it to the entire eight million acres of Maori land remaining in the colony, he accepted that there were reasonable grounds for making some provision to enable Maori to work and settle their lands. He assured Parliament that he was prepared to consider this seriously and would seek further information on what could be done.²⁵⁸

His subsequent investigation confirmed that the Advances to Settlers board had developed strict criteria for lending on Maori land, based on the belief that it could not resort to selling the land as security if defaults occurred, as was possible for other land. All applications for lending on Maori land had to fulfil the following criteria:

- ▶ The applicant 'must hold the land offered as security in fee-simple in his own name'.
- ▶ The applicant 'must have other land sufficient for his support'.
- ▶ The land on which the advance was to be made had to be leased under a registered lease to a European, with a copy of that lease furnished to the office and rent equivalent to the repayment amounts assigned.
- ▶ Where a lessee failed to make a rental payment, the applicant would agree to allow the office to retain a proportionate amount of the loan to ensure

repayments were made during the period the rent was anticipated (a sinking fund).

- Any loan granted was subject to the office solicitor being satisfied as to the applicant's title and power to mortgage.²⁵⁹

The Crown agreed, in its submissions to us, that these parliamentary debates indicate that the Advances to Settlers board may well have 'fettered itself' with a policy of not, in practice, lending on multiply owned Maori land. This included establishing criteria which meant that only those Maori who held land in severalty (that is, who had a defined piece of land of their own rather than unascertained or undivided shares in a block), whose title was fully in order, who could show they had other land for their support, and who could demonstrate an ability to service their loan were considered eligible.²⁶⁰

In effect, the criteria were very similar to those Heke and Carroll had complained of in 1903, with the possible additional requirements that land had to be held in severalty and applicants had to have other land for their support. These were the same restrictions already being implemented, which the Government had promised to address in 1905. The criteria did take account of the 'title difficulty' Maori faced, but only by taking the blunt approach of excluding all land that was not subdivided and held in severalty. Maori land, multiply-held, did not meet the criteria. And even then, Maori faced far stricter criteria than did Pakeha settlers of limited means who were also regarded as poor risks by private sources. Very few Pakeha settlers would have owned additional land for their support or rental income that they could assign as security against the land they actually wanted an advance for. Effectively, the criteria sought to exclude a whole class of land and remove all possible risk. This was a completely different approach to the encouragement shown to Pakeha settlers of limited means. In addition, while Maori land could be lent on, in very restricted circumstances, Maori who wanted to farm their land themselves were still excluded. Even if they vested their land in a Maori land council (or, from 1905, a Maori land board) to overcome title problems and then

leased the land back in order to farm it (itself an unwieldy process) they were still not eligible for an Advances to Settlers loan. Ward confirmed this, when he noted that the lending criteria imposed by the advances office already 'of course' excluded Maori who might want to take up such leases.²⁶¹

It is hardly surprising that, left to its own devices, the Advances to Settlers Office took a cautious line with lending to Maori. In his analysis of the early history of the office, Professor Belshaw observed that, while it provided a major boost to farming, the office nevertheless took a conservative line in assessing and authorising loan finance to individuals within the classes it was required to consider, restricting its business to what it regarded as first-class securities.²⁶² In general terms, this caution was remedied by the Government for certain classes of settler or classes of land, as was considered necessary, by passing a series of amendments removing any official uncertainty about eligibility for advances in these cases. The Government also required the office to establish lending systems that were specifically designed to address difficulties identified for some groups of settlers of limited means. These not only included reasonably-priced credit and low set fees for required processes such as land valuations, but also easily understood, certain, and regularised repayment terms, and facilities for easy repayments of advances. The office was also required to work on the assumption that deserving and hardworking settlers, as a class, should be given an opportunity and encouraged into farming, rather than be considered a risk in uncertain new enterprises that required guarantees of ability to make prompt repayments. This did not prevent advances boards from taking a conservative and prudent approach to individual borrowers, but it did help to prevent the wholesale exclusion of classes of borrower.

Maori leaders asked for a similar approach for Maori landowners who showed themselves able and who required lending finance to take part in farming. They did not ask that all Maori landowners be given lending finance regardless of their particular circumstances or history.

However, they did ask that the Government modify the general lending framework, as was done for deserving settlers, to recognise the barriers faced by Maori and take reasonable steps to address them, rather than expect Maori to conform to criteria and systems designed to meet the needs of others. They also expected a similar level of encouragement for Maori landowners to enter farming, not criteria that could only ever provide an exceptional few with lending assistance. With the Government's 1906 Budget statement, Maori leaders believed that they had been promised effective steps to overcome the problems they faced with gaining access to state lending finance to farm their land. They saw this as Government recognition of a necessary balance, given its new policy of more actively targeting 'unutilised' Maori land for purchase.

The struggle to have the advances scheme more effectively extended to Maori was not easy. Ngata explained this further in Parliament, reporting that the Maori members had made a number of proposals to Ward. They accepted that, as matters of tenure were involved, it might be more appropriate to provide better access for lending finance from the advances scheme in a Native Land Bill. However, for the moment, they asked for amendments to the Advances to Settlers legislation that would clarify the eligibility of Maori land for lending purposes. They proposed, for example, that Maori land under lease from a Maori land board and incorporated Maori land should be included within the classes of land regarded as security. They noted that the Maori Land Settlement Act 1905 had created a new class of tenants who were holding leases from Maori land boards, and they assumed that tenants holding such leases would be entitled to advances just as were tenants of leases held under the West Coast Settlement Reserves Act. They appear to have anticipated that these provisions would ensure, at the least, that Maori who obtained such leases would become legally eligible for access to the advances fund.²⁶³

The Maori members also proposed that incorporated Maori land be included within the classes of land that advances could be made on. They noted that the 1905 Maori

Land Settlement Act included a provision allowing Maori owners and incorporations to borrow from the Lands for Settlement Fund, with the approval of the Minister of Lands, up to one-third the unimproved value of their land. However, it had been found in practice that this provision was 'exceedingly limited' and in any case the loans were not made from the Advances to Settlers fund.²⁶⁴

Ward at first rejected these proposals, and then responded only reluctantly. He agreed that the original Government Advances to Settlers Act did not require the strict lending conditions that the advances office had set in practice for Maori landowners, but was unwilling to require any changes to the criteria in spite of his Government's apparent promises in 1905. He explained that officials had told him that it was 'most difficult to make Maori recognise their responsibilities' in regard to payment of rents and interest, and therefore 'some extra precautions are necessary in such cases'. He claimed that, even so, a 'large number of loans' had been made under the office's criteria.²⁶⁵

Ward explained that he had 'serious objections' to the proposal to extend the Bill to include leases granted by Maori land boards as security for advances. He feared that advances to Maori could be used to surreptitiously remove alienation restrictions so land could be sold.²⁶⁶ Ward also believed that there was no need to specifically extend the scheme to Maori land incorporations, as there was nothing in the existing Act that specifically excluded advances to them. It is not clear to us how he came to this view, given the evidence of the strict criteria the office was applying to Maori land (even though this was not required by the Act). Ward agreed that there was some question about whether incorporations actually had the power to mortgage, or could produce a mortgagable title, which 'of course' had to be determined by existing legislation affecting those lands. However, he insisted that the current Advances to Settlers Bill was not the place to make any amendments that might be found to be necessary in this respect. Therefore, and in spite of his own and his Government's recent promises, Ward now found that there was 'no necessity' to amend

the Advances to Settlers Bill 1906 to include Maori land. Maori, he argued, were likely to be treated in the same way as Europeans who applied for advances, as long as they could provide security to the satisfaction of the advances board and assure it that they could make regular repayments. He claimed this was also required of Europeans, and that therefore 'there is no distinction.'²⁶⁷

Ward did, however, offer the possibility suggested to him by the superintendent of the advances office, that a clause might be added to the Bill enabling the Governor in Council to make regulations concerning the form of mortgages made to Maori. This would enable the office, in cases where there were defaults in repayments, to recover the money by leasing instead of selling the land, on such terms and conditions as might be necessary for a term not exceeding 30 years.²⁶⁸

We received no evidence on the claims made by Ward and his officials that it was difficult to ensure that Maori met their repayment responsibilities and that a 'large number' of loans had been made under the strict conditions set for state lending on Maori land. This is an area that requires further research. The claim of a 'large number' of loans on Maori land by 1906 seems to contradict other evidence, including very clear accounts of the exclusion of Maori who wished to gain lending finance to develop their lands. As a comparison, we note figures cited in the report of the Stout–Ngata commission in 1907, of the total amount of Maori land exempted from the operation of section 117 of the Native Land Court Act 1894 between 1894 and 1904. Section 117 barred private dealing in Maori land, but exemptions could be granted in some circumstances, including for mortgages. In almost 10 years, from 1894 to the end of July 1904, a total of 423,184 acres of Maori land were exempted from section 117 for the purposes of sale or lease to private buyers and for mortgage to Government agencies, including the Advances to Settlers Office.²⁶⁹ The figures were not broken down further, but it seems most unlikely that mortgages made up even half of this total. Even if they did, this would have amounted to around 200,000 acres of Maori land mortgaged throughout the

country. In comparison, during the shorter period from 1892 to 1900 the Government purchased 2,729,000 acres of Maori land.

We can only assume that, as relatively few loans were being granted for Maori farm development at this time, officials were referring to the experience of Government lending agencies in taking over outstanding Maori debts incurred for other reasons. Many of these were long-standing and the result of entrapment of the worst kind by private lenders, who were known to impose harsh repayment and interest terms. As we will discuss further in the next section, some of these dubious loans had been inadvertently given legal standing as an unintended consequence of Liberal legislation in the 1890s, which had resulted in a series of actions to enforce land sales and a very real threat that some Maori communities would be left with no land at all for their support. In response, the Government had enabled its lending departments to take over some of these more serious debts at lower rates of interest and on more equitable terms, to try and save the land from being totally lost. This was the experience of many officials of these lending agencies, when they spoke of Maori debt management and the criteria they felt best applied to such lending. It was not the same context as dealing with Maori landowners who were making careful efforts to borrow finance to make their land productive for farming and for other development purposes. As Seddon had acknowledged, many of these Maori farmers were farming as well as other settlers around them, occupying and working land and maintaining themselves and their families, and capable of creating good security and paying interest, but were still forced to find a European to nominally lease their land if they were to have any chance of obtaining finance from the advances office for their farms. This was the difficulty the Government had promised to address, and which it had seemed to be promising to respond to in its 1906 Budget.

We agree with the Crown's submission that there was an identified problem with Maori debt management at the time and that it needed to be addressed by the Government, both by assisting Maori to gain experience with managing

debt and by persuading lending agencies and officials to overcome their reluctance to encourage deserving Maori. Maori leaders themselves, including those from our inquiry region, had agreed on the necessity for this. As noted previously, in 1905 Tureiti Te Heuheu had spoken in favour of entities such as Maori land councils having some monitoring role over commercial deals entered into by Maori. Extra precautions, advice, and monitoring may well have been required, appropriate, and agreed in these circumstances, at least until Maori landowners had gained reasonable experience and expertise in debt management. However, the existing lending criteria did not allow for this. They simply excluded most Maori landowners, and in doing so denied them an opportunity to gain the necessary experience. This is noticeably different from the efforts the Government was making to positively encourage and assist other sectors of the community, including those who had been regarded as poor risks by private lenders.

In spite of the Government's reluctance, the Maori members of Parliament continued to persist with efforts to provide improved Maori access to the advances fund through the 1906 legislation. After further consultation, the Government did eventually include Maori land board leases among the classes of land included in the 1906 Advances Act, with the proviso that the board joined in the mortgage for the purpose of securing the due payment of instalments.²⁷⁰ The Maori members apparently hoped that, by providing for board monitoring, this might encourage the advances office to lend to Maori landowners who had taken out leases from the boards. The Act also incorporated the suggestion made by the advances office superintendent that his office could recover defaulted payments by leasing rather than selling the land used as security.²⁷¹ This, again, appeared to offer potential for the office to relax its strict criteria of insisting that Maori landowners wanting to access advances had to lease land to Pakeha farmers and have the rents assigned.

Ngata explained that, together with other Maori members, he had met Ward and persuaded him to accept these amendments. The members did not see these amendments

as meeting what they wanted or what they believed had been promised. Ngata described them as 'not altogether a revolution', but all they had been able to achieve in the circumstances. He did, however, hope that they might alter the narrow focus of state lending officials and that this would result in a distinct improvement for Maori, whereby the advances office might not now feel so 'cramped' in its operations.²⁷² Tame Parata expressed similar hopes. He told Parliament that there were many capable Maori farmers who were unable to utilise their land because of restrictions stopping them from raising money for improvements. He noted that Maori were often regarded by Pakeha as incompetent, lazy, and unwilling to use their land, but he felt the blame lay with the barriers they faced. He hoped the amendments would be accepted, so that Maori could use their lands and prosper, and he thanked the Government for what he called this small concession in response to Maori requests for assistance over so many years. Like Ngata, he noted that it was by no means all they had sought, but they were thankful they had at least gained a little.²⁷³

Ward confirmed that the new provision for lending on Maori land boards' leases was intended to ensure that the lessee carried out what was required and did 'what a European would do if he borrowed the money'. It was deliberately intended to be more restrictive when compared to provisions affecting Europeans, because the system of Maori land tenure was different. He insisted that he had gone as far as he had told the Maori members he was prepared to, and therefore expressed surprise at Parata's comments. He also insisted that the measure would give Maori what they wanted.²⁷⁴ Ward should not have been surprised. The Maori members were speaking in the context of their long struggle to have the advances scheme more effectively extended to Maori, an objective all the more important now that the Government was again going to actively target 'unutilised' Maori lands. They were also speaking to what they believed had been much more expansive promises of Government action made in 1905 and 1906, in return for new policies targeting Maori land. They were not speaking

to the minor and reluctantly agreed amendments they had now obtained – amendments that still, critically, relied on the willingness of officials to implement them, even though official attitudes had evidently barely changed since 1894.

As Ngata said, all they had really been able to obtain were amendments that enabled the advances office to take a less restrictive attitude to lending to Maori. In effect, this required determined governmental guidance, and in spite of its apparent promises, the Government remained reluctant. In 1905, the Government had recognised that hard-working and careful Maori landowners who wished to farm their land were suffering an unfair disadvantage in obtaining loans from the advances office. In addition, the Government had assured Maori communities that, as part of its new policies for purchasing Maori land, it would take more effective steps to provide them with a 'start' to begin farming. In spite of this, the Government failed to take the opportunity offered by the new Advances Bill in 1906 to take reasonable steps to do so. The difficulties it pointed to as standing in the way of more fundamental changes were barely any different from those already identified by Maori leaders from at least 1903. The 1906 provisions were nowhere near the determined steps the Government might have been expected to take at the time, especially when compared with what it had shown itself capable of doing for other groups of landowners and tenants of various tenures.

The Government did demonstrate that it was capable of creatively preventing sales of Maori land if repayments failed, by instituting a system of leasing to recover the debt. This was a potentially important initiative to resolve a difficult problem but, importantly, this and the other provisions for lending on Maori land required the Government to take determined steps to address and ameliorate the hostility of its officials towards implementing lending for Maori farming. The Government had to address, on the one hand, the debt management skills of Maori, and on the other its officials' lack of experience in dealing positively with those Maori landowners who were capable of engaging in more productive forms of lending. Without

this determination – which the Government had already shown itself to be capable of with respect to other groups of limited means and experience – such initiatives had little chance of any real effect.

We do not have sufficient evidence to consider any preliminary findings of deliberate bad faith by the Crown in 1905 and 1906, when it promised more effective assistance to Maori and then failed to act on its promise in anything but the most minimal way. We note that the untimely death of Seddon, in 1906, after which Sir Joseph Ward took over as Prime Minister, may well have contributed to confusion over Government policies and promises and what might have been implemented. Nevertheless, the Crown's failure to take advantage of opportunities at this time was a continuing breach of its Treaty obligations of active protection of a right of development, and equitable treatment of Maori in providing access to the advances scheme or some equivalent form of state lending for farming purposes. This Treaty breach clearly included Maori in our Central North Island inquiry region.

We were not presented with any detailed evidence on whether the provisions enabling leasing instead of sales after defaults on loans, or the involvement of Maori land boards in lending on leases taken up by Maori, produced any discernible impact on state lending to Maori. We do, however, have evidence that Maori leaders continued to believe that Maori who wished to farm their own land were still practically excluded from the advances scheme. This was increasingly blamed on the way that office implemented its criteria without regard to what was legally possible. In 1907, as the Government adopted policies requiring half the Maori land vested in land boards to be sold and the other half leased, Ngata was still challenging the Government in Parliament to provide effectively for Maori to be able to utilise the land they retained. This included addressing issues of title, financial assistance under proper safeguards, and expert instruction in farming pursuits.²⁷⁵

The Stout–Ngata commission, established in 1907, reported that Maori suffered financial disadvantage just from trying to get their retained lands to a point where

they could begin to be used for farming. First, there was the expensive process of gaining suitable title, and secondly, surveys had to be made and roads formed to physically create economic blocks of land, at which point Maori caught up with what settlers received ready-made from the waste lands boards. The commission's report noted that under the Lands for Settlement Acts, as much as £13,000 had been spent preparing land in this way for the settlement of one settler. The average cost of settling each settler on land under the settlement schemes was estimated at around £1500. This meant that, once a settler acquired his block, his main financial concern was to improve the land he had obtained. The settler expected to be able to borrow money for that purpose on easy terms, claiming this as of right because he was regarded as a valuable asset to the State. The report recommended that the Government should now give Maori a higher priority in ensuring they, too, were able to settle their land.²⁷⁶

As we have noted, there is very little evidence of lending to Maori from the advances fund, even to those who were able to meet the strict criteria imposed. This lack of evidence encompasses our inquiry region. More research would be useful here. However, we note that the evidence available to us from published sources supports the view of Maori leaders that such lending continued to be very restricted. For example, in her history of housing in New Zealand, *Building the New Zealand Dream*, Gael Ferguson cites information supplied to Maui Pomare in 1914 that, in the four years from 1910 to 1914, only 88 Maori throughout the country had received loans from the Advances to Settlers scheme. These loans were presumably mainly made for farming. In 1922, Pomare was further informed that, in the 10 years from 1912 to 1922, only 57 Maori had received loans from the office.²⁷⁷

This supports the view that, as far as lending for participation in development opportunities was concerned, and especially to improve lands for farming purposes, Maori received very few loans relative to other groups of landowners with limited means. If we assume that these mortgages were made under the strict criteria imposed

by the lending agencies, none would have included land that Maori wanted to farm themselves. None would have applied to Maori land held in multiple ownership. Most of these mortgages would have had to have been on land leased to Europeans. This, it seems clear to us, effectively means that where Maori in our inquiry region wanted to farm their land themselves, they would have been excluded from such lending.

A brief review of official publications indicates that Maori leaders and communities continued to pressure the Government to extend the Advances to Settlers scheme to more practically include Maori landowners, or provide an equivalent means for them to access the increasingly large source of funds created by the scheme. For example, in 1911, Dr Te Rangihiroa (Peter Buck) reminded Parliament that Maori still wanted to use their land but were unable to do so without assistance from the State. He observed that even Pakeha, with all their advantages, still relied heavily on state assistance, including lending finance. He explained that Maori also required financial assistance. He described Maori as fledglings in economic development who were reliant on the Government to help with feathers so they could fly: 'He huruhuru te manu ka rere' (the bird must have feathers before it can fly). He noted that Maori wanted to be included in the Advances to Settlers scheme, but now proposed that a special sum should be set aside for Maori if they were to have a chance.²⁷⁸ This proposal recognised the difficulties Maori faced with access to the scheme and the criteria the advances office felt obliged to impose. It recognised that an alternative approach, creating a special fund out of the general advances fund, might be a better way of ensuring that Maori received a fair share.

We were presented with no evidence about whether the Government seriously considered this proposal. Maori members of Parliament were able to secure limited provisions to enable Maori to access and utilise lending finance for farming, for example from the land boards. Such lending, however, was increasingly limited to sources of money specifically allocated to Maori rather than the much-larger



A group including Sir Apirana Turupa Ngata (fifth from right, in light-coloured full length coat), outside the Lake Hotel, Taupo, November 1928

advances fund. We refer to the evidence of Dr Gould that, towards the end of the 1920s, Ngata began to claim that his practical experience was that some time in the years following the First World War, the Advances to Settlers Office adopted an even more restrictive policy of insisting that Maori applicants take their applications to 'Maori' sources of finance, while the office would consider only Pakeha applicants. While we received no detailed evidence as to why this policy was adopted, we agree with Dr Gould that by this time Ngata was well-versed in practical knowledge of Maori access to finance.²⁷⁹

Ngata had been closely involved in attempting to improve the legislative provisions for accessing finance and

knew how these provisions had been implemented by officials. His view was that the Maori land boards were never able to provide Maori with an effective channel into the advances fund. Rather, according to Ngata, even though the land boards (and what became the Native Trustee) were given wider lending powers, they were restricted to 'Maori' sources of finance: effectively 'Maori' money earned through the rents, interest, and other forms of income the boards received from Maori land, and the funds held for beneficiaries by the Native Trustee. This meant that Maori were, in fact, funding what little land improvements they could make for farming themselves, while being effectively

excluded from much larger sources of state finance such as the Advances to Settlers fund.

Ngata drew attention to this situation in 1926, explaining that the Native Trustee did not receive 'a single penny of State money'. While, technically, the law made state financial resources available to both Maori and Pakeha, especially through the State Advances Office, in practice, since the creation of the Native Trust Office, the advances office had sent Maori applicants there for loans. Therefore, Ngata reasoned, the resources of the State were not available to Maori and had not been for some time. He claimed that the Government took credit for establishing the Native Trust Office and said Maori did gain loans from it. However, it was not correct to assume that in using it Maori were gaining assistance from the State. Ngata warned that those criticising Maori for laziness should be aware of this and should also be willing to provide funds as generously to the Native Trust Office or any other agency intended to help Maori as they would to the State Advances Office, which lent to Pakeha only and ignored Maori. Ngata informed Parliament that consolidation was going ahead for Maori land and asked the House to consider providing a lot more funds to the Native Trustee and the Maori land boards so that they could enable Maori to farm their land.²⁸⁰ By this time, Ngata seems to have decided that a separate fund provided to the land boards and Native Trustee was the best hope for Maori to share equitably in state financial assistance for farming.

Dr Gould explained to us that it was his impression that, in the Rotorua inquiry district, the Native Trustee, the Arawa Trust Board (established in 1922), and the Waiariki Maori Land Board were the major sources of farm finance for Maori, other than the 'dubious peripheral private funding regime'.²⁸¹ He also referred us to Ngata's explanation to Parliament of the situation in 1929. This was that, although, theoretically, Maori had access to state advances funds, in practice Maori were not getting access to any of the millions of pounds the State was putting towards farm loan assistance through this means. Instead, most loan assistance for Maori farming actually came

from much smaller Maori sources and Maori money, via the Maori land boards and the Native Trustee. With the exception of 'occasional loans through the State Advances Department', Ngata believed that the State had not put money into lending assistance for Maori. He claimed that for the previous 15 years the State had not provided 'one penny' of the money that had gone to provide Maori with loan assistance for farming, because the advances department had adopted a policy of sending all applicants for loans on Maori land to the 'Maori fund'. As a result, even though the money the Government provided for settlement was theoretically available to Maori, in practice it was not. Ngata proposed that the only way to overcome this problem was for the Government to supplement the Maori fund. Even then, he said, not much was being asked for, because many titles still had to be put in shape before they could form legal security for advances.²⁸²

Government ministers did not challenge Ngata's explanation of this policy for Maori applicants. Gordon Coates, then Leader of the Opposition, gave Ngata some support by telling the House he believed Ngata was justified in explaining matters to Parliament as he had. Coates stated that he, too, believed that Pakeha did not fully realise the difficulties Maori faced in trying to farm their land, and agreed that Maori had been led to expect that, if they would work their land, they would be given reasonable assistance. It also had to be acknowledged that, in general, Maori had no hope of assistance from private sources. He believed that, if the Maori land boards and the Native Trustee were enabled to help in earnest, then Maori would show they could work and be successful.²⁸³ Ngata's views are also supported by Professor Belshaw's subsequent analysis, published in 1936, that, before 1929, Maori gained little access to state funding assistance for farming. Professor Belshaw believed that, instead, most financial assistance that was available for Maori farming came from accumulated Maori money held by the Native Trust Office and the Maori land boards. Although the Advances to Settlers scheme was theoretically available to

Maori, he believed the prejudice against Maori title was so great that few were actually able to get such assistance.²⁸⁴

Dr Gould points out that Ngata's comments to Parliament did not take account of the Maori soldier settlers after the First World War. However, we believe that Ngata was speaking in the context of Maori access to the Advances to Settlers scheme. The matter of inclusion in returned servicemen's schemes is a separate issue, which was not canvassed in any detail before us.²⁸⁵ It is not clear, from the information available to us, exactly what period Ngata was referring to when he described what had now become the State Advances Department's adoption of a policy of sending all Maori applicants to Maori sources of funds. In 1929, he described this policy as having been in operation for 15 years, which would have meant from about 1914. He also noted, in 1926, that the policy became definite when the office of the Native Trustee was established. We note that this office was established as the result of a recommendation of an official inquiry into the Public Trustee in 1912. However, the outbreak of war delayed implementation of the recommendation and the office was officially established under the Native Trustee Act 1920.²⁸⁶

We also note Dr Gould's evidence that he found a ledger entry for 1913, showing 'less than 40' advances made to Maori nationwide under the Advances to Settlers scheme.²⁸⁷ It seems reasonable to consider that the policy, as described by Ngata, was being implemented from around the end of the First World War, although we agree that more research is required. It does appear that the policy may have been adopted by officials as an unintended consequence of the efforts by Ngata and other Maori leaders to use the Maori land board process as an alternative channel to access the advances fund. Officials may well have believed that Maori land boards and, later, the Native Trustee were best placed to understand and offer the kind of lending Maori required. A separate but equivalent form of assistance was clearly not beyond reasonable contemplation at the time and, if it had been truly equivalent, we agree that such a system would have

been consistent with Treaty principles. However, this was clearly not the case, as the boards were required to rely largely on meagre Maori money and were generally excluded from access to the general advances fund. The Crown failed here to take reasonable steps to meet its obligation to protect Maori in their Treaty development right to utilise their lands for farming. Specifically, the Crown failed to ensure either that the advances office was enabled and required to consider Maori as well as Pakeha or, alternatively, that a separate, equivalent system was provided through Maori lending agencies.

Maori and other Government department lending

The Crown submitted to us that it had, in fact, provided some alternative facilities for Government lending for Maori land development, most especially with provisions from 1897. These enabled ordinary Government lending departments, rather than the Advances to Settlers Office, to lend on Maori land. The Crown argued that these provisions were a reasonable response, at the time, to the difficulties Maori faced with managing debt and accessing lending finance. While the provisions might seem paternalistic today, whether they were appropriate has to be considered in light of the difficulties Maori were understood to be facing in managing mortgages generally and private mortgages in particular. As such, it was a reasonable response for the Crown to restrict access to private mortgages and provide Maori with alternative Government lending assistance in a more controlled and monitored environment. This was better geared to Maori needs than was the general state provision of lending to settlers. The Crown submitted that this was a reasonable attempt, in the circumstances of the time, to balance concerns about Maori debt while opening some opportunity for state mortgage lending for Maori land.²⁸⁸

The Crown submitted that these provisions provided a more controlled lending environment for Maori, and that they enabled lending on Maori land that was held in multiple ownership as well as to Maori holding land in severalty. In many ways, this addressed problems Maori

encountered with general lending through the Advances to Settlers scheme.²⁸⁹ The Crown began this more controlled lending from 1895, with provisions enabling Government department lending to Maori incorporations under careful controls and the supervision of the Public Trustee. The Public Trustee was enabled to lend money to Maori incorporations for surveys and roading, and, more generally, to open their lands for sale or lease and to 'utilise' them.²⁹⁰ Following this, the Native Land Laws Amendment Act 1897 enabled Government departments to lend finance to Maori more generally. This amendment enabled Maori landowners (or their incorporations) to vest land in a competent trustee (generally the local commissioner of Crown lands or the Surveyor-General) who could, among other things, legally borrow money to survey and subdivide the land. Maori landowners could also borrow from a Government department to improve their land, subject to a number of precautions, including, for example, providing evidence that they retained other land for their support.²⁹¹ The Crown submitted that incorporations also enabled Maori to overcome the barrier of having to gain the agreement of every individual owner to a mortgage agreement, by permitting a majority vote to agree to a mortgage.²⁹²

Little detailed evidence was presented to us on the practical outcomes of these provisions, either generally or in our inquiry region. We have already considered the impact of Maori incorporations in chapter 11. As we noted there, incorporations were first provided for in the Native Land Court Act 1894. This Act (and regulations provided under it) enabled incorporations to raise mortgages on land for farm purposes. The Native Land Court, with the consent of a majority of the owners of a block of land – where the Crown had not acquired an interest and where the court felt that the block could be dealt with to the advantage of its owners in this way – could constitute the owners as a body corporate. On incorporation, the land was to vest in fee simple in the body corporate, subject to any existing alienations.

The Native Land Court was to appoint a committee of owners to administer the incorporated land. All court

charges and fees on land had to be cleared before land was incorporated, or charged to the owners. The management committee was able to alienate incorporated lands, or parts of them, with the consent of the commissioner of Crown lands (or a special official) on such terms and in such mode as might be prescribed by the Governor in Council.²⁹³ The proceeds of any alienation were to be paid to the Public Trustee, who was to have powers to sue and recover any moneys due from any alienation. After deducting all his expenses, those of the committee, and any fees, charges, or commissions payable to the Crown, the Public Trustee was to distribute the proceeds of any alienation to the owners, or dispose of them for their benefit as might be prescribed by the Governor in Council. The Governor in Council was able to make regulations for the management committees, for advantageous alienation of lands vested in the body corporate and for the payment of any fees and charges to the Crown, including those incurred in the administration of the lands under these provisions. Disposals of land for sale and leasing were required to be made through district land boards. Having taken out its fees and charges, the board was to pay the remainder to the Public Trustee, who was to distribute it among the owners according to their interests without making further charges for this.²⁹⁴

Regulations made under the Act, in 1895, confirmed that land alienations for these purposes included mortgages, leases, and sales. They also confirmed that all types of alienation could only be undertaken with the full knowledge and consent of the district commissioner of Crown lands, or a specially appointed official.²⁹⁵ The management committee had full power to withhold any incorporation land from sale in order to utilise it for farming for the owners, under conditions and directions imposed by the owners in general meetings. In managing the farm business of the incorporation and its property, the management committee could authorise contracts, but any contract over £50 required the consent of the Public Trustee.²⁹⁶ Profits and revenues from such farms had to be paid to the Public Trustee.²⁹⁷ The Public Trustee then had power to distribute the net proceeds from the farm business of an

incorporation to the owners, at times and in such a manner as the trustee and the management committee thought fit.²⁹⁸

Where incorporations leased land, the Public Trustee was to be a party to every lease and had powers to monitor and enforce leases. Plans of land to be leased had to be prepared, notified, and forwarded to the Minister of Native Affairs. The instrument of lease also had to be approved by the Minister, the Public Trustee, and the Commissioner of Crown Lands. Provision could be made for setting aside money to pay the value of improvements once the lease expired.²⁹⁹ As noted, the sale of incorporation land had to take place initially through a district land board and with the approval of the district commissioner of Crown lands. With regard to proceeds from alienations by sale or lease of incorporation land, the purchase money was to be paid to the Public Trustee. The Public Trustee was to hold the money in trust, invest it, and apply the income in such a manner as he thought proper for the benefit of the vendors. Where the vendors had sufficient other lands for their support the money might be paid directly to them.³⁰⁰

The regulations specifically provided that, for the purposes of settling the land or stocking and farming it, the management committee of an incorporation, with the consent of a majority of owners, could also raise investment money through the channel of the Public Trustee. The Public Trustee could mortgage against the value of the land or future profits, rents, and proceeds of sales, and controlled the raising of the money either at the recommended amount or at a lesser amount, as he saw fit. The Public Trustee also controlled and monitored repayment terms, as well as any sinking funds and their investment.³⁰¹ An 1895 amendment confirmed that the Public Trustee was able to advance money to the body corporate to open up the land for sale or lease or otherwise utilise it, on terms and conditions set by the trustee.³⁰²

As we noted in chapters 7 and 11, incorporations at this time were a very limited option for Maori. They were relatively expensive to establish and operate, they had insufficient access to lending finance, and their powers were, as

yet, uncertain in practice, requiring a series of amendments for clarification. These limitations were noted immediately by Maori members of Parliament. As we have noted, in 1894, for example, Wi Pere observed that without sufficient resources incorporations would be limited in what they could do to even begin farming.³⁰³ We also noted the very close monitoring and control by Government agencies of what incorporations were able to do. We agree with the Crown's submission that some monitoring and advice was required, especially with what were new entities, and that owners required protections and accountability. We have also noted that Maori leaders at this time accepted and welcomed the Government's assistance with financial advice and expertise. What was required was some potential for the strict control required of state agencies to evolve into something more advisory, as Maori gained experience. Placing overall authority in the office of the Public Trustee did not bode well for this. The Government was well aware of Maori dissatisfaction and concern over the authoritarian and paternalistic role of the Public Trustee. This had been clear as early as the mid-1880s, when Native Minister John Ballance had accepted that the reputation of the Public Trustee with Maori was already such that any involvement of the office in his reforms was likely to dissipate Maori support. The report of the Rees–Carroll commission on native land laws in 1891 also reported Maori concerns with the office of the Public Trustee: 'The Natives distrust a chief whom they never see, and a power which they cannot call to account'.³⁰⁴ The office was linked very much with removing control from Maori and treating them as either incompetent or incapable. This was deeply resented by Maori who wished to participate in business themselves. In any case, the office was not geared to promoting commercial and entrepreneurial activities, and the controls imposed during this period did little to encourage such efforts. In common with other Government initiatives, the office was geared to ensuring utilisation of Maori land but less focused on encouraging or enabling Maori to participate actively in that utilisation themselves.

Another major limitation was that money available for lending through the Public Trustee, including that available to incorporations, appears to have been more limited than that available through the large and growing state advances fund. Like any other trustee, the office was required to undertake conservative lending policies so as to protect the funds of its beneficiaries. It was not geared or dedicated to funding farm development in the same manner as the advances office. The same held true for other Government lending agencies, which, even when they were able to focus more on land development, also generally appear to have had less access to funds for lending for this purpose than the advances office.

We note that, as the Crown has submitted, the Native Land Laws Amendment Act 1897 further opened state lending finance to Maori landowners, in addition to the access of incorporations to funds through the Public Trustee. This amendment enabled Maori landowners, or their incorporations, to vest their land in a competent trustee (generally the district commissioner of Crown lands or the Surveyor-General) who could, among other things, legally borrow money for survey and subdivision. Effectively, this meant that Maori were required to vest their land in such a trustee before they could gain access to lending finance through the efforts of that trustee. Once again, Maori had to give up substantial control of their land in order to gain finance to develop it, and again, this went considerably further than the monitoring and advice Maori were seeking and had agreed was needed. This also, in requiring agencies to act on behalf of Maori, prevented Maori from gaining experience themselves. It had the potential to assist the utilisation of Maori land, but it did not assist the development and active participation of those communities who owned the land and wished to begin farming it themselves.

The evidence available to us indicates that, in addition, the 1897 provisions were not initially established with the objective of monitoring and advising Maori landowners so as to provide a controlled means of enabling them to enter farming. Instead, the focus was on overcoming another unintended consequence of the Native Land Court Act

1894. Some Maori individuals and communities were trapped in harsh and often long-standing forms of debt and now stood to lose all their landholdings and become a burden on the State. The 1897 provisions were intended to enable the Public Trustee, in particular, to take over such debts, many of which had become more legally enforceable as a result of the 1894 legislation, and to offer more reasonable rates and terms to enable these debts to be repaid, or losses cut and land sold. They were not originally aimed at assisting and encouraging Maori to obtain lending finance to participate in new farming opportunities.

James Carroll explained this to Parliament in 1897, noting that the proposed amendment to the Act was a response to difficulties arising through the Native Land Court Act 1894, and subsequent amendments in 1895 and 1896. These had arisen from Government attempts to legislate to end all private dealings in Maori land and streamline processes concerned with alienating the land. These had included the abolition, in 1894, of the separate protections of the trust commissioners, centralising power in the Native Land Court. Questions had then been asked about what would happen in cases where Maori had already entered into private deals over land but had not completed them when these provisions came into force. The Government had attempted to address this by also providing that such lease and sale agreements could be completed. However, this was not extended to include mortgages. When issues arose with these, the Government had attempted to address this oversight in a further 1895 amendment to the 1894 Act, which relaxed restrictions on private mortgage deals so that mortgage agreements could be completed and repaid.³⁰⁵ This was done by enabling the Native Land Court to issue confirmation orders, which effectively certified that a mortgage entered before 1894 in an inchoate state could still be regarded as having legal effect.³⁰⁶

The Maori members of Parliament appear to have generally accepted this as reasonable, as evidenced by debates of the time. It was agreed that Maori should be required to fairly pay debts they had entered into, even if, as Hone Heke noted, Maori landowners had difficulties paying off

debts on their land because the Government monopoly prevented them from gaining a fair market value. Heke did believe, however, that if sufficient reserves were set aside and made inalienable, and a system of reasonable safeguards implemented so they could be sure that transactions entered into were fair, Maori were generally willing to utilise their lands commercially.³⁰⁷

However, as Carroll explained, in 1897, it was found that the unintended effect of the 1895 measure was that Native Land Court orders intended to confirm incomplete mortgage agreements and therefore make them liable for payment were now effectively unimpeachable, even if it was found that the whole transaction had been 'steeped in fraud'. A Native Land Court judge, whether competent to deal with the matter or not, was now able to issue a confirmation order that would be regarded as covering 'a multitude of sins'. Carroll explained that the intention of the 1895 amendment had been to give the judges only the same authority as had previously been held by trust commissioners, not the much greater power the amendment had inadvertently created.³⁰⁸ In the meantime, it had also been found that the 1895 amendment, while giving protections to those lending on mortgage, was nevertheless insufficient to compel the Maori owners to execute a mortgage to the lender. The Government had therefore passed a further amendment in 1896. This, in turn, had now been found to have created further unintended and possibly unjust consequences for Maori owners. They were now compelled to enter into a mortgage which could cause them considerable harm, and lenders had been placed in an unfairly advantageous position. At the same time, Maori landowners had been left without any of their previous protections to ensure that a deal had been properly and fairly entered into. The result was that mortgages on Maori land that would previously have been considered invalid could now be forcibly legalised.³⁰⁹

Carroll gave a number of examples, including a block of Maori land in the Wairarapa district where it now seemed that, as a result of the 1894 provision and the amendments described, debts could be legally enforced against the land

of a tribe, leaving them without any land for their maintenance at all.³¹⁰ Heke explained that the 1895 measure had made it legal for Maori to be compelled to honour debts such as promissory notes, and lenders could take action against Maori for recovery of advances made against land. The 1896 amendment had gone even further, enabling lenders to enforce debts against land entered into before 1894 whatever their validity. Maori were compelled to pay these debts, even if the agreements had not been checked against previous protections such as fairness and whether Maori had sufficient other land. Effectively, these amendments gave new powers to recover moneys on advances made against land that had not been legally recoverable before 1894.³¹¹

These explanations were accompanied by lengthy debates in Parliament about the intentions of the various amendments referred to and the possibly dubious practices employed by some private lenders in using mortgage finance to trap Maori into debt and force sales of land. The practical details are beyond the scope of this report and involve examples outside our inquiry region. We note, in passing, that there was evident confusion in Parliament, in the 1890s, about the large amount of legislation passed at this time relating to Maori land and its practical significance for Maori landowners. There was also widespread acceptance that some private lenders were deliberately using lending against land to entrap Maori landowners into debt and then force the transfer of the land out of Maori ownership. The major point of interest, for us, is that the debates clearly indicate that the 1897 measures were overwhelmingly concerned with making limited provision for the State to take over existing harsh debts on Maori land, especially those that would previously have been considered invalid but were now found to be legally enforceable as a result of recent legislation. The objective was to take over the worst cases of debt, at more reasonable rates and terms, in order to prevent Maori communities from being left entirely landless and therefore a burden on the State. The system was neither developed nor designed to meet the needs of Maori who wished to obtain lending

finance to develop their land more productively, including for farming.

This was confirmed when the Government explained the 1897 measure further in referring it to the Legislative Council; the objective was to enable the Government, through its own lending departments, to lend money at a low rate of interest on Maori land to save the land from being sold. Maori who found themselves in such difficulties (as had occurred in the Wairarapa case highlighted by Carroll) would then be able to acquire finance at a less exorbitant rate than was available privately, so the land could be saved not only for the immediate benefit of the owners but also for their successors.³¹²

In order to achieve this, section 3 of the 1897 amendment enabled any Maori, whether incorporated or otherwise and who owned land under any kind of title, to convey that land by way of trust to the Surveyor-General, the Commissioner of Crown Lands, or some other fit person duly appointed, upon agreed terms as to sale, leasing, managing, improving, and raising money on the land. The trustee would be able to borrow on the security of the land, either to pay off all encumbrances or to survey and improve the land. The Public Trustee was also able to lend money on the security of the land and could execute a mortgage for the purpose. A clause added during the committee process made further provision for Maori to access mortgage finance – though only Maori who owned land in severalty would be eligible. Such an owner would also have to secure both a certificate from the Native Land Court that he had ‘other land sufficient for his maintenance’ and then the authorisation of the Governor in Council to mortgage his land. Finance would be available from specified Government lending departments, including the Public Trustee.³¹³

It was explained in the upper house that these dual provisions of the Bill recognised that one impact of the 1894 legislation had been to effectively tie up Maori land so that it could not be alienated in any way except to the Crown. All Maori, whatever their social position, were thus debarred from borrowing opportunities enjoyed by

the rest of the community.³¹⁴ The new provisions at least offered some possibility for Maori to obtain finance on their land: incorporations or Maori owners who were not incorporated could vest their land in trust in nominated Government officials who could borrow on the security of the land; or owners who held their land in severalty could borrow from Government lending departments. The Public Trustee might make his funds available in either case.

This was a recognition that Maori should have some access to reasonably-priced finance. Incorporations or unincorporated Maori owners, however, would have to rely on a nominated trustee to mortgage and improve their land. And where a Maori owned land in severalty, there were, as noted above, other hurdles to clear. Moreover, it was provided that, once an owner was authorised by the Governor in Council to secure a mortgage, the mortgage should operate as though the borrower were ‘other than a Native’; thus none of the restrictions and limitations of the Native Land Act 1894 in respect of Maori land were to apply. In our view, this only served to emphasise the fact that the lending was meant for the exceptions among Maori and not for Maori landowners generally who wished to farm their own land.

We accept that it may well have been Treaty-compliant for the State to have offered some controlled and monitored system of providing lending finance to Maori landowners. This may even have required closer monitoring and controls, for a period, than were regarded as necessary for others who borrowed from the State, although it is important to remember that many of those who benefited from the Advances to Settlers scheme were also initially regarded as poor risks by private lenders. Maori leaders also appear to have accepted the need for some form of monitoring and control.

However, the 1897 provisions went further than this. Their main focus was effectively Maori landowners or incorporations who were required to vest their land in a Government entity that would take over the full management of the land, including borrowing to improve it or, if it

was thought necessary, selling it. This, of course, was based on the Act's original objective of remedying the worst cases of debt, and not on encouraging Maori owners who wanted to improve their land to begin farming. Maori agreed that they had to accept some restrictions on their rights of ownership if they borrowed money against their land, but this was not the same as being forced to vest their land in another authority in order to borrow against it, and have it improved for them. Taking land and lending completely out of Maori control offered no scope for Maori who were careful landowners and who wished to gain experience and expertise in debt management so as to participate actively in farming their land themselves. The alternative of mortgaging land directly to a Government department was available only to Maori who had partitioned out their interest, who had considerable landholdings, and who were prepared to take their case to the Governor.

In our view, any reasonable separate system of Government lending would have required some form of access to sources of lending funds for farming equivalent to that provided to other sectors of the community. The evidence available to us indicates that this was not the case with the sources of state finance available to Maori under this regime.

Although the 1897 system was initially established for a different purpose, subsequent changes to this system of Government department lending may have enabled it to become more useful for Maori owners who wished to farm their lands themselves. We note, for example, that section 18 of the Maori Land Settlement Act 1905 allowed the Minister of Lands to make advances to owners of Maori land, or to registered proprietors in the case of a body corporate, out of the Lands for Settlements Fund. The advance allowed was limited to one-third of the unimproved value of the land. This, at least, had more of a focus on developing land for farming. However, as we have already noted, officials advised the Maori members of Parliament, in 1906, that such advances were 'exceedingly limited' in scope. In fact, they were told that such advances were only considered for individual Maori who held land 'in fee simple

in his own name'. It was also apparent that the advances came out of a very limited source of funds, and not from the Advances to Settlers fund which Europeans had access to and to which Maori also wanted access.³¹⁵

This advice confirms that the by-now-substantial Advances to Settlers fund was not available to other Government lending departments. While the Advances to Settlers Office controlled an increasingly large fund and was required to focus on its role of lending to settlers for land development purposes, other Government lending agencies, such as the Public Trust Office, did not have access to nearly the same amount of money for lending and were not so focused on the provision of farm finance. On the contrary, they were required to meet a range of other priorities when considering lending.

Furthermore, the Government lending departments were subject to the strict criteria for all state lending on Maori land, as we have previously described with the advances fund. This undermined any potential legislative improvements for this kind of lending. As we noted, in our consideration of the Advances to Settlers scheme, these criteria were so restrictive that state lending was effectively denied to the great majority of Maori landowners during this period, and this would have included Maori in our Central North Island inquiry region. These restrictive criteria may well have been based on the experiences of officials who were dealing with the very worst cases of debt that Maori suffered as a result of mortgages incurred for short-term purposes, such as immediate consumption and paying off other debts. However, they offered little encouragement or scope for those Maori landowners who wished to borrow money for more productive purposes, such as improving land to begin farming.

We agree with the Crown that a separate, more controlled state lending environment for Maori may have been appropriate and Treaty-compliant at this time. It was acknowledged that Maori faced barriers to accessing lending finance that other sections of the community did not. They may well have required more targeted Government responses, particularly in the areas of overcoming title

difficulties for security, general prejudice against Maori borrowers, and the relative lack of experience of debt management among Maori landowners. The greater legislative and other restrictions Maori faced in obtaining finance from private sources were another reason for targeted Government action. We agree that some form of monitoring and precautions may well have been appropriate, and we agree that a system of lending through Government departments had the potential to protect and assist Maori to gain necessary experience without having to rely on private lenders. As a point of comparison, the Advances to Settlers scheme certainly had the potential to ease settlers of limited means into a position where they were regarded as more reasonable risks by private lenders.

From the evidence available to us, however, we are not persuaded that the 1897 provisions provided a reasonable alternative for Maori landowners who wished to farm their own lands. This measure was focused on assisting Maori already entrapped in debt to avoid the threat of losing their remaining land. Existing difficulties with debt had been exacerbated by legislation, passed in the years from 1894 to 1896, which enabled even dubious debts to be enforced without adequate protections. The experiences and views of the officials who had to deal with the fallout from this lending were not necessarily applicable to Maori communities and individuals who had carefully set aside land for farming and were capable of taking it up, farming, and repaying their debts, if they could only gain access to lending finance.

The Government was willing to take a risk on other settlers of limited means who also wanted to use their land for productive purposes such as farming. In these circumstances, it was not reasonable for the Crown to extend its control to the point of requiring Maori land to be vested in an outside authority before lending would be provided, thus excluding Maori owners from gaining experience with debt management. Nor was it reasonable for a system especially designed to meet Maori needs to be restricted to lending only on blocks held in severalty instead of multiply owned land. It was not reasonable to limit Maori

borrowing to the normal resources Government lending agencies had access to, without at the same time providing Maori with access to lending that was equivalent, in some form, to the Advances to Settlers scheme. Given the restricted lending available in return for such significant loss of control over land, it is hardly surprising that the Stout–Ngata commission reported, in 1907, that very little land had been conveyed under the regime and that it ‘is practically a dead letter’.³¹⁶

Access to finance through Maori land councils and Maori land boards to 1929

The Crown submitted that the system of Maori land councils, which it established in 1900 and transmuted into Maori land boards in 1905, offered another reasonable alternative for Maori to gain lending finance. We agree that the land councils and boards were more focused on land development than were the Government’s 1897 provisions, and that they had the potential to more effectively address the barriers faced by Maori in using their lands for farming. We note that the councils and boards also took over the role of monitoring incorporations, including their borrowing.

We have considered the system of Maori land councils and Maori land boards in more detail in chapter 11. As we noted there, Maori land councils were established in 1900 as a way to overcome title difficulties with Maori land; this would enable the land to be better managed and utilised more quickly for a variety of purposes, including for farming. The councils could also monitor business arrangements entered into between Maori owners and private individuals, to ensure that Maori were being treated fairly while they were still inexperienced in business. Maori and Government shared control of the councils, offering the possibility of a partnership whereby the Government’s appointees were potentially able to help Maori owner representatives overcome barriers, including access to expertise and finance, as well as contribute their own experience of land and financial management. At

the same time, any surplus Maori land could be quickly utilised for European settlement purposes.

The introduction of the councils raised several questions: How effective would they be in facilitating land management? How would the inevitable loss of some Maori owner control be balanced against landowners' rights to a significant say in management decisions over their land? And how would the pressure to develop land for farming be balanced against the right of Maori to gain experience and expertise in commercial management of their lands?

The Maori land councils, (and, from 1905, Maori land boards) were provided with a monitoring function for most transactions involving Maori land, including private sales and leases but not Crown purchases. From 1900, Maori owners, whether incorporated or not, could transfer Maori land to the councils on trust and on agreed terms for the purposes of leasing or improving, including borrowing against the security of the land on mortgage. Mortgages were to be on the same terms as were available through the Advances to Settlers scheme, and each council was allowed to lend up to a defined amount of the resources it had available. The councils were able to borrow from state lending agencies against land vested in them and also, with the Governor's consent, from private sources. The councils took over the Native Land Court's power to constitute land incorporations, which, in turn, could vest land in trust on agreed terms in the councils. Owners might also use the councils to administer lands without vesting them in trust. The councils were to have full authority to mortgage or lease land, but could not sell it unless it was found to be unsuitable for use or occupation, in which case it could be sold or exchanged for other land.

These provisions appear to have offered some useful opportunities for lending for farming, but from the evidence available to us it seems that this did not translate into anything like what the Maori leadership had hoped for in practice. By 1905, Maori leaders were expressing concerns that the new system was not proving effective in facilitating Maori to farm their lands, and was not providing better access to lending finance. A major drawback identified by

landowners was that the councils were required to largely fund their administration from the rents they received and the fees and charges they imposed. Otherwise, costs had to be charged to the land, including the cost of bringing land to a state where it could be leased as farm units. These costs could be significant, and consequently Maori owners were reluctant to vest their land in the councils when they could not be sure what charges might be made against their land or whether such charges might result in their losing control of their land for lengthy periods. This reluctance is one reason why relatively small areas of land were vested, which, in turn, limited the scope for rental returns. Further, while Maori were concerned that vesting might lead to significant loss of control over their land, they found, ironically, that the councils had relatively weak powers of decision-making and management when it came to assisting those who wanted to farm their land.

These concerns were raised by Ngati Tuwharetoa in 1905, in evidence to the Native Affairs Committee already referred to in this chapter. As we noted, in giving his evidence Tureiti Te Heuheu supported a petition from Waikato and Ngati Maniapoto, which noted that the land councils faced a heavy financial burden in administering vested lands, including the expenses of administering the requirements of the 1900 Act. Of concern was the fees that land councils might have to charge against vested lands in order to pay for administration. The petitioners asked that such fees be charged at no higher rate than 5 per cent. They also complained that, although there was pressure to vest more land in the councils, some land that had already been vested had not been dealt with because the councils were not in a financial position to do so. The petitioners asked for greater financial assistance with administrative costs from the Government (in much the same way, as we have already noted, that the waste lands boards did for Crown land).³¹⁷

Ngati Tuwharetoa supported this request for the colony to bear the expense of administering the land councils, on the basis that the councils were helping to open lands to settlement for the benefit of Maori and the colony as a

whole. Further, they claimed that the Crown had already made large profits from buying Maori land and resources at relatively low prices. Without adequate financial backing, the councils could not work properly, and even the small areas of land then vested in them could not be adequately utilised due to insufficient funds to undertake the work required. Te Heuheu gave evidence of the enormous profits he claimed that the Crown had made under its system of purchase monopoly, and he stated his belief that, as a result, the Government could well afford to pay the costs of administering the councils. He also asked that, once land was set aside as farm blocks, Maori would be included within the Advances to Settlers scheme to enable them to work the land.³¹⁸

Ngati Tuwharetoa had also found that the councils lacked sufficient authority to implement landowners' own development proposals. Owners might take their plans to Maori council members, who were respected people of experience, and gain approval from them, but a report then had to be prepared and sent to officials to gain the necessary final approval. The process could take months, and Ngati Tuwharetoa were finding that these delays often meant that the original proposals were no longer viable. Yet, when they made new applications, they were obliged to go through the whole process again.³¹⁹ Te Heuheu gave the Ohutu block as an example of land handed to the local land council that had not brought any benefit for the owners.³²⁰

For this reason, Ngati Tuwharetoa did not see any particular benefit in vesting land in the council system that they believed they could already use commercially. They much preferred to retain their own land. This included land with resources such as forests, flax, and gravel that they wanted to commercially exploit for their own 'utilisation' outside of the councils. In these cases, they wanted the councils to have no more than a monitoring and advisory function, and to ensure that transactions with Pakeha were fair. The only exception was in cases where the land was poor and

a large number of owners were involved, and where it was more costly to partition the land into manageable blocks than the land was worth. In such cases, they agreed that vesting in councils could be useful, but only if the system was reformed. They saw no advantage in the councils having papakainga land vested in them, because the owners had no intention of ever using such land commercially and wanted no alienations at all. It was to be kept as an inalienable tribal estate for the owners' immediate needs, including traditional uses, without fees or rates being charged. However, Te Heuheu did seem willing to agree that, under the direction of the owners, councils could legally identify and set aside papakainga land and land for farming and other commercial purposes, before having the remainder vested in them.³²¹

Ngati Tuwharetoa also agreed that, once papakainga land and land they could utilise for farming and other commercial purposes had been set aside, and land they wanted to farm but which was too poor to be further partitioned had been vested, any additional land that they did not want to utilise could be vested and leased (or, in cases where they decided and directed the council, sold) for additional investment income. In the tribe's view, the councils were seriously flawed as a mechanism for overcoming title problems so that land could be utilised commercially, because they involved high and not easily anticipated costs, controls that were too bureaucratic and cumbersome, and the risk that owners might lose control of their land. As Te Heuheu explained, let the councils 'continue . . . to watch me and see whether I administer [the land] rightly or wrongly, but do not let them seize the mana of my lands.'³²² Ngati Tuwharetoa saw a potentially positive role for the councils, if greater owner control could be exercised, and if more protections for owners were instituted. In addition, they could play a useful role in monitoring and advising on commercial transactions, which would give Maori the opportunity to fairly participate in such transactions while they gained experience. Te Heuheu did not mention

incorporations as a means of overcoming title problems, and presumably he still did not see them as an attractive option. However, he did note that the problem of scattered interests in many different blocks (including those he held himself) still had to be overcome, possibly by more emphasis on exchanges.³²³

A brief survey of Parliamentary debates from 1900 to 1929 reveals that during this period the Maori members of the Government, James Carroll and, later, Apirana Ngata, promoted a series of legislative improvements. These were designed to improve the powers of the Maori land councils and boards to act as a channel for Maori owners seeking to access state lending funds to farm their land. They included means whereby Maori might more readily access the Advances to Settlers fund, such as Carroll's attempts in 1905 described earlier.³²⁴ We have already noted early optimism that the boards might help to access lending by other Government agencies. We have noted the limited provision in the Maori Land Settlement Act 1905 for Maori owners or incorporations to borrow up to one-third of the unimproved value of their land from the Lands for Settlement Fund, with the approval of the Minister of Lands. Carroll explained that such lending assistance would be offered on the understanding that it would be used for farming. The Government also proposed to allow the boards to borrow on the security of land vested in them to pay the expenses of making the land ready for the market. The loans were to be repaid out of revenue obtained from the land sales. Carroll also wanted the same rights for borrowing on Maori land that applied to Europeans who borrowed from the Advances to Settlers scheme, including the ability to pay off a mortgage and clear the land of all encumbrances within 42 years. He expected that, at the end of 50 years, if there were no encumbrances on the land, it could then be revested in its Maori owners.³²⁵ As we noted, the Maori members were subsequently advised that, in practice, Maori eligibility for this kind of state loan had been found

to be 'exceedingly limited' and from only a very limited source of funds.³²⁶

As we have described, further attempts were made in 1906, by including leases from Maori land boards among the classes of land that were to be regarded as security for the Advances to Settlers scheme. The hope was that, by making such leases clearly eligible for lending, providing land board monitoring, and allowing any defaults on payments to be recovered through leasing, the advances board might see its way clear to relax the strict lending criteria it imposed in practice on Maori landowners. When the Government introduced fundamental changes to the initial vesting agreements for Maori land boards in 1907, with the Native Land Settlement Act of that year, Ngata nevertheless sought to make the best of the measure by including provisions to assist Maori owners who wanted to farm lands they had vested in the boards. He provided for the boards to lease such land to Maori owners without competition, and for the Maori lessees to borrow money from a state lending department for the purpose of farming, stocking, and improving the land. Ngata's intention was to extend and confirm the right of Maori farmers to borrow on their freehold, and the right of Maori holding leases from the boards to borrow on their leasehold. When it became apparent that Maori landowners were finding incorporation impossible, as a result of increasing congestion in titles and partitions, a 1907 amendment also enabled the Native Minister to establish incorporations on request.

However, the major difficulty remained. In spite of these various measures to improve the powers of the boards and their legal access to state lending finance for Maori landowners (including the Advances to Settlers fund), lending still, in practice, remained dependent on the readiness of hostile officials to relax their criteria. The evidence indicates that they remained convinced that Maori could not be trusted with loans.

As Ngata noted, regarding the State Advances Office, in 1907:

during the whole of the twelve years that this Department has been in existence the Government has never directed its attention specially to the question of assisting the Maoris upon their lands. Whenever there has been any great outcry about the settlement of Native lands in the North Island[,] about the question of taxation and about rates, there has been only one way suggested of meeting that outcry, and that is by getting Native lands on the market in order to meet the demands of those who want land. But the attention of the Government has not been directed to the necessity of enabling the Maoris themselves to utilise some of the lands which are now alleged to be waste.³²⁷

Ngata proposed that the Government focus more on assisting Maori to become farmers of their own land by helping them with training and financial assistance. He noted that the Government had recently made efforts to assist other groups in the community who were identified as struggling – workers and backblocks settlers. Now, it needed to support attempts to give the Maori land boards greater scope to advance money, in deserving cases, for Maori who wished to utilise their land.³²⁸

Ngata and the other Maori members continued their efforts to gain direct access for Maori to the Advances to Settlers scheme. But they also appear to have accepted that, because of continuing prejudice, more hope lay in providing separate forms of lending assistance to Maori through entities such as the Maori land boards. Ngata and Heke both supported provisions that were intended to extend access to state lending for Maori farmers through the Maori land boards.³²⁹

The risk to this strategy was that general lenders would take the chance to completely turn their backs on Maori seeking lending finance, leaving them to rely entirely on Maori sources of lending. Nevertheless, Ngata managed to secure a series of provisions that provided for lending by the boards, and extended this to the new Native Trustee Office, established under the Native Trustee Act 1920. This

Act gave the Native Trustee power to establish a common fund, using funds held largely by the Maori land boards along with undistributed rents from Maori reserves previously administered by the Public Trustee. The boards had accumulated funds, through rents and land sales, that could not be immediately distributed while they tried to ascertain who the proper sellers and beneficiaries were. The intention was to allow the Native Trustee to lend these funds, in the meantime, to Maori who had individual parcels of land or to Maori land incorporations. The trustee could also lend to Pakeha lessees of Maori land.

The Government acknowledged that the continuing requirement for even this lending to be available only on Maori land that had been fully partitioned into individual parcels was deliberate. It was designed to encourage the ‘individualisation’ of Maori land – something that the Government preferred and still insisted was possible and desirable – and to discourage communal systems of land-holding.³³⁰ In the words of Sir William Herries:

one great advantage will be – and this not the least advantage – that it will encourage them, almost compel them, to partition their land, because it is only on partitioned blocks that money will be advanced. It will take them out, I believe, of the communal system, which, in my opinion, is holding the Maori nation back.³³¹

However, even with lending restricted to these limited cases, it seems that the Native Trustee was not practically able to offer significant loans during the 1920s. Ngata warned, as early as 1921, that the Native Trustee was likely to encounter practical difficulties in lending for farming for some time.³³² The total advances made by the trustee to Maori farmers peaked in the 1924–25 year at £204,320 for the whole country, before falling sharply to just £12,100 in the 1928–29 year. This coincided with new legislative provisions, which enabled the boards to withdraw their funds from the trustee and begin lending on their own account.

These changes, also sponsored by Ngata, extended the boards’ powers to lend directly for improving land for settlement, although, again, it was restricted to Maori land

held as individual 'units' and incorporations. Ngata also sought measures that would allow the boards to undertake more direct involvement in developing Maori land on their own account. He managed to obtain a number of legislative amendments during the 1920s in this direction. Some of these amendments have been drawn to our attention in evidence. They include a 1922 measure that finally enabled the boards to advance moneys on Maori land on first mortgage with the consent of the Native Minister. The boards apparently made some of these advances to European lessees of Maori land, but a number were also made to Maori farmers and to the management committees of land incorporations. Such advances could only be made on land where title was complete or in a position to be completed by survey. A further 1924 measure provided that boards could be considered as state lending departments for lending purposes. In 1926, the boards were given the power (with the approval of the Minister) to advance moneys for the purpose of farming improvement or settlement of Maori land, on the security of a statutory charge binding all the owners and without the necessity for a mortgage or personal covenant.³³³

As well as being able to make advances, by the later 1920s the boards were also able to take a more active role in developing Maori land themselves. For example, from 1927, and again with the permission of the Minister, they were able to purchase land for and on behalf of any Maori or body of Maori, and hold the land in trust subject to repayment of the purchase price and any other charges the board required. Potentially, this enabled boards to purchase better-quality land for farming or add to existing land blocks to make them more economically viable. From 1928, more comprehensive provisions were passed that enabled boards to manage land as farms on behalf of Maori owners. With the consent of the landowners or an order of the Native Land Court (which, for the purpose, was regarded as the same thing) the board could manage and undertake any pastoral or other business connected with the land or produce of the land, for the benefit of the owners or other interested Maori. From 1929, the boards

were also able to buy land out of their revenue and appoint land managers (again, subject to the Minister's approval). They were now also able to provide a guarantee for the accounts of Maori dairy farmers so that dairy companies could advance funds, such as for necessary equipment, up to a limit of £300.³³⁴

Despite these undoubted improvements in the boards' powers to assist with Maori land development for farming, critical problems remained. A major issue was the boards' access to funds for lending. As we have seen, they remained reliant on a small and dwindling source of largely Maori money. Throughout the 1920s, as the national economy faltered, the funds available to the Native Trustee and the boards were also shrinking, due to falling prices for produce, lower values for land that was sold, and pressing claims on the trustee from beneficiaries no longer able to gain the same degree of seasonal work as previously. Ngata's concerns in this respect have been confirmed by other studies, such as Professor Belshaw's analysis that, although the boards were empowered to increase their lending operations to Maori from 1926, the source for this lending was mainly Maori funds deposited with the boards. During the 1920s, there was an increasing drain on these funds as Maori found it harder to obtain farm labouring work. Harder economic times required many to fall back on the rents and funds held by the boards. A serious depletion of these funds by the late 1920s further restricted the ability of boards to lend to Maori for farming.³³⁵

Dr Hearn presented evidence to us which indicates that lending by the Native Trustee and the Maori land boards was very limited in our inquiry region.³³⁶ He reported that evidence from the National Expenditure Commission of 1932 indicates that, between 1924 and 1931, the Native Trustee did not grant any mortgages to Maori landowners in the Kaingaroa and Taupo inquiry districts.³³⁷ The situation was different in much of the Waiariki district (our Rotorua inquiry district covers a large part of this area) where, as we will describe, the Waiariki Maori Land Board was active in lending for farming on Maori land, especially in cases where owners had been able to incorporate.

By 1928, this board had approved some 34 mortgages on Maori land in its district.

The evidence indicates, however, that the boards never gained access to the advances fund that was available to other settlers. From around the time of the First World War, as we have noted previously, the Advances to Settlers Office adopted a policy of referring all Maori applications for lending to the land boards or the Native Trustee, further denying Maori practical access to that source. As we have previously found, the boards were overworked and under-resourced, required to meet conflicting objectives of facilitating alienation and developing Maori land, and forced to juggle administrative and judicial functions with limited resources and expertise. By the 1920s, the boards effectively comprised the Native Land Court judge and registrar in each district. While judges were familiar with Maori land title problems, they had less experience in commercial enterprise and land development issues. Although boards were given increasing powers to bring land into development, in an effort to sidestep the title and management difficulties that were the result of having numerous owners, these new powers allowed boards to commit landowners to incurring significant charges against their land, and to make development decisions over which landowners had little say or control.

A possible alternative to lending was for the Maori land councils and boards to accumulate sufficient funds to invest in land development and improvement for farming. The evidence available to us, as we will explain further, indicates that this was never realistic during this period. The councils and boards were not in a position – and did not feel required – to monitor leases and sales so as to ensure sufficient funds could be accumulated for development purposes. Their focus, in this regard, was on what Maori might require for subsistence. It was recognised, in any case, that access to rural credit was vital for landowners wishing to begin farming at this time. Relying on accumulated funds alone was rarely possible. Although the powers and focus of the boards were increasingly aimed at assisting and encouraging Maori landowners to begin

farming, it is evident that this happened relatively late, towards the end of the 1920s, that the boards were under-resourced, and that such lending finance as they could access was restricted to a relatively small source of mainly Maori funds. In contrast, the Advances to Settlers fund had grown to a substantial sum of some £56 million by the late 1920s.

The evidence available to us indicates that Maori communities in our region did make a number of attempts to begin farming their own land during this period, in spite of the limited lending opportunities available. But these efforts were delayed, due to difficulties in settling title and overcoming the problems of uneconomic land blocks as a result of partitioning, including efforts to separate out Crown interests. These difficulties were made clear in the Rotorua district as a result of the Stout–Ngata commission's inquiry. The commission reported that, of all the hapu and iwi of the district, Ngati Pikiao had been able to retain the largest quantity and best quality of land. The commission found Ngati Pikiao were keen to farm their land, but that they had first to get their titles settled and then form incorporations where land had been heavily partitioned, and substantial survey and rates charges were often still outstanding.

As a further indication of how difficult it was for even the better-placed iwi and hapu to begin farming their land at this time, we note the evidence of Donald Loveridge about Ngati Pikiao's lands. In his report, ‘“The Most Valuable of the Rotorua Lands”’, Dr Loveridge takes account of the assumption that land sales and leases administered and monitored by the Waiariki Maori Land Board might be a potential means of accumulating funds for investment in farming. Dr Loveridge notes that legislative changes, from 1909, encouraged a surge in sales and leases of Ngati Pikiao land. The tribe was particularly interested in leasing and, by the 1930s, half of their retained lands were leased under confirmation from the board.³³⁸ Dr Loveridge found that a significant proportion of the income raised from leasing was first required to pay off substantial survey liens and court costs.³³⁹ He found other problems similar to those

that have been found more generally to affect Maori land boards, and which we have already considered in chapter 11. The board was only able to undertake perfunctory monitoring of leases and sales. In many cases, it was satisfied with relatively low rents just to ensure that the land was utilised. The board required low or no payments or royalties for associated resources such as timber, often on the ground that owners received indirect benefits such as milling employment. It appeared unable to monitor leases adequately, including monitoring improvements. The low returns from many leases appear to have contributed to numbers of them eventually being freeholded to lessees, rather than returned to their owners' control for farming. Dr Loveridge confirms the view of other historians that '[t]he idea that lands could be leased or sold to finance the agricultural development of the rest proved to be something of a mirage'.³⁴⁰

Dr Loveridge also reports evidence that Ngati Pikiao encountered difficulties in obtaining sufficient lending finance to adequately develop their lands for farming. They did not receive the level of assistance from the Government that was recommended by Stout and Ngata. Nevertheless, in an effort to overcome title and management difficulties, and farm some of their most suitable lands, they did form some incorporations. They were able to begin their own farm development schemes on Taheke and Maketu land by the 1920s. These schemes received some lending assistance from the Waiariki Maori Land Board within the lending policies laid down by the Government, which, as we have seen, favoured lending to individuals or incorporations and intensive development of land for family farms. The newly-formed Te Arawa Trust Board also provided some financial assistance, once it had obtained legal confirmation that it could assist with land development work.

The Taheke scheme, encompassing some of the best of Ngati Pikiao's land, received establishment lending finance from the Waiariki Maori Land Board, and finance and security from the Te Arawa Trust Board for the establishment of individual dairy units.³⁴¹ A large part of this lending was spent on fencing, dairy equipment, and grassing

the land. While these improvements were being made, the income from dairying was minimal, so little of the loan could be repaid. The board later took over the scheme, as a result of repayments owed by 1932. However, insufficient capital was available to keep the scheme going and it began to fail. When it was later absorbed into the state-assisted Maori land development schemes, in 1933, expert advice was that the land was not suitable for dairying and that it had been split into farm sizes that were too small to be viable.³⁴² It seems that the board's efforts to encourage individual farms had come at the cost of economic viability. There was also insufficient funding available to undertake the continued development of these farms for dairying, especially as the wider economic outlook for farming began to decline by the later 1920s.

The effort of forming land incorporations did not necessarily prove to be an advantage, if sufficient lending finance was not available. Dr Loveridge notes evidence of the Rotoiti 4 block, which was incorporated in December 1908, and for which a management committee was appointed in May 1909. In September 1911, the proprietors applied to the Waiariki Maori Land Board for approval of four leases to the owners. These were approved in November 1911, and two more were approved the next year. However, the lessees first had to pay off significant survey and other debts on the land, and within a short time the leases began to be sold to private Pakeha interests. The available evidence indicates that even those communities with significant retained lands – such as Ngati Pikiao, who were regarded as having potentially the best lands for farming in the Rotorua district – still struggled to utilise their lands for farming. This was not just a result of the physical challenge of farming, but also stemmed from continued problems with land having been broken up into uneconomic units by excessive subdivision, large debts for surveys and unpaid rates, and a shortage of lending finance.³⁴³

Evidence was made available to us from the Bayley-Shoebridge document bank regarding the Waiariki Maori Land Board's purchase of Tihiotonga station in 1928. The board purchased the station from European owners on

behalf of Ngati Whakaue, who were then considered 'practically landless'. The station, which was also eventually absorbed into the state-assisted Maori development schemes, was a mixture of freehold and leasehold, located about three miles from Rotorua township. It was managed by the board until 1934, with considerable difficulty, as it proved to be cobalt-deficient and difficult to develop. The land board was unable to invest sufficient funds itself to make the station viable.³⁴⁴

We also received evidence of Ngati Tuwharetoa's efforts to seek assistance from the Government to develop their better lakeside land for modern sheep and dairy farming during this period. Although some farm development was undertaken in the nineteenth century, it was soon realised that more substantial lending would be required to develop this land. The tribe's request was supported by the Aotea Maori Land Board, which confirmed the efforts being made and the need for financial and technical assistance, including help to meet rating demands. However, the Government did not respond with more direct financial assistance until the advent of the land development schemes in 1929.³⁴⁵

We agree that a separate means of channelling state development lending for Maori farming, through entities such as the Maori land councils and land boards, was potentially consistent with the Treaty. Such a system could have provided a more reasonable means of ensuring equitable Maori access to state financial assistance, given the particular barriers faced by Maori. During this period, the Maori land board system became the most important potential promoter of farming for Maori owners, and a number of legislative reforms enabled the boards to act more effectively as lending entities for Maori land, and to encourage Maori entry into farming their own land. However, the Crown failed to take reasonable steps to ensure that lending through the boards addressed the difficulties Maori faced in entering farming on an equivalent basis to other landowners of limited means. Instead of finding ways to meet their needs, the lending system simply excluded large groups of Maori landowners who

did not conform to the Crown's ideal of individual titles. The Crown also failed to take reasonable steps to ensure that the board system provided a channel to enable Maori access to the Advances to Settlers fund and similar state lending resources. And the Crown failed to take reasonable steps to ensure that the separate Maori land board system was not used by its lending agencies to further limit Maori only to that system and its comparatively meagre source of funds. That Maori were, in practice, limited in this way effectively required them to use dwindling moneys from Maori funds to finance their farm development.

Skills and knowledge

In its submissions, the Crown did not respond on the matter of adequacy of technical skills and training during the period up until 1929. This stance was consistent with the Crown's view that farming was not, then, a reasonable development opportunity in the Central North Island. However, we note that, from at least the early 1890s, the Government's own inquiries and the advice it received from Maori leaders clearly indicated that assistance with skills and knowledge was required if Maori communities were to successfully participate in the new types of farming. In the nineteenth century, the usual ways to gain such skills and knowledge were through access to skilled people and through practical participation. We have previously noted how many Maori communities successfully gained the skills and knowledge needed to participate in trading and shipping enterprises during the first decades of colonisation. At that time, the Government acknowledged an obligation of positive assistance. It encouraged missionaries, for example, to settle among Maori communities. As we saw in chapter 13, it provided advice and encouragement directly, for example by presents of much-needed technology, and through such forums as Maori language newspapers and visits by Governors and officials.

By the 1890s, it was recognised that rapid and successful participation in the production of farm produce for the export trade required almost everyone entering the new farm industry to gain significantly new skills, knowledge,

and technical expertise. Areas as diverse as improving pasture production, combating animal and plant pests and diseases, improving soil quality, and improving stock breeds for the production of wool, meat, and dairy products all required a lift in expertise. The new style of farming also required new animal husbandry skills, and new skills and technical knowledge to ensure acceptable and consistent quality of production. Alongside these developments came new initiatives for collecting and processing quality dairy and meat products, which, in turn, required appropriate knowledge and expertise.

The Government identified a lack of such skills and knowledge as a barrier to entering farming. From the 1890s, as the economic potential of farm exports began to be realised, the Government became actively involved in providing assistance to farmers. This included coordinating and disseminating knowledge, and encouraging and regulating quality at all stages of export production. Advisory and education services ranged from the development of formal institutions, such as the School of Agriculture at Lincoln and, later, Massey Agricultural College, to the development of a comprehensive programme of advisory services, quality control, and research. Government initiatives also included the creation of a separate Department of Agriculture in 1892, formed out of the older and smaller livestock branch of the Department of Lands, and the establishment of a farm advisory service to encourage the dairy industry from 1889. Advisers actively went out and promoted better methods to farmers, helping them to establish dairy companies and to improve their manufacturing techniques, quality control, and financial organisation.³⁴⁶ In the 1890s, dairy instructors were imported from overseas to bring expertise in butter and cheese making to New Zealand.³⁴⁷ The role of dairy instructors was extended, from the turn of the century, with the establishment of winter dairy schools to improve the operation and management of dairy factories. Through the 1920s, the Government continued building up the system of dairy instruction.³⁴⁸

The Government established a system of compulsory inspection and grading of dairy produce to ensure quality for export. A similar system of inspectors was established to regularise grading and quality control over the full range of meat production. Government inspections of meatworks began in 1893 with vets recruited for the purpose. The system was formalised and expanded from 1900. Government agencies were heavily involved in the acquisition and dissemination of technical knowledge in a variety of areas, including plant and animal breeds, pasture improvement, stock management, and the control of pests and diseases. This was achieved, in part, through the establishment of model and experimental farms and the dissemination of a variety of technical publications. By the 1920s, the earlier focus on importing expertise was giving way to home-grown research and experimentation, with the establishment of agencies such as the research division within the Department of Agriculture and the Department of Scientific and Industrial Research.³⁴⁹ Historians, such as Professor Belich, for example, have recognised that this comprehensive and extensive state-funded assistance, monitoring, and advice had a major impact on the rapid and successful development of the modern farm industry in the period up until the 1920s.³⁵⁰

The Government was well aware of Maori needs in gaining skills and expertise for farming their land, by the time this comprehensive system of farm assistance was established. For example, as we have noted, the report of the 1891 Rees–Carroll commission recommended that the Government provide training and educational assistance so that Maori would be able to participate in the opportunities available in farming. This included education for the young that was not only academic but practical: vocational training for a ‘useful life’.³⁵¹ The report recommended that reserves of land should be made on an ‘extensive scale’ from retained Maori land to enable such practical learning.³⁵² It observed the widespread support from Maori communities, reflected in evidence it received, for liberal reserves of land to be set aside for their children’s education and for the establishment of industrial schools.³⁵³ The

report also proposed that the land management boards it recommended should have powers, with the advice and consent of local Maori committees, to establish schools for the education of Maori children and to examine and report to Parliament from time to time on all endowments made for educational purposes for Maori.³⁵⁴

Carroll, in his supplementary notes to the commission's official report, reminded the Government that Maori required assistance in education and training if they were to successfully participate in new economic opportunities such as modern farming. Maori wanted to become useful settlers and contribute to the productive wealth of the country, and Carroll rejected what he described as a 'fashion' for assuming that the Maori race would become extinct, which he claimed was already contradicted by the latest census returns.³⁵⁵ He asserted that it was a 'somewhat melancholy reflection' that, during all the years that Parliament had passed legislation regarding Maori land matters, 'no single *bona fide* attempt' had been made to induce Maori 'to become thoroughly useful settlers in the true sense of the word'. In his view, no attempt had been made to educate Maori in acquiring industrial knowledge. Whatever progress they had achieved had been through their own efforts. He warned that Parliament would add 'to its many blunders in administering Native affairs' if it short-sightedly failed to devise means for encouraging and assisting Maori to become useful settlers. The time was right for helping Maori to learn, and Parliament needed to act if opportunities were not to be lost.³⁵⁶

We received no evidence of the Government acting on these recommendations, at this time, to ensure provision of the training, practical experience, and advisory services that Maori required for establishing farming on their retained lands. Nor do we have evidence that Maori were widely included in the comprehensive scheme established to meet the needs of settlers generally. The evidence does indicate that the Government's focus on utilising Maori land generally meant making it available to others. The strict criteria imposed for lending finance tended to exclude Maori from gaining practical experience, and from the

general system of advisory services open to farmers who were able to begin farming their land. The Government's assumption that Maori land would generally be developed outside Maori participation also precluded serious consideration of targeted training, education, and advisory services for Maori.

As previously noted, these problems had been acknowledged by the Government by 1905. It promised Maori communities that, as part of a new programme of actively targeting 'unutilised' Maori land for purchasing, it would also take more effective steps to enable Maori who wanted to farm their land to do so. As we have noted, the Budget of 1906 contained assurances that steps would be taken to give Maori a 'start' with farming their lands and a 'guide' to enable them to make their lands more productive. This appeared to offer the promise of more effective targeted assistance, not only with finance but also with 'guiding' in the skills and knowledge required for modern farming.

This policy option was discussed in Parliament, where the member for Manawatu, John Stevens, outlined some of the steps that could practically provide this kind of guidance to Maori. He noted that the Native Department had many officials who were experienced and expert at administration and keeping records, and in purchasing Maori land. What was now required was the appointment of men capable of guiding and teaching Maori to improve and cultivate their individual land holdings and also helping them to manage any loans they might obtain to improve their lands. Stevens believed that this kind of assistance could even be financed by a charge on much of the Maori land that was at present unutilised. He reminded Parliament that, when considering means of pressuring Maori off their land, it also had an obligation to give Maori fair and full consideration and ensure that they were properly provided for.³⁵⁷

Stevens' proposals are open to criticism, in that they assumed it was possible to individualise Maori landholdings and that Maori land would still have to bear the cost of the same kinds of assistance the Government was providing without charge to other citizens. Nevertheless, they

indicate that proposals to actively assist Maori with training and advice for farming their lands were not impossible for parliamentarians to contemplate at this time. They also show an acknowledgement of the Crown's obligation to ensure that Maori retained sufficient lands (and were able to use them) when it purchased Maori land.

Nevertheless, Maori leaderships continued to point to continued Government inaction and an apparently deliberate decision not to adopt any proposals to provide this kind of advice for Maori. As we have noted, Ngata told the House, in 1907, that Maori required assistance to be able to utilise the land they retained, which included not only proper title, ample powers, and financial assistance under proper safeguards but also expert instruction in farming pursuits.³⁵⁸ The Stout–Ngata commission, established that year, provided the Government with further evidence of the practical steps needed to assist Maori communities with training and skills for farming. The commission reported that the provision of effective encouragement and training was a 'paramount consideration' in enabling Maori to become industrious settlers. Yet the statute book, it went on to say, could be searched in vain for any scheme deliberately aimed at achieving this end. Parliament had always 'stopped short' of providing such assistance, and indeed the necessity for assisting Maori to settle their own land had never been properly recognised.³⁵⁹

The commission's report warned the Government that the matter was urgent, and that state assistance was required. The report proposed two major practical initiatives. The first was to include agricultural training within the system of school education. The second was for the State to take a positive role in the guidance and leadership of Maori adults towards practical experience



Manuring crew and vehicle at work near Turangi (undated)

of farming and horticulture. State experimental farms, the commission suggested, would enable selected Maori youth to learn those facets of agriculture, such as orcharding, poultry keeping, and stock breeding, that were most likely to be useful in Maori districts. The Government was encouraged to ensure that agricultural instructors visited Maori districts. The commission pointed to examples from overseas of this kind of assistance, such as in France, and noted that this was 'a very pressing matter'. It recommended that the Government act immediately to design a scheme to efficiently educate Maori in agricultural matters.³⁶⁰

The commission's report also recommended that, in the Rotorua district, Maori should be given the chance to gain experience in farming through the establishment of communal hapu farms under the general supervision of the Maori land boards and under the management of competent European managers. This would provide the necessary impetus and organised practical instruction to enable a reasonable number of Maori to become efficient and scientific farmers. The report asserted that training in such

matters, and in the exercise of care in financial management, would mitigate many of the evils currently afflicting Maori, including cases of wastage of money received from land sales.³⁶¹

The commission recommended that the Government assist Te Arawa to organise and develop a number of communal hapu farms: one each for Ngati Whakaue, Tuhourangi, and Ngati Uenukukopako; and two for Ngati Pikiao. Each farm would have a separate incorporation and management committee, and be around 2000 to 3000 acres in size. The farms would be utilised as experimental farms, with managers as agricultural instructors, so that they could be used as schools of agriculture for young people. It was recommended that the State pay the instructors' expenses, but that the farms should bear all other costs. The commission observed that:

The expense to the State of such an experiment would be a mere bagatelle compared with the money expended by the Department of Agriculture for the benefit of the farming community generally.³⁶²

In a later report, the commission noted the willingness of Ngati Whakaue to put land towards a proposed communal farm for training their young people. It observed that there were no opportunities for young Maori to gain agricultural training in the Rotorua district, as there were very few farms in the interior at this stage. The Presbyterian Church had offered to provide instructors, if land was made available, and Ngati Whakaue had agreed. It was hoped that this initiative would be successful and that other hapu would be able to learn from it and provide similar instruction on their own communal farms. Ngati Whakaue had agreed that cadets from other Te Arawa hapu would be accepted on the farm, as spaces became available. The commission recommended that the Government take steps to enable the scheme to proceed.³⁶³

These recommendations clearly set out the need for agricultural and farm training for Maori, picking up some of the ideas already expressed in 1906. They offered a range of practical options to the Government that would offer a

fairer share of the training and advisory assistance already offered to other sectors of the community. The commission warned of the pressing need to institute such initiatives, particularly as other barriers had limited the practical experience that Maori were able to obtain. However, on the evidence presented to us, it seems that, generally, the Government decided against adopting such policy initiatives. Dr Gould observes that, until 1929, when the land development schemes began, the Government ignored the Stout–Ngata commission's recommendations with regard to agricultural education for Maori.³⁶⁴ That Maori continued to be excluded from general advisory and assistance programmes appears to have been recognised at the time. For example, in 1931, the member for Otaki, William Field, proposed that Maori farmers should be afforded the same kind of guidance and direction as Pakeha obtained from the Department of Agriculture, with experts sent among them to watch their operations and see that they were working along sound lines, especially in connection with the use of manure, grass mixtures, and crops.³⁶⁵

Although, as we have noted, the Maori land boards became the main agency assisting Maori to enter farming during this period, the Government failed to ensure that the boards had members with the necessary expertise and resources to offer advisory and training services similar to those available to other sectors of the community. This, too, was a major missed opportunity to offer Maori the kind of targeted assistance with skills and expertise that two Government inquiries, separated by a period of 16 years between 1891 and 1907, had determined was required.

Impacts for the Central North Island inquiry region

We have considered the impacts of Crown policies, generally, concerning lending finance, and skills and training for Maori who wished to utilise their lands for farming. We have less detailed evidence of the impacts of these policies in our Central North Island inquiry region. We also need to consider the Crown's view that lands in this region were generally so marginal for farming that assessment of prejudice is very difficult. Even if Maori had been able to

gain equivalent access to the Advances to Settlers fund, for example, there is still the question of how practically useful it would have been in this region, where lands were possibly so marginal that they would have been beyond the kind of lending considered reasonable at the time.

We have noted, for example, that, when the scheme began, most individual loans amounted to £500 or less, possibly significantly less than was required to develop the marginal lands in this region. We have also noted evidence of the conservative lending views of the advances office, which may well have meant that neither Maori nor Pakeha landowners in the region would have been considered eligible, especially on the more difficult pumice country. There is some evidence that Pakeha also had difficulty developing family farms in much of this region. This was not just due to cobalt deficiency in the soils, although this was a major barrier in many areas, but also because of the generally poor soils of the interior, along with problems of isolation and the sometimes harsh climatic conditions. The difficulties in developing family farms do seem to have contributed to a general reluctance from Government and private lenders to advance loans in much of this region, regardless of whether land was owned by Maori or Pakeha.³⁶⁶ One result was that Pakeha wanting to establish family farms were reluctant to take up land in much of this inquiry region while better land in the North Island was still available.

Maori owners wanting to farm their retained lands in this region had to look at what was practically possible. The most successful and economically viable farms in the interior continued to be relatively large and less intensively farmed, and predominantly ran sheep for wool and meat. Larger farms were better able to cope with the physical difficulties of farming in the region, including the need for enough 'healthy' land to condition stock from cobalt-deficient areas. Maori communities do appear to have been enthusiastic about developing more intensive farming, such as dairying, where this seemed possible on better pockets of land, especially as lending finance was geared towards this kind of development. However, as the

Stout–Ngata commission made clear, they were also willing to begin farming larger farms and stations. In many cases, this form of development fitted as well, if not better, with their aspirations for hapu community development. The larger, less intensive farms could not hope to support entire communities on their own, but this was hardly possible with farming in the region anyway. Farming could do no more than contribute, along with other forms of activity such as timber milling, to supporting communities. Less intensive farming also made it easier for traditional forms of land use, such as hunting and fishing, to continue to coexist. These farms provided a contributing source of income, and work and business experience for young people. They could also be run collectively as incorporations, or as hapu farms (as the Stout–Ngata commission suggested), enabling communities to collectively manage and work their lands.

Although soil deficiencies remained a major difficulty, efforts to establish some form of farming in the region were still considered possible, even on some of the marginal interior lands. As the region became less isolated during the first decades of the twentieth century, with improvements in rail and road infrastructure, Pakeha began taking up some land, optimistic that some form of farming could be established. Small dairying communities had been established in the Rotorua district, for example, by 1910. Although these struggled, there was optimism that, with improving infrastructure and technical knowledge, they could be made viable. A number of Pakeha landowners also recognised the greater economic viability of larger farms and stations in the region. Freehold land and leases of Maori land were bought up, in the Rotorua region especially, to establish large farm units. There is no doubt that these larger farms required substantially greater than average capital investment to clear, grass, fence, and stock in order to begin farming, even at a less intensive level. These farms were likely to be the most practical form of farming on much of the retained Maori land of the region, as Ngati Tuwharetoa had told the Government in 1905, and the Stout–Ngata commission had later confirmed with

respect to much of the retained Maori land in the Rotorua district.

It is difficult, from the evidence we have available in this stage one inquiry, to be sure of the precise relationship of factors leading to a failure of farming efforts by Maori in the Central North Island. It could have been because any kind of farming was very difficult, or because Maori were only able to access lending finance for the least suitable forms of small family farms. Or again, failure could have arisen where Maori were forced to rely on much smaller sources of funding than were available to other landowners, while still having to pay off the large costs incurred in bringing their land titles and interests to a state where land blocks could be set aside to begin farming.

We note that there are examples in the Rotorua region of economically viable, larger-style farms of the kind that the Stout–Ngata commission recommended. In his report on Ngati Pikiao's land, Dr Loveridge identifies a number of examples of Pakeha aggregating large areas of leased Maori land into stations in the Rotorua district, once restrictions on private dealing were lifted. With sufficient capital investment and the right skills, these stations did prove to be economically viable. The Lichtenstein station, for example, was created from Rotoiti lands leased from Ngati Pikiao around the time of the First World War. The land was grassed, fenced, and stocked, and by 1936 carried 7500 sheep and 700 cattle. Dr Loveridge found that, when the owners agreed to sell the lease to the Crown, the station was worth considerably more than any comparable land that Ngati Pikiao had been able to develop, even though it was not greatly different in quality from their other land. The difference 'was entirely attributable to the liberal application of capital and pastoral expertise'.³⁶⁷

We accept that, during this period, much of the region remained marginal for modern, intensive farming, and that governments were concentrating on encouraging small family farms which were, in many cases, the least suitable for this region. The evidence nevertheless suggests that the development of larger, more extensive farms or stations

was possible and viable. This was not the Government's preferred form of farming, but it was well aware that this was the most practical option for much of the retained Maori land of the region. Since the Government continued to press Maori to properly utilise their land, or lose it, it had a responsibility to respond to what Maori landowners in the region practically required, even if only for the short term, until such time as its goal of developing family farms might become more feasible. The Advances to Settlers scheme was never modified sufficiently to accommodate the needs of Maori landowners in this larger-scale style of farming. The Government did, however, show itself willing to amend the scheme to meet the identified needs of other groups of landowners when they faced barriers to using their lands. The Government also recognised that Maori might be better served by a separate system of lending and encouragement for farming, such as through the Maori land boards. This provided an opportunity to fund a different style of farming without necessarily changing the main scheme. The Government's failure to adequately address this possibility must have caused prejudice to some of the Maori communities involved. We are not in a position, at this stage of the inquiry, to determine the likely extent of this prejudice for particular communities; we leave that matter for further negotiations and research, if necessary.

We are persuaded that even the less intensive forms of farming practically possible for much of the region at this time had the potential to contribute to the economic base of Maori communities. These farming possibilities, along with other opportunities such as timber milling, would have enabled these communities to better support themselves and to at least place some of their members in a position to maintain community links with their land. In particular, Maori could have gained farm skills and management expertise, helped contribute to their communities, paid the costs of retaining land, and protected land from further alienation pressures in the most practical way open to them at the time.

The Government failed to act on the recognised needs of Maori in our inquiry region. This included:

- ▶ not taking reasonable steps to ensure that their title could be settled quickly and reasonably cheaply, so that blocks of land could be set aside for farming;
- ▶ not providing access to reasonable finance to develop the kinds of farming most suitable for their particular lands; and
- ▶ not acting on the representations of Maori leaders and the recommendations of its own commission of inquiry regarding farm needs in this region.

All of these failures were prejudicial to Maori. We have evidence that even those hapu communities in our region with retained lands continued to face significant barriers to farming. They were forced to rely on seasonal work, including clearing, fencing, and grassing Pakeha-owned farms, and on labouring to develop infrastructure. This kind of work was itself in decline by the 1920s, as the period of intensive development of farming came to a close.

Maori communities in this region are also likely to have suffered less tangible but nevertheless far-reaching prejudice. The failure to actively assist Maori, for example, prevented the Government from adequately informing itself of the true limitations of farming in this region. In turn, this led to: the continuation of policies requiring Maori to 'properly utilise' their lands or have them targeted for alienation; a failure to recognise and protect other development opportunities; and a continued insistence that individual family farms were a realistic and viable option across much of the region. We also note that, while state lending to settlers has been recognised as a significant influence on the attitudes of lending institutions towards other landowners previously regarded as poor risks, the continued exclusion of Maori from state lending also precluded any opportunity to influence such private lenders' views of Maori land. This was another lost opportunity, and one that helped to confirm and entrench Pakeha prejudices regarding Maori capability for development opportunities. We note the evidence from Dr Gould, for example, that, by the 1920s,

Maori land was generally 'regarded by the wider community as idle and unproductive', and as a barrier to local development.³⁶⁸

Tribunal findings

We have considered the issue of whether it was reasonable for the Crown to assist Maori at this time, and whether the Crown took reasonable steps, in the circumstances of the time, to positively assist with access to, first, state lending and, secondly, training and skills. We are now in a position to consider findings in respect of our overall question. That is, did the Crown fulfil its duty of active protection of the Treaty development rights of those iwi and hapu of the Central North Island who wished to use their retained lands in farm development opportunities in this crucial period from the 1890s to the 1920s?

We note that all parties before us have agreed that there is considerable evidence that Maori in this inquiry region wanted to participate in utilising selected lands in farm development, particularly around the turn of the twentieth century when new opportunities seemed to be opening up. We also note that it has been agreed that there was considerable Government pressure on Maori throughout this period to 'properly' utilise their land, predominantly through some form of farming, and that Maori were obliged to put their lands to productive use in order to pay the costs incurred in retaining them, such as rates, taxes, surveys, land title determinations, and so forth.

On the evidence available to us, we find that it was considered reasonable at the time for the State to actively intervene to encourage forms of economic development that it had identified as significant, and for it to encourage and assist various groups within the community to participate in this development. It was considered reasonable, and possible, to assist Maori communities to enable them to utilise their lands and resources in identified economic opportunities.

In addition to land ownership, a number of factors were recognised as important prerequisites for participation in farming opportunities by the 1890s. These included adequate forms of land title and governance, access to lending finance, and access to necessary skills and knowledge. The Crown was well aware, by this time, that Maori landowners faced considerable difficulties in meeting these prerequisites before they could utilise their lands for farming 'equal in the field' with other landowners.

The Crown was aware, by the 1890s, that landowners of limited means faced barriers in gaining access to private sources of lending finance for farming. The Government of the day thought it appropriate to create sources of state lending to overcome this problem. The Crown recognised that Maori landowners were among those who faced barriers to gaining private lending finance, and that for Maori the problem was made worse by Government policies, from 1894, which prohibited Maori landowners from dealing privately with their land, including seeking mortgage lending.

The Crown failed to take reasonable steps to extend the Advances to Settlers fund to Maori landowners. Maori land was technically covered by the scheme, but this was the unintended result of legislative provisions rather than the outcome of a deliberate effort to identify and recognise Maori lending requirements. The Crown allowed officials to apply very strict criteria, which effectively excluded most Maori land from the scheme. The Crown did recognise that it had a further obligation to enable Maori to utilise their land for farming when it developed new policies targeting 'unutilised' Maori land for acquisition from 1905. However, in spite of promising to take more effective steps to extend the advances scheme to Maori land, the Crown continued to allow strict and limiting lending criteria to be applied. This effectively undermined any reforms that it made.

Having failed, despite Maori requests, to make the advances fund available to Maori, it would have been Treaty-compliant for the Crown to create a separate but equivalent system enabling Maori landowners to gain

access to state farm development funds. The Crown recognised that this was possible, and that such a system might be more appropriate for meeting Maori rural lending requirements. However, the Crown failed to take reasonable steps to ensure that its 1897 measures, and the various processes it established by which Maori (including their incorporations) could access development finance, genuinely met the identified needs of those who wished to farm their land. Nor did the Crown ensure that its 1897 measures provided access to sources of state lending at an equivalent level to that made available to other landowners of limited means.

It would have been Treaty-compliant for the Crown to have provided access to state lending for farming through the system of Maori land councils and Maori land boards that it established from 1900. This system was more focused on Maori farm development needs and concerns than were the 1897 measures. However, while various reforms extended the boards' powers to lend money and to become involved in encouraging and assisting Maori farming, the Crown failed to take reasonable steps to ensure that the boards were able to access the same level of funding as that available for other landowners. Instead, the Crown allowed Maori landowners to be limited to much smaller Maori sources of development finance, sources that dwindled through the 1920s. The Crown's failures with respect to rural lending were a breach of iwi and hapu Treaty rights to develop their land, taking advantage of opportunities on a level playing field with other citizens. In failing to provide access to state rural lending equivalent to that made available to other sectors of the community, the Crown was in breach of article 3 and the principle of equity.

The Crown failed to implement any of the reasonable steps that were proposed at the time to assist Maori with training and farming advice, including proposals from its own commissions of inquiry. This failure was a breach of the Treaty right of development for Maori of our inquiry region, and also a breach of article 3 rights to assistance equivalent to that offered to other sectors of the community.

The Crown's failures to take reasonable steps to ensure that the various solutions it offered to title problems were effective on the ground, and to provide fair and equivalent development finance, training, and skills, so as to enable Maori to exercise their Treaty development right to utilise their land for farming, are likely to have caused serious prejudice to Maori communities in the Central North Island. This included the inability to develop hapu station farming in the interior, on the model of the Lichtenstein station, and the continued targeting of 'unutilised' Maori land for alienation. There were less tangible, but no less real, effects. These included a perpetuating of the Government's failure to engage with the type of land-holding and farming needed in the region, and the failure to educate private lenders in the way that occurred for other sectors of the community previously considered a bad risk. It was not possible to determine the full extent of prejudice at this stage of our inquiry. We leave this matter for further negotiation between the iwi and hapu of this region and the Crown.

MAORI LAND DEVELOPMENT SCHEMES FROM 1929

KEY QUESTION: WERE THE CROWN'S MAORI LAND DEVELOPMENT SCHEMES AFTER 1929 A TREATY-CONSISTENT RESPONSE TO ITS OBLIGATION TO ACTIVELY PROTECT THE TREATY DEVELOPMENT RIGHTS OF IWI AND HAPU TO UTILISE THEIR LANDS?

The Maori land development scheme era, which began in 1929 and lasted most of the rest of the twentieth century, was a major Crown initiative to assist with the utilisation of retained Maori land for farming, both nationally and in our Central North Island inquiry region. The Maori land development schemes provided significant state assistance to overcome the barriers that were preventing Maori land-owners from using their lands. These barriers included title and governance difficulties, problems in obtaining lending assistance, and a lack of skills and expertise. Development

schemes were proposed for Crown land at a time when it was believed that large-scale state development initiatives could bring marginal land to a condition where it could be cut up and run as individual family farms. This initiative was then extended to include marginal Maori land, and here, too, there was a focus on eventually creating individual family farms for selected owners who wished to take up farming.

For the State, the objective of the Maori land development schemes was to take control of areas of Maori land for a period of time, thus sidestepping difficulties with title and scattered interests. The State would then develop them as large farm blocks, as was proposed for Crown land, and bring them to a reasonable standard for farming, with the cost of development charged against the land and paid off as the farms became viable. These large blocks could then be divided into economically viable farm units, where possible, with an emphasis on creating family farms. The initial land development period was also intended to provide significant rural employment for Maori communities. Once a block was developed and divided into family farms, selected owners would be able to continue farming, providing a livelihood for a continuing core community.

The first Maori land development schemes to be established were in the Rotorua district, within our inquiry region. Of the three districts that make up our region, Rotorua had the largest number of schemes. The exact number depends on the criteria used for inclusion, as some were gazetted but never established, while others were altered, amalgamated, or subsequently split into more than one scheme.³⁶⁹ However, according to research presented to us by Dr Gould, around 40 Maori land development schemes were implemented in the Rotorua district, in three main geographical areas. These were:

- the Te Puke schemes of the coastal Bay of Plenty;
- the schemes of the middle lakes area around Rotoiti and extending north to the coast, including Tikitere, Brents farm, Okataina and Okareka; and
- the Horohoro series of schemes and those south-west and west of Lake Rotorua, including Tihiotonga

station and its satellite farms, the Arawa and Awahaou schemes, and the Onuku scheme near Lake Roto-mahana.³⁷⁰

Terry Hearn presented evidence to us that a smaller number of development schemes were established in the Taupo and Kaingaroa districts. These included around 15 established in Taupo, of which a number were located on the better land around Lake Taupo, and three in Kaingaroa. We were also presented with mapping evidence of many of the schemes.³⁷¹ We note that, by earlier direction, the Tribunal has agreed that, although the Ngati Manawa development scheme is located within the Central North Island inquiry region, it will be considered as part of the Urewera inquiry, where a separate report is currently in preparation.³⁷²

Historians generally agree that the Maori land development schemes were established under two quite different legislative and policy regimes, before and after the Second World War.³⁷³ When Ngata first established the schemes in 1929, they were implemented on a more or less 'emergency' basis, given the recognised poor and declining economic circumstances of many Maori. This included many in this region, and even those communities with retained lands. Ngata rapidly expanded the schemes and included as much land as possible within them. In many parts of this inquiry region, land was included on an experimental basis, in the hope that economies of scale and massive initial development would help to solve problems of reversion and the costs of initial farm development. Much land was also included in an effort to provide impoverished communities with badly-needed employment in the short term, and in the hope of providing long-term community support through farm development. Decisions made and accepted by communities in this initial emergency situation often created issues that needed to be resolved later. These issues included a lack of clarity over the rights of owners while their lands were held in schemes, the level of debt repayment that was considered reasonable for what was often experimental land development, the balance between owner and occupier rights and obligations, and

the extent to which the schemes, at times, further complicated title issues.

Development schemes implemented after 1949 were established under much clearer commercial criteria, with more clarity of owner and occupier interests and a much greater focus on economic viability and efficiency. These schemes still operated, for the most part, with a focus on eventually creating viable family farms. In the early 1950s, the first returns to owners were made, with many vindicating earlier optimism that farming could be made viable in at least some parts of the region, given sufficient lending investment, and appropriate skills and knowledge. Upturns in commodity prices also helped many schemes repay debt. However, some of the newer schemes continued to be experimental on very marginal lands, while some of the earlier schemes struggled to ever become financially viable. A significant number of these schemes took a very long time to return to their owners, and a number appeared to achieve very little overall financial benefit. Although, for most of the period, the Government insisted on focusing on the creation of family farms, by the 1970s there was a growing acceptance that some farms could only ever be viably run as large stations. During the 1980s, the Government began to withdraw from active farm development assistance and adopted a policy of returning all development scheme lands to entities representing landowners.

At their height, the Maori land development schemes involved significant areas of retained Maori lands in this inquiry region and, at least until the Second World War, they also employed large numbers of owners. The development scheme initiative was relatively long-lived, although individual scheme lands were returned to groups of owners over varying time periods and sometimes with the loss or addition of some land. The last of the development scheme lands were returned to owners in this region in the early 1990s. The scale and influence of the schemes meant that they had a significant impact on Maori farming in the region for more than half a century.

The claimants' case

The claimants acknowledged that the Maori land development schemes were a welcome new initiative in Crown policy, at a time when Maori owners were struggling to be able to use their land to participate in farming opportunities.³⁷⁴ The schemes were regarded by many Maori groups as long-overdue recognition that they should be assisted, along with other sectors of the community, to participate in farming opportunities. They were especially welcome at a time when many Maori communities faced difficult and declining economic circumstances. Such communities were willing to accept expert advice and guidance, and to allow some loss of control of their land during the initial development period. They also agreed that reasonable development debts should be repaid from farm profits. However, they saw the schemes as a way for them to make a start in meeting their own long-term objectives for their retained lands. They expected the land to be returned after a reasonable period, and they expected significant consultation and participation in decision-making over the shape of farm developments.

Some claimants submitted that, in their case, the schemes were too little, too late.³⁷⁵ The majority of claims before us, however, concern the implementation of the schemes and allegations of a Crown failure to adequately recognise and protect the Treaty rights of owners and their communities when participating in them. This included participation in decision-making, and being able to operate schemes to meet owner and community objectives as well as pay off debts and support Crown objectives. Many of the claims are based on allegations that the Crown used its control over the schemes to sideline the owners' interests and objectives. Instead, the priority was on farming the land in the national interest and promoting policies of assimilation and individualisation. The claimants' generic closing submission on land administration alleged, as a result, that the overall benefits of the land development schemes for owners were 'very mixed'.³⁷⁶

The claimants argued that, in taking the powers that it did to sidestep title problems, the Crown impinged

unreasonably on the owners' rights, often for long periods. The Crown also increasingly diminished the original relationship of partnership between owners and the Crown by centralising power in Government agencies. It was submitted that the original concept of a direct relationship and partnership between the Native Minister and the owners and their communities was diluted and replaced, as power was centralised. From 1934, direct responsibility for the schemes passed from the Native Minister to a centralised Board of Native Affairs.³⁷⁷ Up until the 1970s, the board gained increasingly extensive powers to control the operation of the schemes and set policies and objectives. The Crown also failed to take reasonable steps to make formal legislative provision for when land would be returned.³⁷⁸

The result was unreasonable restrictions on owners' rights in the land covered by the schemes. It was claimed, for example, that a 1931 provision allowing the Crown to charge owners with trespass was likely to have been 'legally dubious'.³⁷⁹ It was alleged that owners should have retained rights to use land included in the schemes for cultural and traditional purposes in order to retain their links with the land, so long as this did not interfere with or obstruct farming operations.³⁸⁰

In centralising power away from owners and their communities, the Crown failed to take reasonable steps to adequately consult with owners over strategic decision-making for most of the life of the schemes. The original 1929 legislation provided for committees of owners, but these appear to have been rarely used and were done away with by the Native Land Amendment Act 1936.³⁸¹ Later district land committees with at least one Maori representative were not established until 1949.³⁸² Maori representation on the Board of Native (later Maori) Affairs was not provided for until 1948, and even then it was minimal. Local land committees with owner representation were established from the 1950s, with delegated operational powers, but still with very little say over major policy and management decisions. More effective owner advisory committees were not established until the 1970s.³⁸³ It was submitted that during the life of most of the schemes, consultation with, and

participation by, owners in strategic decision-making was, for the most part, 'extremely minimal'.³⁸⁴

Claimants accepted that, in return for financial investment in developing the land for farming, some loss of owner control was inevitable, given the need to use land as security. However, the Crown took more extensive control than was reasonable over the operation of the schemes and the length of time that the land could be held in them. It was submitted to us that this reflected a continuing lack of Crown confidence in the ability of Maori to participate in the management of their land.³⁸⁵ It also reflected the Crown's focus on ensuring that the land was farmed in the national interest, and its reluctance to release land to owners because it was believed that a return to Maori ownership would result in decreased productivity.³⁸⁶ If it was necessary for the Crown to intrude on ownership rights in order to assist with farming and provide security for lending, this intrusion should have been as minimal as possible and for as short a time as possible.

In the claimants' view, the Crown progressively extended its centralised control, and began to operate the schemes in its own interests and for its perceived national interest objectives, while failing to take adequate account of community imperatives for farm development. This was especially so after 1949.³⁸⁷ The emphasis on only accepting skilled farmers as occupiers, for example, meant that some owners were passed over for outsiders, and this had serious implications for wider community objectives.³⁸⁸ One claimant witness, Makere Rangitoheriri, explained how, although the Department of Maori Affairs developed land at Mokai, it insisted on bringing in skilled Pakeha farmers rather than accepting and training local owners who were experienced in bush work rather than farming. As a result, it was claimed, local people had to leave the area to find work as bush work declined, and the local community and whanau had drifted away from their land.³⁸⁹ David Whata-Wickliffe similarly gave evidence on his unsuccessful efforts to settle on the Tikitere scheme in the Rotorua district in the 1950s.³⁹⁰

Further, the claimants argued that, in pursuing the objective of individual family farms, the Crown failed to take reasonable steps to recognise and protect the long-term title rights of owners whose land was included in the schemes. Early efforts at consolidation and exchanges of interests in lands, in order to create titles more closely reflecting family farms, were increasingly allowed to lapse and eventually abandoned as they became too difficult to implement. However, the Crown failed to take adequate and timely steps to clarify the position in which unit settlers and owners were left.³⁹¹ It was acknowledged that the Crown eventually began to introduce more formal legal provisions for licences and leases for unit occupiers, especially after 1949. Even then, however, the Crown pursued security of tenure and protection of occupier rights, in order to encourage family farms, at the expense of the rights of wider groups of owners, their links with the land, and their wider tribal development objectives. This led to a great deal of uncertainty and concern, and a lack of confidence in the schemes.

In some cases, the Crown further complicated title matters while operating the schemes and failed to clarify matters adequately, such as when land was added to or lost from schemes, when exchanges were made with Crown lands, when agreements were made with occupiers, and when shares were later allocated in trusts and incorporations.³⁹² While trusts and incorporations were significantly reformed during the later part of the century to become more useful for managing returned farm land, there were also claims that some owners felt that they were not adequately consulted and informed about how to run these entities and how they might best be used to meet community interests and objectives.³⁹³

In pursuit of its own policies, the Crown also failed to take reasonable steps to adequately clarify the rights and responsibilities of outsiders brought into the schemes. This failure led to owner and community frustration with the schemes, ill feeling, and a sense that community objectives were being undermined. It was submitted that the

introduction of migrants into the schemes was originally accepted in good faith. Many were initially welcomed, for bringing new skills and expertise. Concerns increased, however, when issues arose, as a result of a lack of clarity and consultation, over possible long-term leases and the acquisition of significant rights by outsiders without adequate input and agreement from local communities.³⁹⁴ For example, John Fenwick, for Ngati Te Takinga, explained to us that he believed the Government's failure to adequately consult on and clarify the future rights of Ngati Porou families settled within the Tikitere development scheme led to a 'great deal of unnecessary ill will'.³⁹⁵ Kipa Morehu, also of Ngati Te Takinga, raised similar issues, with regard to an alleged Crown failure to acknowledge the wishes and aspirations of whanau with regard to their own development opportunities in their ancestral tribal areas.³⁹⁶ It was submitted that, with its emphasis on individualisation, the Crown failed to recognise that outsiders, even other Maori, could not be expected to have the same attachment to the land and wider community objectives as local whanau and hapu. For example, Barney Meroiti, for Ngati Tuteniu, explained that many Waikato people brought into Te Puea Road farms later rapidly sold their freeholds.³⁹⁷

Some claimants submitted that, as landowners, they felt under intense pressure to cooperate and include their land in the schemes to enable them to better meet wider community objectives, even if such inclusion might not have resulted in the best immediate economic returns for them. They alleged that the officials, rather than owners, had most say in deciding what land would be included or excluded from schemes, regardless of community needs. For example, claimant witness Huirama William Te Hiko, of Ngati Raukawa, gave evidence regarding the Waipapa, Takapou, and Otanepai schemes within our Taupo inquiry district, saying that they were turned down for Department of Maori Affairs assistance and had to turn to the Department of Lands and Survey instead.³⁹⁸ Other claimants noted that communities had little choice but to submit to the Crown's decisions. This was because those left outside the schemes

continued to face the same barriers to using their lands for farming, including title difficulties and lack of access to private lending finance, that had stymied development throughout the century on Maori land.³⁹⁹

In other cases, claimants alleged that the Crown failed to heed community objectives to have land developed in schemes, in order to pursue other priorities. Counsel for Ngati Tuwharetoa claimed that, even though the tribe had long identified the better land around Lake Taupo for farm development, the schemes for them were 'too little, too late'. Even then, the Government allowed hydro development works, in the national interest, to damage the land and leave it permanently unsuitable for farming. Hydro development affected land in the Tokaanu, Korohe, and Tauranga Taupo schemes, and, while some compensation was paid for the damage to some of this land, it was alleged that the Crown did not recognise or compensate for the harm done to Ngati Tuwharetoa's overall farm development opportunities.⁴⁰⁰

The claimants agreed that the Crown did contribute significant financial lending and assistance to the land development schemes. This was important in terms of the ability of the schemes to contribute to the economic well-being of owners and their communities. It was also important, initially, in providing employment for many communities at a time of significant economic need. However, it was submitted that, while the Crown regarded farming on marginal land, in general, as being worth some overcapitalisation because of the perceived national benefit, this philosophy was not applied in an equivalent way to Maori land development schemes, which were required to repay what sometimes became very high levels of development debt. These repayment requirements failed to take reasonable account of the 'emergency' economic and social circumstances in which some early schemes were established, or that some schemes were experimental in nature on extremely marginal land.

This focus on the security of the State's investment also failed to take reasonable account of the owners' sacrifices

and contributions, which were made on the understanding that the State would help to develop the land for the long-term benefit of local communities as well as the national good. For example, some owners contributed funds from their own sources to assist schemes and some agreed to forgo alternative opportunities such as forestry in order to contribute land to make schemes viable. Many owners contributed cheap labour to the schemes, even though not all could be occupiers in the long term.

It was claimed that officials had powers to make important financial decisions that loaded some schemes with significant debt without adequate owner consultation or agreement, even though owners were required, in many cases, to bear the full cost of debt repayments.⁴⁰¹ A number of these kinds of complaints were made before us with regard to various schemes. For example, we received evidence from Charles Te Raihi (Jack) Morehu, regarding the Tikitere development scheme, where alleged debts were charged on land without adequate consultation or the knowledge of owners.⁴⁰² We also received a number of claims alleging financial mismanagement in the operation of some schemes.⁴⁰³

Further, the claimants argued that the Government's focus on debt repayment and the security of its investment failed to fully recognise and balance landowners' development rights. Its focus on creating family farms and securing the repayment of its investment caused prejudice to the economic opportunities of landowners, who found themselves burdened with high debts for unreasonably long periods.⁴⁰⁴ It was claimed that the Crown's policies of ensuring that repayments took first priority in the schemes, and that profits from the schemes went first towards reducing charges, fees, and loans, were not reasonable in circumstances where the land was so poor that such repayments were certain to separate owners from their land for many years. This limited owners' ability to take advantage of new farm development opportunities and denied them opportunities to regain reasonable use of their land as more viable economic alternatives became apparent, such as forestry. It also meant that many owners saw little financial return

during the early development period, although more discretion was possible in later years.⁴⁰⁵ It was acknowledged that the schemes implemented after 1949 were much more reasonable in this respect, although it was claimed that the Government persisted in operating schemes on the basis of creating small family farms for far longer than was reasonable, and that in some cases this added unnecessarily to debt.

It was submitted that it was recognised, later in the twentieth century, that many schemes were more commercially successful when they were run as large stations, so the Government turned to this type of farming in order to better repay debts.⁴⁰⁶ However, its continued insistence that the land eventually had to be converted into individual family farms caused further debt charges and lesser economic returns to owners. The Government rejected, without sufficient consultation with owners, other commercial options for the land, such as large sheep stations and mixed timber planting, that may well have contributed more of an economic return. In the claimants' view, this created further unnecessary frustration with the schemes, added to title difficulties, and undermined owner and tribal objectives for the schemes.⁴⁰⁷

When the Crown returned land to owners in the 1980s, under its policy of returning all scheme land, some of the schemes, particularly from the early development period before 1949, were still heavily in debt. The claimants alleged that the Government failed to adequately allow for the fact that such land had unrealistic debts charged to it, and that this left owners taking over such lands struggling to make the farms commercially viable.⁴⁰⁸ The Crown also failed to recognise and make allowance for the fact that the lengthy retention of land in the schemes to repay unrealistic debt caused significant lost economic opportunities for the owners and their communities, in terms of lost alternative development opportunities.

In addition, communities who wish to continue to develop their lands themselves, now that they have been returned after long periods of being tied up in these schemes, face further burdens and restrictions under

current regulatory requirements. Development enterprises of an earlier period, from which Maori were excluded through lack of Government assistance, did not have to face these restrictions.⁴⁰⁹ Such obstacles include planning and pollution control regimes – including having to address pollution from the early, intensive farming practices that Maori were largely excluded from, but which now cut across their choices for the profitable use of their land.

We received evidence and submissions from Ngati Tuwharetoa, for example, about environmental and zoning requirements from the 1960s and 1970s, including the Lake Taupo Proposed Lake Shore Reserves Scheme. Farm land in the Lake Taupo catchment was compulsorily retired, and lakeside land development opportunities for purposes such as tourism have been restricted. In the claimants' view, this has had a serious impact on their development opportunities. Recent planning proposals – made in an attempt to mitigate nitrate pollution issues in Lake Taupo – are likely to cause further prejudice to Ngati Tuwharetoa development rights, because land use is likely to be frozen at current levels. However, as a result of the Crown's failure to include them adequately in pre-1929 forms of farm assistance, damage to their farm development schemes as a result of later hydro development, and restrictive zoning, Ngati Tuwharetoa still have significant areas of undeveloped land in the Lake Taupo catchment area.⁴¹⁰ While they support efforts to protect the lake and its tributaries, they face significant development restrictions as a result of past barriers to exercising their Treaty development rights, which, they submit, need to be taken into account in any current and future decision-making.⁴¹¹ Otherwise, they claim, they will continue to be trapped in a cycle of underdevelopment with regard to their retained lands. Current restrictions and environmental proposals mean that their landholdings in the Lake Taupo catchment are now illusory in an economic development sense.⁴¹²

The claimants agreed, however, that the development schemes did offer greater opportunities for training in farming skills. A major focus of the schemes was to provide

practical farm training under supervisors, and this appears to have been reasonably successful for farm work.⁴¹³ However, it was alleged that the Government failed to provide adequate assistance and expertise in the management of farm enterprises. This included the management of large stations, even as these clearly became likely to be the most economically viable option, along with adequate preparation for the management of entities such as trusts and incorporations, which were likely to be required to operate the large stations effectively. It was submitted that the Government continued to hold to a vision of Maori as small farmers under close supervision and as farm workers, rather than as farm managers and entrepreneurs. As a result, the Government failed to provide adequate training and advice for the kind of farm management that was required across much of this inquiry region when scheme land was returned, and as many of the old land board leases began to expire from the 1970s onwards.⁴¹⁴

Claimants also submitted that land returned from development schemes and from long-term leases still faces considerable barriers to development. These barriers are a legacy of the Crown's failures with lending assistance, which continues to influence the perceptions of lenders. The Crown has also failed to adequately address the system of title it created for Maori land, and private lenders' perceptions of the system. These are matters of particular concern at a time when the Government is withdrawing from direct involvement in development lending. The generally unwelcoming attitude of lending institutions has changed only slowly and to a very limited degree. It remains a barrier for those without a successful past history of development. This means that Maori owners still face considerable barriers to participating in new development opportunities, and that these barriers are still not adequately recognised by Government policies.

Ngati Tutemohuta claimed, for example, that north-east Taupo lands have recently come under considerable development pressure as part of a designated eastern development corridor. While this offers potential development opportunities for owners, they can only take effective

advantage of these opportunities with adequate access to development capital. Even today, they still face difficulties in gaining access to development capital for Maori land.⁴¹⁵ Lennie Johns explained, in his evidence for Ngati Tutemohuta, that development opportunities on Maori land now generally require joint-venture arrangements with investors to generate adequate investment capital, and that potential investors require more reassurance about Maori title. They demand that owners have sound governance systems for their lands. However, many groups of landowners are still struggling with addressing this in the relatively short time many have had to take full management responsibility for their land. Owners still face barriers to lending finance for Maori land, and many groups of owners also still face internal conflicts, often as result of a past history of title complexities. It was submitted that Crown failures to take reasonable steps to address these problems result in continued barriers for Maori land development today.⁴¹⁶

The Crown's case

The Crown submitted that the Maori land development schemes began in this inquiry region and were particularly important to Maori land development within it, especially in the Rotorua district.⁴¹⁷ These schemes were a major response to the recognised barriers faced by Maori in utilising their retained lands for farm development opportunities.⁴¹⁸ This response was developed as problems became evident with Maori access to finance and land development early in the twentieth century. The schemes are fundamental to assessing Crown actions with regard to Maori land development opportunities in this inquiry region.⁴¹⁹

In general, the Maori land development schemes were a success story. Although Maori land development is a complex issue to address, overall, the Crown's policies and actions with the development schemes did not cause widespread, generic, or systematic prejudice to Maori in Treaty terms. Some difficulties may be evident with particular schemes, but this is dependent on assessing each scheme

and any such failings did not cause prejudice at a generic level.⁴²⁰

In assessing the schemes, the Crown argued, it is also necessary to take the wider context in which they operated into account, including the objectives the schemes were intended to fulfil, such as facilitating the development of Maori land, social objectives, and, in some cases, unemployment relief. Any assessment also has to take account of the wider economic context and the unknown future for participants, including future markets for farm products, scientific evaluations of land development, and the fact that, in many cases, Maori retained lower-quality land.⁴²¹ The Crown submitted that it is not realistic to expect the Crown to have stemmed urbanisation or to have guaranteed employment in rural areas through the schemes. These were matters outside the legitimate role of the Crown and resulted from economic pressures and international trends over which the Crown had little influence.⁴²²

The Crown also noted that there were tensions between owners over the direction of development that were never going to be easy to resolve and would always cause some frustration. For example, some owners of land included in schemes wanted to continue to use it for traditional purposes. They felt themselves to be in conflict with the economic requirements of the farm operation and frustrated by what they saw as the distance between themselves and development initiatives. Others expressed frustration with those owners who wanted to use land in ways that undermined chosen development initiatives. The Crown referred us to the evidence of Professor Ward regarding the experiences of states such as Fiji and Papua New Guinea, where traditional kinship groupings and individual economic enterprise tended not to go well together, and his reference to development schemes in that context.⁴²³

The Crown submitted that any financial assessment of development schemes must take into account a number of factors, including the objectives of the scheme, debt loading, profitability, and the wider economic context during the life of the scheme. Assessments of profitability do not just rely on trading results, but also on land status,

environmental quality, and the suitability of the land. Any consideration of debt levels must also take into account the scale of development attempted and remedial measures such as debt write-offs.⁴²⁴

It was submitted that some restrictions on the rights of owners in the schemes were a necessary corollary to the significant finance the Crown was advancing, and the importance of owners, as a group, retaining responsibility for development debt. The Crown was investing on a scale not available from other sources; any other forms of debt financing for rural development would have come with broadly comparable limitations. As it transpired, the restrictions imposed carried very little risk to land ownership and the Crown, as a lender, 'exhibited a tolerance the private sector may well have not.'⁴²⁵ It was submitted that the restrictions were an acceptable compromise in the circumstances of the time. The Crown had a duty to balance Maori and state development objectives. This included some loss of control over lands in return for finance, but this loss of control was not too dissimilar to what normally occurred with mortgages.⁴²⁶

The Crown suggested that allegations that it had a certain mindset, in placing excessive and systematic limitations on owners' rights and taking a claimed easier route of suspending owners' interests rather than working more closely with them to obtain more meaningful consent, are to view the matter from today's perspective. The schemes can be characterised as an exercise in partnership between Maori landowners and the Crown, in order to develop Maori land, but they had to be undertaken with a certain detachment on the part of the Crown. There is no evidence that some of the more restrictive controls, such as provisions to treat owners as trespassers, were ever implemented in practice.

The Crown acknowledged that a key claimant allegation concerns the issue of partnership and consultation over the establishment and operation of the schemes. The Crown submitted that there is evidence of significant consultation and agreement in starting up schemes.⁴²⁷ There is no evidence that Maori owners were coerced into schemes.⁴²⁸

The Crown responded to owners' concerns by establishing various owner committees, regularising annual meetings of owners, and improving communication channels with the bureaucracy administering the schemes.⁴²⁹ The consolidation schemes were a positive effort to reform title and facilitate development, but they were eventually found to have only limited usefulness as they were complicated, time consuming, and ultimately undone by successions. However, the Crown did not allow title issues or proposals for consolidation to impede its partnerships with Maori communities over implementing land development.⁴³⁰ The Crown submitted that 'strangers as occupiers' were not an extensive problem in land development schemes in this inquiry region (and, therefore, were not capable of generic consideration).⁴³¹

The Crown agreed that it had different motives 'in part' from Maori regarding the land development schemes, but submitted that there was, nonetheless, a significant degree of alignment between the Crown and Maori over goals for the schemes. Their goals were neither inconsistent nor mutually unachievable, even where they differed in emphasis. Even though these goals had to be modified over time, and as a result of outside circumstances such as urbanisation, they remained basically intact.⁴³²

The Crown submitted that the goal of developing family farms through the schemes was consistent with other general land policies of the time, and that it was a vision shared by many Maori who participated. It was a goal that accommodated Maori preferences concerning land. Maori did generally accept that there was a possibility of layering interests in Maori land, using demarcated units for which an immediate family group had responsibility. For example, the Crown cited the evidence of Dr Gould, who described Ngata's vision of a wider family group having ownership of a family farm, on which one or a few of the group did the actual farming.⁴³³ Small family farms also fitted with the economic model of dairying, which was predominant at the time, required less land and capital to develop, and provided a more balanced income stream than sheep farming.⁴³⁴ After 1957, there was an assessment of changed

economic circumstances that had made small dairy farms uneconomic. One result of this assessment was widespread rationalisation of units towards a corporate model of farming tribal land.⁴³⁵

The Crown submitted that, in order to transform the development schemes into Maori businesses, it was necessary to retain earnings and plough them back into the enterprise. This is a characteristic of all businesses in growth mode and is characteristic of many trusts and incorporations today. It also means that debts must be regarded in the context of the long-term build up of assets of an enterprise. It was not always possible to accurately predict the length of time and resources that would be required to develop farms. It depended on factors such as site, environment, soil deficiencies, and broader economic forces that could not always be controlled or easily foreseen by the Crown.⁴³⁶

Nevertheless, the Crown was willing to write off debts from overcapitalisation and readily wrote off development costs before 1949 and after 1971, although not so much in the interim period.⁴³⁷ The Government's policy on returning land from the schemes did change over time, but in general the Crown was willing to write off debts to make schemes sound, did not pursue all debts and charges that it might have, and handed schemes back as financially sound operations.⁴³⁸ Maori suffered no prejudice from the schemes. Most land was returned to its Maori owners, in many cases asset values had increased enormously, and the lands were returned under incorporation management in line with policies of favouring collective ownership and management of these assets.⁴³⁹

The Tribunal's analysis

We agree with the parties that it is not possible for us to consider individual Maori land development schemes in detail in this stage one inquiry. There were well over 50 individual development schemes and they varied enormously in circumstances, economic viability, management policies, and the length of time they were in operation.

Some of the first development schemes in the country to be implemented began in this region, along with some of the last to be disestablished and the land returned. The schemes also had a wide range of outcomes. Some lands were returned as economically viable farms within a relatively short time period, and sometimes with additional land included, while in other schemes owners lost contact with their land for generations and appeared to receive very little economic benefit. Some lost interests in their land altogether.

We accept, however, that the land development schemes were a major Crown initiative and that they had considerable influence over the ability of Maori landowners in this region to participate in farm development opportunities through a large part of the twentieth century. Therefore, while we cannot consider schemes individually, we do need to consider a framework for assessing Crown policies regarding the schemes. We have received sufficient evidence to be able to make some general observations on these Crown policies, in the context of the Crown's obligations to protect the Treaty rights of those whose land was included within the schemes. Our observations are intended to provide a guide to parties in negotiations over particular schemes.

In considering the Maori land development schemes, we need to begin with the Treaty development rights that we have previously identified. As we have found, the Crown has an obligation to actively protect Maori in utilising their properties for development opportunities, including farming. This Treaty development right includes not only a right to be able to utilise land in development opportunities, but also a right to retain reasonable control over how the land is utilised and for what objectives. Although, for development purposes, it may be necessary at times to agree to suspend some rights of property ownership for a period, or to use those rights as security, Treaty development rights require this to be done only in so far as it is reasonably necessary. Owners and their communities are still entitled to participate in strategic decision-making over the direction and objectives of this development to

the greatest extent possible. The Treaty right of development requires, in other words, not only that Maori properties are able to be utilised 'equal in the field' with those of other sectors of the community, but that Maori themselves can participate as actively as possible in such opportunities in order to develop themselves and their communities according to their preferences and needs.

We agree that in assessing, in practical terms, whether the Crown took reasonable steps to protect this Treaty right of development with regard to the Maori land development schemes, we need to consider the wider context of the circumstances of the time – the economic context, the state of scientific knowledge, and the widespread optimism that scientific advances would make even more marginal lands productive. We agree that there was a long-standing and influential belief that individual family farms should be encouraged in all districts of New Zealand, for economic as well as for social and political reasons. Against this, we need to take account of the practical knowledge and experience, already gained in this inquiry region, which suggested that farms would need to remain large for some time to come in order to be economically viable. We also agree that many of the wider economic pressures of the time were beyond the Crown's control, including urbanisation and declining rural employment. However, we note that it was still widely accepted that the Crown should play an active role in encouraging the growth of viable rural communities, and that significant Crown funds were directed towards this end, including the Crown lands development schemes and continued targeted encouragement of certain groups to take up farming, such as returned soldiers.

We agree that, in contributing significant funding to the Maori land development schemes, in sidestepping title problems, and in providing significant expertise and advice, the Crown was entitled to a reasonable measure of control over the operation of the schemes, especially in the area of technical farm development and where farms generated sufficient income for development debt repayment. We note that this was agreed by all parties before us.

On the evidence available to us in this stage one inquiry, we acknowledge that the Maori land development schemes were a major Crown initiative to enable Maori of this region, at last, to be able to use their retained lands to participate in farm opportunities. Even though the early growth phase of farming had passed, farming was still regarded as a significant growth opportunity both nationally and in this region, the more so if, as was anticipated, marginal land could be intensively developed and then taken over to be run as farms. Even though there was a decline in farm produce prices during the 1920s, it was still clear that, in the long term, modern farming would remain a major economic enterprise in New Zealand, not just as the major source of potential opportunity for landowners but also for national economic growth. Farming based on individual family farms had been the most successful of the types of modern farming developed in the early twentieth century, and it was widely anticipated that this would continue to be the case. National statistics confirm this optimism: in spite of fluctuations in markets and prices in the period from 1920 to 1950, for example, more than 90 per cent of New Zealand's exports continued to be wool, meat, and dairy products, and more than 60 per cent of these exports continued to be absorbed by British markets.⁴⁴⁰

In the 1920s, as it became apparent that the availability of unimproved lands for farm development was declining, attention turned to the more marginal remaining Crown lands, such as the Northland gum country and the pumice lands of the Central North Island. Maori land was also regarded as being generally under-utilised for farming. An economic downturn restricted employment opportunities, but also made continued farm and rural development seem more desirable for political and social reasons, as a means of diverting young men away from congregating in urban areas and possibly contributing to unrest. The inclusion of Maori land, from the late 1920s, in programmes of state development assistance was a major policy change. The Maori land development scheme initiative did, at last, provide a significant practical response to the major barriers preventing Maori from exercising their Treaty rights to

develop their retained lands. The Crown deserves considerable credit for this.

The land development schemes had significant impacts for Maori landowners. Some schemes achieved significant economic benefits for their owners, confirming the view that, in some parts of this region, the lack of sufficient investment and expertise had been major barriers to creating viable farms in the past. Some development scheme lands were returned as viable economic enterprises and, in the Rotorua district, some communities even managed to add to their landholdings through the schemes, recovering land that had been lost through earlier sales and long-term leases. We received evidence of this for the Tikitere, Rotoiti, and Horohoro schemes, for example.⁴⁴¹ In the period up until the Second World War, the schemes brought immediate economic benefits for many impoverished communities. Work on the schemes alleviated the harshest impacts of unemployment during the 1930s depression. The early schemes also brought wider cultural benefits; they provided a focal point for cultural and community regeneration, and assisted with improvements in overall health and housing at a time of critical community need.

Not all schemes were so successful. In some, the economic results were variable and even resulted in the loss of some Maori land. Some owners were excluded from farming opportunities in the schemes, and others were parted from their land for lengthy periods for little real economic benefit. We note the Waihi Pukawa scheme, for example, which was first gazetted in January 1939 and where the land was not returned to its owners until 1982.⁴⁴²

We do not have sufficient evidence to assess the economic performance of every scheme in our inquiry region. We accept that it is not realistic to expect every single scheme to have been economically successful. Nor is it realistic to expect that there should have been no mistakes or mismanagement in the operation of any of the schemes, regardless of how carefully they were established or operated. We have found that the Crown's Treaty obligation of active protection does not extend to ensuring economic success in every venture. What it requires, rather, is active

protection of opportunities to participate in economic ventures, and reasonable steps, in the circumstances of the time, to achieve this.

We agree that any assessment of the success of the schemes needs to take account of more than just financial profits or losses. At the very least, the schemes are likely to have contributed to Maori ultimately retaining a significant proportion of their land in this region. The schemes helped to change the mindset that Maori land could only be developed if it was taken out of Maori ownership and that Maori could never be capable farmers. In this way, they helped to protect Maori from the strong pressures to alienate land still considered not to be 'properly utilised'. A large proportion of the land that was eventually returned was available to owners for continued farming or for other development opportunities. We also accept that, as with any development venture, there were wider economic and social factors influencing the outcome of the schemes that it was not always possible for the Crown (or owners, for that matter) to foresee or control. What was required of the Crown were reasonable steps, in the circumstances, to establish processes and policies that encouraged development while protecting the development rights of owners and their communities.

We note, in relation to considering the wider context in which the schemes were operated, that it is unfortunate that we were presented with so little evidence about the way that development schemes were operated on Crown land in this region. Although there were significant differences in approach between the two systems that need to be taken into account in any comparison, many of the major issues they faced were similar. These included title issues, what was thought to be reasonable and feasible in the way of supervision, balancing the rights of tenants against repayments to the State, time periods for land development, and tenant participation in decision-making. More information about the Crown land development schemes might have given us a useful broader context for assessing what was reasonable and equitable in the circumstances of the time. Ngata, for example, was severely criticised for failing to follow public

service rules with the Maori land development schemes. Yet we note, with interest, that the official histories of the Crown land schemes recognise a general belief that senior officials had to have considerable drive and impatience with red tape and bureaucracy if they were to succeed in establishing such schemes on marginal Crown land.⁴⁴³

Having considered the general thrust of the claims before us, and submissions and evidence available to us on the land development schemes in this region, we are in a position to assess the extent to which the Crown took reasonable steps to protect the Treaty development rights of Maori landowners and their wider communities to participate meaningfully in the schemes, and have them operated for their benefit and according to their preferences. This includes a consideration of whether the Crown used the considerable powers it required to sidestep title difficulties and develop the land to, as the claimants alleged, further its own objectives of the perceived national good and the assimilation and individualisation of Maori owners and communities at the expense of its obligation to protect their Treaty development rights. This, once again, goes to the heart of the major theme of autonomy underlying our report.

The establishment of the Maori land development schemes

The wider context of the Maori land development schemes is important for an understanding of what motivated their establishment and what it was reasonable to expect of the Crown in the circumstances of the time. The schemes were established in the context of new policy initiatives in the late 1920s, whereby the State agreed to become more actively involved in developing marginal Crown land to a stage where it was in a condition to be farmed. This even included land where difficulties such as cobalt deficiency still had not been resolved. It was recognised that it was beyond the capacity of small landowners working individual blocks to develop such marginal lands themselves, even if they had access to existing forms of development finance. The scale of development required was too large and the initial investment too high for farmers to contemplate on

their own. This was confirmed by the difficult experience of many returned servicemen, who were placed on marginal land following the First World War and soon found the costs of developing it were beyond them. After some experimentation, it was hoped that, with economies of scale, the application of new and experimental techniques, and intensive initial stocking to prevent problems of reversion, initial development work could enable marginal land to be grassed, cleared, and stocked, and in the process brought to a condition where smaller farms could be cut out and remain viable.

The Crown had already begun to experiment with developing some of its poorest pumice lands for farming by the 1920s. It used prison labour on Crown land in the Taupo district, in anticipation of bringing the land to a position where it could eventually be subdivided into operational family farms.⁴⁴⁴ When such experiments appeared hopeful, the Government began to move to a new policy of initial state development of marginal Crown land, before it was cut up and offered for farm settlement. The new policy was agreed by 1929, hastened by the need to find rural employment at a time of deepening economic recession. There was a consensus that the State would undertake the necessary initial development work to bring the land to a farmable state, and that a reasonable amount of the development costs could be charged against the farms once they were producing an income, although it was expected that some write-offs of development costs would be required. As Dr Gould explained to us, development of marginal land assumed some degree of overcapitalisation by the State, and it was accepted that in some cases development costs might far exceed the valuation of the property once the land was developed.⁴⁴⁵ However, this was accepted as being in the overall national interest, as more land would be brought into production and the country would reap the social benefits anticipated from enabling further rural farm settlement.

The Land Laws Amendment Act 1929 provided the Crown with the necessary authority to develop Crown land through a Lands Development Board. The board



Breaking in pumice land. Photograph by H Drake, circa 1940.

had powers to purchase land, develop marginal Crown land, settle the land once it had been developed, and make advances on the land to tenants. The first of the Crown schemes began on the Ngakuru block near Rotorua, initially under the Department of Agriculture and then under the Department of Lands and Survey, which became the main Crown agency operating these land development schemes.

Ngata, with his long experience of trying to find ways to enable Maori to farm their land, was quick to see that this new approach of intensive application of expertise, financial investment, and intensive development of large blocks of land was precisely what was required to bring large areas of Maori land into farm production, even for areas known to be as marginal as this Crown land. The new development initiative therefore opened a potentially new opportunity for some kind of development assistance for Maori struggling to farm their land. He proposed a broadly similar approach, whereby the State would take control of the land for an initial period, thus overcoming immediate title difficulties, develop it for farming, and then return it in a condition where development debts could be repaid and it could continue to be farmed. The landowners would

be able to repay development debts as the farms began to produce an income.

Ngata was apparently able to persuade the Government to at least try his proposal by appealing to its desire to solve the seemingly intractable problems of under-utilised Maori land. He believed that the scheme might largely recover its costs and that intensive development work would provide a reasonably immediate solution to the growing problem of Maori impoverishment and declining work opportunities in rural areas. The

Native Land Amendment and Native

Land Claims Adjustment Act 1929 provided the Native Minister with significant powers to sidestep title difficulties for Maori land placed in a development scheme. The Act also allowed the Minister to protect land for farming (thus preventing its alienation, among other things) once it had been notified as included in a scheme. The Minister also gained significant powers to begin implementing the development of land placed in schemes. Development could proceed in two main ways. Individual 'units', or occupiers of land set aside for farming, could be provided with the necessary development funds to work under supervision to develop and farm the lands. Alternatively, for large areas of land not currently occupied or farmable, the Native Department could implement work schemes for owners, employing them to clear the land and develop it to a state where it could be worked as a farm. It has been estimated that, during the 1930s depression, up to a quarter of the total Maori population benefited to some degree from this kind of farm employment.⁴⁴⁶

The Maori land development schemes were established at a time when it was recognised that an economic crisis had developed among many rural Maori communities, even those in this region who had retained relatively significant areas of land. Unable to effectively farm their

lands, by the 1920s many of these communities were reliant on semi-subsistence lifestyles, traditional hunting and fishing, and rapidly declining seasonal and rural employment by those farmers who had been able to begin developing land. Many Maori communities were heavily reliant on extractive industries such as flax and timber milling, which were in decline as land was progressively cleared for farming. As the economic outlook began to worsen, many communities were already in a vulnerable position and this was recognised by officials. We note the evidence of Dr Hearn, for example, of an official report of the 1930s which noted the importance of Maori land development for the Taupo area, 'to save local Natives from destitution'.⁴⁴⁷ Dr Hearn also reports evidence that Government and local authority public works schemes, including afforestation contracts on the Kaingaroa plains, which were important sources of employment for Maori communities of our inquiry region, declined sharply during the 1930s.⁴⁴⁸

This slump in rural work opportunities in the region contributed to the already evident decline in rural seasonal employment as the pioneering period of early farm development came to a close. The Government was seriously concerned that the economic recession would only increase evident Maori poverty. Furthermore, the possibility that large numbers of unemployed Maori would be forced to move to urban areas was a significant concern both for the Government and for Maori leaders. This was especially the case because the Maori population had begun to increase after the 1896 census, and had doubled in the 40 years to 1936.⁴⁴⁹ The Maori land development schemes were therefore seen not just as a way to advance long-term rural opportunities but as an immediate response to an emergency situation facing many Maori communities in this region. We also note that it was easier for the Government to agree to extend its development schemes to Maori land at a time when worsening economic conditions meant that Pakeha pressure to target marginal Maori land for settlement had eased.⁴⁵⁰

Owner consultation and participation in the land development schemes

As we have noted, from 1929 the Government agreed to extend broadly similar state development assistance to Maori land as was being applied to marginal Crown land. As with the Crown development schemes, the original intention of the Maori land development schemes was to gazette areas of land that it had been agreed could be developed, undertake the development process, and then (in the case of the Maori land schemes) return the land to owners as operating farms. This involved the State taking significant control of the land during the development period, thus sidestepping title difficulties and the problem of numerous scattered interests, and grouping lands into areas capable of development. The intensive development phase, now undertaken on large blocks of land, enabled significant economies of scale to be applied in clearing and stocking. It also enabled Ngata to negotiate rapid payment of existing burdens on the titles (such as fees and charges of various kinds) as lump sums against whole blocks.

As well as overcoming immediate title barriers, the schemes provided a dedicated source of funding for Maori land development, and this was soon supplemented with unemployment subsidy funds. In the development stage, the State was also able to apply its resources of expertise, scientific knowledge, and land development experience to supervise and plan development, while owners and their communities gained work on the schemes. This overcame barriers to development that owners had faced through a lack of skills, training, and experience. It was intended that owners would gain farm skills, under supervision, enabling farming to continue once land was returned. It was intended that land could be developed through either collective effort or as individual farms, regardless of underlying ownership, with the land then returned either as subdivided farms or as developed lands for owners to further manage as they wished. Under Ngata's proposal, the State's financial investment in developing the farms was intended to be treated as a form of mortgage, to be repaid

once the land was producing an income. Necessary security for lending against the land was achieved by taking control of sufficient land within the schemes to ensure that the Government investment could be repaid. This often meant bringing more land into the schemes than it was intended to farm, in order to provide necessary security. Ngata clearly believed that he needed to make as much provision for repayment of the Government's financial investment as possible. However, it is important to note that some overcapitalisation of marginal land development was considered acceptable at the time, in situations where land might otherwise be under-utilised for farming. Overall, the extension of farming was considered to be in the national interest.⁴⁵¹

The evidence presented to us indicates that many of the early development schemes established in the 1930s were implemented in considerable haste and with some lack of clarity as to owners' rights and long-term legal provisions. This was not only because of the emergency economic situation facing Maori communities, but also because Ngata wanted to ensure that significant financial and development commitments were made as rapidly as possible, in the hope that the Government would be reluctant to entirely abolish the programme once the initial economic emergency was over. According to Dr Hearn, Ngata was conscious that Government support for his Maori land development programme was 'at best conditional and at worst tenuous'.⁴⁵²

The first of the Maori development schemes was established with the agreement of owners in the Horohoro area of the Rotorua district. The development work was experimental and, as no unemployment funds were yet available, all labour costs were charged to the land. Officials regarded some financial write-offs on this kind of development as inevitable, but still regarded the development schemes as a success when large areas of land within them were brought into farm production. This perspective was apparently generally accepted at the time, and developments at Horohoro led to agreement to extend Maori development schemes to land throughout the Rotorua and

Taupo-Kaingaroa districts. This extension also enabled the Native Department to rearrange some of its early Rotorua schemes, to take account of the additional land and resources they contained and use them more effectively for development purposes. Some new schemes added at this stage were never meant to be economically viable on their own, but were added for the purpose of providing healthy land for general stock recovery, for example, or timber for fence posts. Arrangements were also made, where suitable, to exchange land with Crown land, or to add additional land where this made blocks more viable.

The evidence indicates that, from the time the schemes were first established, the general principle was that owners and tribal leaders should be consulted over the inclusion of their lands in the schemes, and their consent acquired. Although they were not legally recognised as having authority over land, the evidence indicates that, in practical terms, tribal leaders were recognised as having to be included in the process alongside owners. It is evident that the schemes were intended not only to utilise land but also to help improve the circumstances of landowners and their wider communities. This was especially true of the earliest schemes, where it was recognised that farm development was likely to prove useful for a range of community needs and objectives, in addition to generating long-term benefits for whomever from among the owners eventually continued farming.

We heard claims that in some cases consent was not adequately gained. Maori land board and Native Trustee farm schemes, for example, were included without the consent of owners. Sometimes, officials failed to do any more than hold meetings sufficient to ensure that they had enough land to guarantee security on the proposed Crown investment, rather than to ensure full owner and community understanding and agreement to the major implications of placing land in the schemes. This lack of clarity over adequate consent is most applicable to the pre-1949 schemes. In the post-war period, the evidence indicates that officials were much more careful to fully explain schemes and gain informed consent.

It needs to be recognised that the Maori land development schemes were the major way that the Government chose to assist with the development of Maori land for farming. In practice, owners had very little choice but to agree to the schemes if they wanted to take part in farm opportunities. In principle, however, adequate consent by owners and communities to have land included in schemes was an important part of protecting development rights with regard to the schemes, and a Crown failure to take reasonable steps to obtain this was a breach of Treaty rights.

It is also evident that, from the beginning of the schemes, it was accepted that land development for farming would provide benefits not just for individual owners but also for their wider communities. The expected community benefit – and development rights for communities as well as individuals – were therefore important elements of the schemes from the beginning. As noted, the initial development period for the schemes was regarded as an important source of rural employment for many owners and their communities. There is also evidence that Ngata and the leaders he met with clearly intended the schemes to address wider cultural as well as economic objectives. Ngata regarded the schemes as part of a much broader regeneration and development of Maori communities. The land development schemes were part of a wider programme he established at much the same time, which included encouraging research on Maori traditions, establishing the Maori Purposes Fund in 1924, and helping to establish the School of Maori Arts and Crafts at Whakarewarewa in 1927. From the 1920s to the 1950s, Ngata also encouraged the building and rebuilding of many meeting houses, as part of the wider initiative to also encourage cultural and community regeneration. The development schemes were considered, from their inception, as part of this wider package for Maori community development in rural areas. Modernisation and farm business activity were to underpin tribal communities and their valued cultural traditions and customs.⁴⁵³

There was considerable debate over exactly how modernisation and the maintenance of tribal and cultural elements might be blended through the development schemes. In particular, there was debate over how the creation of family farms might be legally balanced against the interests of the wider community of owners. However, this issue does not appear to have been regarded as a major problem by tribal leaders. They appear to have recognised the potential value of family farms, as long as they were economically viable, in helping to maintain rural tribal communities and their access to tribal lands. They saw no reason why this kind of farming could not operate under tribal leadership.

Ngata was successful in embedding the Maori land development schemes into long-term Government policies. This was a notable policy development, and credit is due both to Ngata and to subsequent Governments for accepting a state responsibility to provide Maori landowners with necessary assistance to be able to utilise their lands for farm opportunities. However, the emergency situation of the time, the haste in implementing the schemes, and their experimental nature all contributed to a lack of clarity about the financial and legal understandings attached to many early schemes. The lack of clarity was especially marked when it came to assessing the balance between reasonable overcapitalisation and charges against the land. This vagueness, while perhaps understandable in the emergency circumstances of the time, had to be resolved in later years for owners and their communities.

There was no necessarily right answer to many of the issues that had become apparent by the 1930s concerning the rights and interests of owners. The evidence available to us suggests that different choices were possible and may well have suited different schemes. What was required was for the Crown to take reasonable steps to consult meaningfully with owners and their communities, and establish adequate mechanisms and processes for continuing effective consultation over decision-making and the strategic direction of the schemes. This process of consultation and resulting strategies for the schemes needed to take account

of the Crown's requirements of reasonable security and the repayment of its investment, and the owners' right to participate in important decision-making to ensure that the schemes met their community needs and objectives.

We were presented with evidence that the Crown began reviewing and seeking to clarify issues affecting the Maori land development schemes from the mid-1930s. Historians have noted that official inquiries during the 1930s, first under the National Expenditure Commission and later in a commission of inquiry, resulted in some criticisms of the schemes. As a result, a number of significant changes were made to the oversight and running of the schemes, along with some clarification of the powers of the State with regard to land in the schemes. These changes included a move, in 1932, from direct ministerial control of the schemes to more constraints on the Minister via a Native Land Settlement Board. This board was replaced by a more powerful Board of Native Affairs in 1935. Provision was also made for district Maori land committees, which could have been used to provide some Maori representation. However, we received evidence that these district committees were not established until 1949, and no Maori was appointed to the Board of Native Affairs until 1947.⁴⁵⁴

Further changes were provided for under the Native Land Amendment Act 1936, which extended board control over land included in the schemes and further limited the powers of owners. There was a significantly greater emphasis on recovering the cost of the State's development investment. The board gained powers to determine who farm occupiers would be and whether or not they were owners, and control over the terms and conditions and forms of tenure granted to occupiers and outsiders. The Act also gave the board powers to create more defined areas of occupation and to allocate farming and development costs to unit lands.⁴⁵⁵ All existing schemes, regardless of any agreements that might have been made when land was included in a scheme, were brought under the 1936 legislation.

The Act confirmed the Government's commitment to assisting with the development of Maori land for farming

rather than targeting Maori land for purchase. There was, in fact, a rapid decline in the rate of Government purchasing of Maori land. The amount of Maori land included in the schemes doubled between 1935 and 1938.⁴⁵⁶ At the same time, according to evidence presented to us, officials believed the 1936 Act was an extraordinary measure of a more or less 'emergency' nature, in terms of its infringement of ownership rights, and was intended to provide the board with a significant mandate to develop and improve the land and place it under capable management.⁴⁵⁷ In the process, the earlier provision for owner committees was abandoned, and the Act failed to include Maori representation on the new board. According to evidence provided to us, no legal provision was made for Maori representatives until 1949, when district Maori land committees with at least one Maori representative were established, and first met from 1950.⁴⁵⁸

We are persuaded that it was reasonable for the Government to have conducted reviews in the 1930s to clarify issues arising with the schemes, and for it to ensure that necessary powers were available to enable agreed development to take place. However, it speaks volumes for the barriers Maori faced in using their lands for farming, especially in overcoming title problems, that the Crown needed to use what were acknowledged as extraordinary legislative measures to enable land development to be rapidly and effectively implemented. In the emergency economic situation of the 1930s, it was reasonable for the Government to concentrate on measures intended to bring about rapid economic benefit. It also seems reasonable, in principle, that, in contributing significantly to a farm development venture, the Crown should have required repayment of development costs from farm profits once lands were developed, equivalent to what was generally considered acceptable at the time. Even so, the Government continued to recognise that the schemes had wider community development objectives than simply ensuring that land was utilised by and for the benefit of individual owners. Dr Hearn has presented us with evidence, for example, of Prime Minister Michael Savage commenting, in 1936,

that the principal intention of the schemes was to train Maori to become industrious farmers, thus reviving their attachment to the soil and creating a form of life that, while retaining the best of Maori culture, would also provide for profitable settlement on their land.⁴⁵⁹

Given that the Government was taking extraordinary measures in order to implement development, and that it was understood this would have a major impact on owners and their communities, the Crown was obligated to ensure that owners and communities had adequate mechanisms for continuing consultation and input into decision-making. Gaining consent to have land included in the schemes did not end the Crown's obligations to consult owners while their lands were being developed. Even at a best estimate, it was assumed originally that some land might need to remain in the schemes for as long as 20 years. In some cases, land was in fact retained for far longer. This prospect required clear mechanisms for ensuring that both owner and Crown interests were recognised and provided for during the development and debt repayment process. The Crown's failure to continue legislative provisions for owner committees or some equivalent representation, at a time of taking extraordinary powers, was a breach of Treaty rights. While, on the one hand, it was an unnecessary and excessive infringement of rangatiratanga over land, it was also an infringement of the right of Maori communities to direct their own development according to their social and economic preferences.

It was also claimed before us that the earlier close relationship between the Native Minister and owners was damaged by the establishment of the board. We accept this, but note that in our view an independent board, as long as it had adequate Maori representation and mechanisms for continuing consultation, could have been a reasonable alternative that would have protected owners' Treaty rights. Ngata did not continue as Native Minister throughout the schemes and, in any case, as the schemes multiplied close contact with the Minister would have become increasingly difficult. A board provided for access to expertise and was, in theory, a reasonable means of administering

schemes given the levels of financial and technical investment involved. However, it was fundamental in Treaty terms that the Crown ensured that such a board, in operating the schemes, infringed owners' rights as minimally as possible and for as short a time as possible, and that any emergency powers were tempered with corresponding protections, including adequate consultation with owners. No other approach would have been expected or tolerated by non-Maori landowners. We do not find that establishing a board was necessarily in breach of the Crown's Treaty obligations. However, in so far as the Crown failed to ensure that the board was subject to adequate monitoring and review in the interests of owners while exercising its powers, and in failing to provide for legal protections for owners such as clear processes for how land would eventually be returned, the legislative provisions established by the Crown in the 1930s failed to adequately protect Maori Treaty and development rights.

We do not accept that providing for meaningful Maori landowner participation and consent during the operation of the schemes, especially when such significant powers over the lands were placed in the hands of the Government and officials, only has meaning when viewed from today's perspective. We have noted that some mechanism for Maori participation through committees was considered necessary and provided by Ngata from the outset of the schemes. The Government of the time was also informed of Maori requests for this. We note, for example, that the Maori Labour Conference in 1936 called for more control by owners of matters affecting their land, and for increased participation in the central and district administrative agencies controlling the schemes.⁴⁶⁰ Ngata himself warned that the legislative changes appeared to place too much power with Pakeha supervisors and boards, and gave too much Government protection to occupier interests over the interests of owners. This threatened owners with what could well be effective dispossession of their land in favour of occupiers.⁴⁶¹

We have before us evidence of continued owner complaints within the context of individual schemes, such as

the Horohoro scheme. Owners raised concerns that excessive bureaucracy was limiting their participation, that there was a lack of adequate mechanisms for their input into resolving issues such as the role of outsiders, that charges were being loaded on their land without adequate consultation, and that there was insufficient consultation with them about the direction and overall decision-making for individual schemes, including their wish to use schemes to further tribal objectives.⁴⁶² The evidence from the earliest period of implementation of the schemes indicates that the possibility of providing better protection for owners' rights, especially through consultation and participation mechanisms, was a reasonable policy option for the Government. Any failure to provide such protections was likely to seriously impact on owners' Treaty rights, including their development rights.

Land development work on Maori and Crown schemes declined considerably during the Second World War as a result of labour and materials shortages. Towards the end of the war, the Crown began considering a renewed commitment to the schemes, including extending them to bring additional marginal lands into production and provide farms for a new wave of returned servicemen. In the post-war period, the Crown had considerably greater knowledge and technology at its disposal to develop marginal lands. Technical developments included topdressing, better understanding of remedying soil deficiencies, and significantly greater access to heavy machinery. There were also changing demographic and economic factors to take into account. It was becoming clear, for example, that rapid increases in the Maori population were going to make efforts at title consolidation even more unworkable. It was also evident that, even if small family farms could be created from land in the schemes, they could now never hope to support even a majority of the rural Maori population. The situation would become even more difficult as land passed through the initial development stage, as fewer farm workers would be required once farms became established. The emergency economic situation of the 1930s depression was well past, and commodity prices

were increasing rapidly. As a result, it was becoming more necessary to seriously consider issues of owners' rights, how land might be returned, and how land development schemes might contribute to overall development requirements for owners and their communities. Some of these issues were already beginning to be raised in a policy context by the late 1930s.

We note, for example, the advice of the eminent economist Horace Belshaw. As we have noted, Professor Belshaw took a close interest in economic development issues, and he later worked for the United Nations. He was an adviser to the Labour Government on a number of economic issues and took a close interest in Maori development and the Maori land development schemes, writing a number of articles on Maori development in the 1930s and early 1940s. By the 1930s, Professor Belshaw regarded the schemes as a generally positive initiative by the Government to assist with Maori land development needs. However, even then, he warned that demographic data required the Government to consider seriously the policy implications of Maori development based on farming their retained lands. He warned that the Maori population had begun to grow at a faster rate than that of Pakeha, and that this had important implications. Even if it was possible to create individual family farms from all Maori retained lands, it would still be insufficient to support the entire needs of the Maori population.

In terms of farming, Belshaw estimated that, if all retained Maori land was of reasonable quality and could be divided into family farms, it still would not be able to support more than a quarter of the expected Maori population in the near future at a reasonable standard of living. The other three-quarters would be forced to find other means of support. They would mainly be young and therefore more highly represented than Europeans as new entrants in industry, and less well represented among those beyond the age of active work. Traditional seasonal rural work, which was in decline as farming emerged from its development stage, would no longer provide a solution. Development schemes would provide employment opportunities during

the initial land development, but these, too, would decline once farms became operational.⁴⁶³

Professor Belshaw warned the Government that it would not only need to provide Maori with better farmer training – to remedy a ‘defect’ in current policy – but also provide Maori with vocational and skills training to enable them to take advantage of better employment opportunities. Maori also required access to business and commercial expertise and experience, in order to take part in business activities with their properties. Professor Belshaw noted that devices such as consolidation and incorporations were major responses to Maori land title problems. Development schemes were intended as a way of ‘circumventing’ title problems, but such difficulties still needed to be overcome.⁴⁶⁴ He reiterated and expanded on his views in a chapter published in *The Maori People Today* in 1940. He wrote that, with regard to Maori development, equality for Maori citizens was not the same as Europeanisation. He warned that, if Maori were not assisted to become economically independent, they risked becoming a submerged class dependent on public funds. Failure to achieve economic independence threatened Maori with complete assimilation and the loss of the best of their culture. It also threatened the ability of Maori to selectively adopt what they regarded as the best of Western culture and its accompanying economic and social opportunities, while still retaining valued aspects of their own culture, social organisation, and racial pride.⁴⁶⁵

With regard to Maori land development, Professor Belshaw questioned whether the development of commercial farming on a European pattern was being ‘pushed a little too far’, when it might be more desirable and practical to have more of a balance between traditional forms of lifestyle and commercial farming. He also proposed that the schemes make more use of the traditional Maori institutions of marae and kainga, and raised the possibility of encouraging villages around them that could provide a home for some of the tribal population, who might no longer possess enough land for farming, but who might still be able to find support in rural areas. These people

might be able to supply labour to schemes and farms, but Professor Belshaw felt that there was also a need to encourage other economic activities, centred around marae but adapted to new economic circumstances. Such encouragement could include the provision of lending finance and other forms of encouragement of cooperative ventures in services allied to farming, which would enable communities and villages to be supported and maintained. This would enable Maori to retain important aspects of their culture, while adapting to and participating in new economic circumstances.⁴⁶⁶

Professor Belshaw believed that these centres of rural life could then act as economically self-supporting communities, providing a focus for larger, dispersed populations to retain ties with their tribal areas and culture. The maintenance of viable and vital home communities would help to preserve the culture of the group as a whole, and the economic strength of these communities would help to maintain community loyalty and a sense of responsibility for migrants. Professor Belshaw believed that this, in turn, would help to enrich New Zealand’s national life.⁴⁶⁷

In many respects, Professor Belshaw was clearly ahead of his time, in the sense that his views did not gain widespread acceptance. However, his advice and published views indicate that it was not beyond the bounds of public policy discussion at this time to consider a range of views about what changing economic and demographic circumstances might mean for the operation and overall goals of the Maori land development schemes. It was possible to consider the schemes in light of overall development objectives for Maori communities, and to debate whether it was feasible to assume that a focus on farm development alone would be sufficient to meet Maori development requirements. A range of options was possible, when looking at how to encourage economic development for Maori communities on their retained lands while still meeting national development objectives.

We agree that, by the later 1940s, a review of the Maori land development schemes in light of changed circumstances was both reasonable and necessary. This, however,

required a review not only of how the schemes might continue to protect the Crown's development investment and meet national objectives for encouraging farming, but also of how the schemes might best contribute to the development needs of Maori owners and their communities. Maori had to be consulted in such a review, and they had to participate in overall decision-making on the direction of the schemes and how they might fit within wider economic strategies for rural Maori communities. It was now becoming clear that family farms could not address all the development needs of Maori.

The evidence presented to us indicates that, instead, Government policy tended to increasingly confirm the powers of the board and Government priorities for land in the schemes. Until the schemes were reformed in the 1970s, there were continued failures to adequately provide for consultation with and participation by owners. The board was required to give priority to the repayment of debts, ensuring that land was properly utilised, and pursuing the creation of individually-owned farms. These policies were implemented in the context of a wider policy of assimilation and were seen as discouraging Maori 'communalism' and alleviating the 'undue economic burdens' of tribal custom.⁴⁶⁸ The Minister of Native Affairs, Rex Mason, described the objectives of the Maori land development schemes in 1944 as being to improve Maori living standards, absorb 'the largest possible proportion of the Maori population as possible into the economic structure', 'bring idle lands into production', combat or eradicate noxious weeds, and assist with 'the payment of county rates'.⁴⁶⁹

A new wave of Maori land development schemes was implemented after 1949, nationally and in this inquiry region, under these policy objectives. The new schemes no longer included any requirement to consider wider community development objectives, but focused instead on more limited and commercially oriented objectives for the eventual creation of individual family farms, on the assumption that these would, anyway, be best for Maori. This focus was confirmed by Cabinet, which required a

greater emphasis on efficiency, maximising farm production, cost recovery, and the settlement of individual farmers and occupiers with secure tenure, as well as continuing to seek the utilisation of all unused or unproductive land. As historians have noted, the objectives for farm development had clearly become more limited in scope. This meant a further loss of the original schemes' wider cultural and social dimensions.⁴⁷⁰ Those early schemes still in operation were brought under the new policies.

We acknowledge evidence that Maori communities in our inquiry region continued to seek to have their lands included in the post-1949 schemes, and that they continued to consent to proposals for schemes even as officials took a great deal more care to clarify what was involved, what Government policies were, and what owners could expect. However, we note that there is evidence of considerable pressure being exerted in some cases, where it was suggested that including land in a scheme was the only option open to the owners. Lands that were otherwise unable to be utilised because of scattered title were especially subject to such pressure, as they were considered to be a 'menace' to Pakeha farmers and in danger of being subject to county councils gaining receivership orders for non-payment of rates. In some cases, owners appear to have acquiesced to Government demands that as much land as possible be utilised.⁴⁷¹ Some owners claimed that they were placed under considerable pressure to allow their lands to be included in schemes that would not have been economic without them. The schemes also continued to be the only real option available to Maori who wanted to develop their lands for farming. For these reasons, we do not accept that owners' continued consent to the inclusion of their lands in the schemes meant that they also consented to being sidelined from the operation of the schemes.

The Treaty required the Crown, in continuing to assert significant powers over the post-1949 schemes, to take reasonable steps to ensure that this was balanced by adequate mechanisms for owner consultation and participation in overall strategic decision-making. This had acquired particular importance, as it was now clear that some schemes

were likely to remain out of owners' hands for significant lengths of time. We accept evidence presented to us that, in general, the later schemes were operated with more effort to protect owner equity in the schemes and to ensure that they were not loaded with unreasonable debt. There was also, over time, a greater commitment to consultation in deciding how land titles might be arranged and partitioned to reflect more economically viable land areas, although consolidation attempts were gradually abandoned. Owner advisory committees were increasingly made use of in this inquiry region, which enabled some participation by owners in the operational matters of individual schemes. As we have noted, there was also provision over time for limited Maori representation on the central board.

However, until the 1970s, the Government remained focused on the eventual creation of individual family farms. It maintained its policy of promoting secure tenure through giving formal, defined leases to those chosen to be occupiers. This supported the national interest objectives of promoting family farming and utilising all available land under this model, regardless of the practical realities of farming in this region. The Minister of Maori Affairs, Ernest Corbett, stated in 1954 'that the national economy demanded that all lands should be utilised to their fullest capacity', and that 'no lands irrespective of ownership should be poorly utilised'.⁴⁷²

We accept the Crown's submission that overall owner and Government objectives for the schemes were not necessarily incompatible and in fact, in many cases, coincided. We note evidence of leaders in our region accepting that some land might be used for national objectives. Ngati Tuwharetoa, for example, informed the Government after the Second World War that they wanted their own servicemen and the needs of owners to be given preference when schemes were settled. However, once those requirements were met, they would welcome outsiders from other tribes. We do not accept that the Crown had the right to decide, without consultation, what objectives would take priority. Many of the issues related to development schemes were capable of a resolution that

would meet both the Government's and owners' interests. However, the Crown had an obligation, in asserting considerable powers over the lands, to provide adequate mechanisms to enable tribal objectives for development to be considered, and to ensure owners' ability to have input into policies and decision-making. We accept that the schemes offered an opportunity for partnership, but effective partnership required reasonable owner input into such issues as the length of leases for occupiers, the way farms were managed, and how and when land would be returned.

We were presented with evidence that the Government agreed to and formally established a number of types of advisory committees for the schemes. A policy decision was taken to include a Maori representative on the advisory committees in each land district, that advised on land development work.⁴⁷³ In our region, the Government responded favourably to some tribal and owner initiatives for advisory committees associated with the new schemes. For example, we received evidence that Ngati Tuwharetoa sought agreements with the Government over the development of lands on a tribal basis and proposed an advisory council or committee to provide input into this development.⁴⁷⁴ As Minister of Maori Affairs, Peter Fraser supported the establishment of these advisory committees, and two were established for Ngati Tuwharetoa.⁴⁷⁵ The advisory committees were intended to improve cooperation between owners and the Maori Affairs Department, and enable a means of owner and tribal input into the operation of schemes. The evidence indicates that they took an active and important interest in the day-to-day operation of the schemes, even if they had little say in overall policies and direction.

Section 11 of the Maori Affairs Act 1953 further empowered the Board of Maori Affairs to formally establish committees to advise or assist in the exercise of its powers and functions.⁴⁷⁶ In 1968, the board considered proposals to appoint a development committee for each farm station, provided this was what most owners wanted. Officials and owners were to have joint membership of the committees,

and were delegated some operational powers. This has been described as a deliberate attempt to encourage owners' nominees to take a more active role in the operation of the farms.⁴⁷⁷ From the 1970s, owner committees were provided with more farm management powers. In many cases, the people serving on these committees later became involved in the management of the trusts and incorporations that were established to manage the land as it was handed back.

It appears that this gradual evolution of advisory committees had some important benefits, especially in providing experience in farm management and operational oversight of farm activities. The evidence indicates that, while this system gradually provided more opportunity over time, the actual extent of owner input and participation through the committees varied with individual schemes. This will require more detailed research for each scheme. However, in general, the evidence available to us indicates that, for most of the period up until the 1970s, the various forms of committee only offered very limited input and consultation for owners, compared to the extensive powers wielded by the board. They had only limited influence over strategic direction and decision-making. During this time, the Crown continued to require the board to give priority to protecting Crown interests and to implementing Government policy. There was insufficient requirement for the board to consider the role of the schemes in the wider development needs of owners and their communities. We note evidence, for example, of long-term reluctance on the part of the Government to consider owners' proposals to incorporate land, unless the land appeared to be completely unsuitable for the preferred option of individual farms.⁴⁷⁸ As debt reduction became a stronger focus of the management of schemes after 1949, the Government continued to insist on maintaining full control over their direction and objectives.⁴⁷⁹ In general, where the Crown continued to fail to take reasonable steps to provide for owner consultation and participation in schemes at any more than a minimal level, this was a breach of Treaty rights, including the right of development.

The claimants argued that the Crown's failure to adequately provide for owner consultation and participation in decision-making helped to prevent owners from gaining the full potential benefit of the schemes. In this regard, claimants pointed to benefits from higher economic returns, improved training and skills, and overcoming difficulties with title. We have already found that the ability of Maori landowners to use their retained lands to participate in new economic opportunities such as farming was assumed to be critically important to their ability to continue to support themselves and their communities, and to have the opportunity to prosper in opportunities brought about by colonisation. It was important, therefore, not only that Maori lands were able to be utilised for farming, but that this utilisation entailed participation and enabled owners to pursue maximum development benefits for themselves and their communities.

Financial management of schemes

The evidence available to us indicates that, in general, the Maori land development schemes were a significant attempt by the Government to assist Maori to overcome severe barriers in obtaining finance to set aside blocks of their land, improve them, and farm them for their benefit. The development schemes enabled the Crown to begin investing in farm development on Maori land, regardless of title problems, and significant investments were made through the schemes, beginning with £250,000 voted to begin implementing the schemes in 1928. As well as providing substantial lending finance, historians informed us that the Crown eventually wrote off a significant part of the debt created through the schemes. The details of how this affected each scheme require further research. In general, we are persuaded that the schemes marked an important turning point in Government policies. It was finally accepted that Maori landowners needed financial assistance to develop their land rather than continue to be subjected to extensive alienation programmes.

It was submitted to us, however, that the Crown's pursuit of its own objectives, including protecting its investment

in scheme land, restricted and at times undermined the benefits that Maori landowners and their communities were able to achieve. Parties before us agreed that it was reasonable for the Crown to require some level of repayment of its investment. They also agreed that providing the Crown with significant powers over the land helped to provide security so that investment debt could be repaid. We, too, accept that in general it was reasonable for the Government to take some control of land to be developed, in order to protect its investment. It was also reasonable for the Government to require some level of repayment of its investment once developed farms were returning profits. However, in taking control of land for the schemes, the Crown also had a duty to ensure debt repayments were reasonable and equitable in the circumstances of the time and in the context of its duty to protect owners' rights and their opportunities to participate in land development. We have previously noted, for example, that some overcapitalisation of marginal lands was accepted, for much of the life of the development schemes generally, as being in the national interest.

When the schemes were first mooted, it was anticipated that legal provision would be made to allow the State's investment to be charged against the schemes and made recoverable. This was at a time when Ngata was trying to persuade the Government to extend Crown development schemes to Maori land. It was, perhaps, understandable in the initial emergency situation that Ngata did not include provisions to write off debt. Within a few years of their establishment on Maori land, however, it had been decided to review and clarify features of the schemes. We have found that it was reasonable for the Government to undertake this review and attempt to find ways to more clearly provide for the long-term future of the schemes. This included clarification of their financial management and debt obligations.

What was also required was some clarification of provisions for debt repayment, along with an acceptance that not all debt would be repayable and that charging full debts against some land could severely hamper a scheme's

profitability – and therefore its ability to contribute to other scheme objectives – for many years. Debt repayments had to be reasonable, given the accepted need to overcapitalise. In light of the experience and advice obtained by the time the 1936 Act was passed, the Government clearly had to provide for writing off some debt.

We note, for example, that official advice, including that of the 1932 National Expenditure Commission, was that it was unrealistic to expect all development debt on marginal lands to be repaid. To do so could make future farming uneconomic.⁴⁸⁰ At the time the schemes were established, it was expected that they would provide benefits not only for landowners but also for the owners' wider communities. The evidence indicates that a number of the early schemes in particular, including those on the Horohoro lands in Rotorua and lands around Lake Taupo, were intended to provide rapid economic relief by creating community employment. As a result, a deliberate emphasis was placed on creating dairy farms rather than sheep farms, because these employed more people and were expected to settle more families. The Otukou property in Taupo, for example, was rejected by officials for inclusion in the schemes on the ground that it was a sheep farming enterprise and would not be able to employ enough people.⁴⁸¹ Government officials clearly accepted that community needs had to be considered in decision-making. This may well have been agreed to by owners, but in requiring the schemes to assist in a social welfare role, the Government had to accept that it might limit the schemes' financial returns and lead to higher debt loadings. It was, therefore, reasonable for the Government to share in some of this risk when deciding a fair level of repayments.

Some of the early development schemes were highly experimental, on land that was known to be very difficult. It was not reasonable, in these cases, to place all the risks of development on owners when they were heavily reliant on Government decisions about risk and debt loading. The Government expected to receive some gains through having such land utilised, and therefore it had to take this into account when setting reasonable debt repayment levels.

Once the first schemes were under way in Rotorua, for example, the evidence indicates that they were extended, in part, on the basis that, while development debts could never be fully repaid, the schemes still benefited the national economy as well as local communities by creating productive land. This was part of the ethos of the times, and it was therefore equitable that repayments should take this into account. Given these understandings, it was reasonable for the Crown to take some steps to allow for debt write-offs.

We note that there were a number of other complications with the early schemes that made determining debt and contributions to the schemes more difficult. For example, in the Central North Island the Crown operated a number of land exchange schemes to ensure that Crown as well as Maori land development schemes would be viable. We note, for instance, that the Crown undertook title consolidation measures in the Waikite area of the Rotorua district in the late 1930s. These involved exchanges of interests between Maori and the Crown to enable the Department of Lands and Survey to consolidate land holdings for its own schemes. Presumably, similar work was carried out for Maori schemes, although it is not clear from evidence available to this inquiry what contributions were ultimately made by Maori. Similarly, while some Crown land was added to Maori schemes, it seems that, in some cases at least, owners were required to pay for the additions through charges loaded on to the schemes. We also lack evidence of how much allowance was made for the generally lower unemployment rate paid to Maori when unemployment funds were put towards land schemes. Nor is it clear whether the investment debts imposed on Maori schemes took account of the subsidies and other forms of support offered to other farmers. There is a question, for example, about whether any equivalent to the mortgage relief offered to many landowners in the 1930s was allowed for in calculating debt repayments on the schemes.

We note that the Native Land Amendment Act of 1936 provided that development costs were to be charged against

scheme lands and could be enforced by the appointment of a receiver or by an order vesting the lands in the Crown. While we accept the Crown's submission that no land was actually vested under this provision, it nevertheless helped to create a perception among officials that debt repayment was a major priority for the schemes. This was to ignore the general understanding regarding marginal lands at the time: that some losses were acceptable in the interests of overall benefits for communities and the nation.

We agree that, in practice, levels of reasonable debt repayment will have varied from scheme to scheme. More detailed research is required here. However, in general, we are of the view that the early schemes, in particular, required measures to protect owners by imposing reasonable debt loadings and repayment requirements. Adequate mechanisms were necessary to ensure that repayments were equitable. Recognition was needed of owners' contributions to the schemes, as well as the opportunities that were foregone. We have evidence, for example, that in some cases contributions were made to schemes from timber royalties, trust funds, and earlier land board schemes. Some communities also agreed to forgo short-term commercial gains from alternative leasing arrangements or timber royalties, in order to allow their land to become part of a scheme for the wider community benefit. Many Maori also contributed to schemes by providing labour at very low rates. This, too, needed to be taken into account when scheme debts were determined.⁴⁸²

We accept that all these issues require further detailed research. However, we are of the view that in some cases the Crown placed the protection of its own interests ahead of ensuring that debt repayments were reasonable for owners. This resulted in significantly longer than necessary delays in returning lands. Further, it was not reasonable, given the way that some earlier schemes had been established, to place them under more rigorous debt repayment requirements from the 1940s. We acknowledge that more reasonable debt write-offs were eventually accepted, in practice, and therefore any determination of the exact extent of prejudice would need to consider the circumstances of

each scheme, along with what was generally considered equitable at the time. We note the view of some historians, for example, that during this period development schemes on Crown land continued to involve a focus on quick settlement, with less concern for costs.⁴⁸³ The Crown's failure to treat debt repayments on Maori land equitably in those circumstances, including its failure to take account of forms of owner and community contributions and the level of support it offered to other sectors of the farming community, was in breach of Treaty development rights and of the Crown's duty to act with scrupulous fairness towards its Treaty partner.

As previously noted, it was recognised, by the 1940s, that some further review and change to policies concerning the Maori land development schemes might be necessary, given changing economic and demographic circumstances. Expert advice indicated that, on its own, farm development on retained lands was unlikely to be sufficient to meet the development requirements of owners and their communities. A greater range of economic development assistance might be required to maintain the economic and cultural well-being of Maori rural communities. In addition, more priority needed to be given to considering how matters of title might be resolved, in anticipation of land being returned to owners.

As we have noted, the Government did begin to establish clearer policies for schemes. This included protecting owners' equity in the unimproved value of land, ensuring that owners were paid a rental based on profits, and a regularised system of payment for improvements based on valuations. Schemes were only established after 1949 where they were considered to be economically viable. Even though results were variable, the evidence indicates that these later schemes were generally better managed and more successful financially. We also note that, in a later dispute between the Treasury and the Department of Maori Affairs over the extent to which development costs should be recovered and the way employment subsidy funds should be treated, there was an acknowledgement from officials that the rest of the farm community had been given access to grants and

subsidies over time, which it was not intended to charge to their lands individually or require them to repay, and that similarly not all subsidies and grants received for Maori land development schemes needed to be recovered.

We received evidence that, by the early 1950s, some land was being returned to owners' control as substantial debt was repaid, helped by strong farm commodity prices. These schemes do appear to have returned benefits to owners, although once again more research is required to determine the extent to which this applied to individual schemes. These successes contributed to optimism that remaining schemes and new schemes might also be developed with some success. Decisions had to be made, however, on schemes that were still struggling, about whether they should be wound up and returned with a reasonable division of losses or utilised for some other development purpose, or whether they should continue to be loaded with investment debt in order to hopefully achieve better results in creating farms. These kinds of decisions involved significant risks to owners, including higher debt loadings and possibly a loss of contact with or even income from their land for many years. This required consultation and decision-making that protected owners' interests as well as the interests and objectives of the Crown.

The evidence indicates that the Crown was very reluctant to consider alternatives that might undermine its overall commitment to utilising land for farming, even where those alternatives clearly seemed likely to bring more financial benefits to owners. For example, Dr Hearn presented evidence indicating that, in 1944, owners in the Waihi Kahakaharoa lands wanted some land released from the failing Waihi-Pukawa scheme, noting that the blocks were not suitable for farming and that it was their preference to have them planted in exotic timber instead, once milling was completed. However, the owners did not succeed in having the blocks released until 1954.⁴⁸⁴ The details of such options for individual schemes, and the Crown's response, require further research. We agree that the Crown had a reasonable interest in seeking to protect its investment in the schemes and in considering that farming, nationally,

was still a major development opportunity. However, the Crown also had an obligation to consider the practical circumstances of this region, the wishes of owners, and the potential likely benefits of land use options for owners. It was not sufficient to assume that whatever the Crown felt was good for the nation must necessarily be good for the Maori owners of this region and their Treaty development rights.

The evidence also indicates that, in a number of cases and especially on marginal lands, it eventually became official policy to run the schemes as large farm stations while debt was reduced to a reasonable level. It was also agreed that the land could be subdivided and settled on valuation rather than on full development costs. This at least avoided burdening land with impossibly high debts. It was also an acknowledgement that, for many parts of this region, the most viable and economic means of farming was on large stations. However, it still remained Government policy to pursue the creation of individual farms as far as possible, which included providing relevant protections and forms of secure tenure for occupiers and recovering the costs required to create such farms. Yet farm development work on these lands was still experimental, and in some cases costs quickly exceeded expectations. The inevitable decline in farm commodity prices from the high returns of the 1950s also impacted severely on some of the scheme debt from the 1960s, which further delayed the return of land.

The financial implications of persistently attempting to create small family farms from very marginal lands with very high debts contributed to a growing gulf between owners and occupiers, which became more evident by the 1960s. It had also become clear, by this time, that other forms of land utilisation might provide more economic benefit to landowners. These included urban or holiday home subdivisions in attractive recreational areas, exotic forestry, and even leasing to Pakeha farmers who were able to pay better rentals than could scheme occupiers, struggling to repay high debts that owners had never agreed to. As farm stations were gradually subject to subdivision, and as family farms were created and debts against them paid

off, the remaining owners frequently found themselves with proportionately reduced income from smaller stations. In a number of cases, the station land that remained was found to be no longer profitable. Owners were more likely to tolerate these losses when the occupiers were from their own communities. However, Government policies that the best-qualified farmers should be selected as occupiers, even if they came from outside the owners' communities, and that experienced Pakeha were best placed to manage and supervise farm stations, caused owners to question whether the Government was placing its interests and the national interest ahead of their own.

In the 1970s, the Government finally abandoned this insistence on eventual subdivision of scheme lands into individual farms, in favour of a policy that more marginal lands could be returned to owners as farm stations. Land was returned once owners created a corporate body and, where debts on the land remained, they were financed from moneys available for rural lending as mortgage advances to the trustees or incorporation to which the land was returned. Even so, some schemes were returned with substantial debts, many of which had been loaded against the land without consultation with, or agreement by, owners.

We accept that there are questions over whether the Crown took sufficient care to ensure owners' interests in (and benefits from) the schemes were balanced with the Crown's interests. In many cases, this will require more detailed research on individual schemes. In general, we are of the view that there was no obvious and universal right answer as to the type of farming that was best suited to the needs of Maori owners and their communities. Some groups may well have chosen to forgo greater economic return in order to enable their own hapu members to take up farming. Others may well have preferred the benefit of outside farm management expertise, in order to maximise profits for other ventures. What they all required were adequate mechanisms for consultation and decision-making over the options available. The Crown's failure to provide this, and its determination to continue to pursue one particular type of farming in this region without reasonable

regard for the commercial interests or wishes of owners, was a breach of those owners' Treaty development rights and of the principle of partnership.

While we accept that it was not always possible to successfully develop all the marginal land in a scheme for farming, we are of the view that, in taking control of land for substantial periods and assuming authority for development and debt decisions, the Crown was under a responsibility to take reasonable steps to ascertain the views of owners when it came to major decisions involving debt, and had to share risks equitably. It was not Treaty-compliant for the Crown to insist on protecting its interests, while leaving owners considerably worse off than when they had agreed to allow land to be included in a scheme. Since the Crown gained accepted national benefits from the schemes, the risks in developing such marginal lands had to be shared more equitably. How this might have been implemented in practice would depend on the particular circumstances of each scheme, but more was required than simply ensuring that the land was utilised and that some Maori farmers were employed. The Crown was also under an obligation to take account of the development right of Maori to be able to utilise land in ways that best suited the needs of owners and their communities.

This obligation extended to cases where the Crown allowed the pursuit of activities in the national interest, such as hydro development, that damaged scheme land under Crown control, without taking adequate steps to ensure that such damage was minimal or that adequate compensation took account of impacts on development opportunities. We did not receive sufficient evidence, in this inquiry, to consider in detail the impacts of such activities on development scheme lands, for example around Lake Taupo. We discuss the impacts for Lake Taupo lands more generally in chapter 18. Here, however, we note that, where Treaty development rights are infringed by such national interest works, we follow the principle that such infringement should be minimal and should include compensation to take account of lost development opportunities for retained lands.

During the 1980s, the Government adopted new policies of withdrawing from active involvement in economic enterprises and restructuring Government agencies. A new policy was instituted of returning all Maori land development scheme lands as soon as possible, even if they still ran debts. The basis of return was set at a level of debt that could be serviced by farm operations.⁴⁸⁵ This resulted in another wave of development scheme returns to Maori control during the 1980s and 1990s. We note the brief but helpful legislative overview concerning land development schemes that was included in the appendix to the Crown's closing submission. The administration of the schemes was restructured with the Maori Affairs Restructuring Act 1989, which in effect continued many provisions concerning the schemes from the Maori Affairs Act 1953, with responsibility for development now placed with the chief executive of the Ministry of Maori Development on the disestablishment of the Board of Maori Affairs.⁴⁸⁶ Powers and obligations concerning the schemes were then transferred to the Iwi Transition Agency, which undertook to implement Government policy to have all Maori land development schemes returned to owners as soon as possible. This was generally complete by the early 1990s.

It was submitted to us that some schemes were returned with large debts or in a run-down state, and that owners were faced with significant problems in even retaining their land, let alone beginning to derive financial benefits from it. We do not have sufficient evidence available to us, either to make findings on particular schemes or to offer general observations on the viability of returned schemes. We accept that, in later years, the Government took a more reasonable attitude to the level of debt repayment that was required for schemes with marginal lands. We also accept that policies for write-offs of reasonable levels of development debt were eventually implemented, and that some schemes were recipients of general subsidies and other forms of farm encouragement offered to farmers generally in the years from the 1950s to the 1980s. How these later policies impacted on particular schemes is a matter for more research.

In some cases, land in this region remained stubbornly resistant to farm development, beyond what was generally understood and anticipated at the time the development was carried out. Even after very long development periods, the return for owners was apparently minimal after costs were deducted and debts repaid even at reasonable levels. The extent to which this impacted on owners and was a result of Government actions or inactions is a matter for more detailed research into individual schemes. We have already found that the Government was not under an obligation to ensure that every scheme was an economic success. However, in making decisions about what kind of development would be pursued, when land might be returned, and how costs and benefits might reasonably be apportioned, the Crown was obliged to take reasonable steps to ensure that the economic interests of owners and their communities in this region were identified and properly taken account of. This obligation could not be overridden and had to be considered alongside what was considered to be in the Crown's or the national interest. The Crown had begun to institute mechanisms that could assist with meeting this obligation, such as the owner advisory committees. However, in so far as these committees were not empowered to provide this kind of consultation and advice, the Crown failed to act reasonably to fulfil this obligation.

The trusts and incorporations that were established to manage returned lands for continuing development opportunities have met with varied success, both economically and in meeting wider community development objectives. More detailed research is required to determine how the past administration of the schemes and the way in which they were returned to owners contributed to this subsequent success, or lack of it. While some of these continuing enterprises have been very successful commercially, they now have very large numbers of owners to provide benefits for. They also face far more stringent regulations, especially in terms of environmental regulations, than was the case with earlier farm developments. Given their community obligations, these enterprises are not free to act in

an entirely commercial way with lands that in many cases form the remnant of their ancestral and cultural estate. Government policies impacting on these entities – and on their exercise of Treaty development rights for communities – need to take account of this whole circumstance, rather than being based on the assumption that they are no different from any other commercial enterprise.

Skills and experience

The Maori land development schemes are acknowledged to have been a major Government initiative to enable Maori owners to gain skills and experience in modern farming and agricultural work. Dr Gould presented evidence which indicates that most of this training was practically based, enabling owners and occupiers selected as farmers to learn on the job under supervision. This was intended to enable them to gain the experience and skills they required to run their own farms, once land had been released from the schemes. However, we were told that, while the schemes encouraged Maori to learn farm skills, the emphasis on efficiency and productivity combined with close bureaucratic control to limit the options available to Maori for gaining business and management skills. The Government's failure to successfully promote entities such as trusts and incorporations during the early development period also hampered owners' ability to gain sufficient experience of these entities before taking over the schemes' operation.

Ngata expressed concern that legislative changes in the mid-1930s were likely to give Pakeha supervisors and officials significant control of the schemes and leave little room for the exercise of Maori leadership. We have already noted expert advice from the economist Professor Belshaw, in the late 1930s and early 1940s, that Maori required training assistance in business management and modern administration so that they could take over from the close supervision of the Native Affairs Department. Professor Belshaw warned that the Government needed to provide training in business skills as well as farm work, and that Pakeha managers and supervisors needed to encourage

Maori leadership within the schemes even if it was not quite as 'efficient' as they might like.⁴⁸⁷

However, we were presented with the view of historians that the close practical supervision of farmers in the schemes, in the interests of productivity and repayment of investment debt, severely limited the opportunities for Maori to gain experience, confidence, and expertise in farm management. Professor Ward cites the research of Aroha Harris, which indicates that farmers in the schemes found the close departmental control to be patronising and overbearing, to the point where they felt treated as little more than employees of the Department.⁴⁸⁸ Dr Gould notes that returned servicemen under Crown supervision on Crown development schemes made similar complaints. Unfortunately, we were not presented with any detailed comparisons between the schemes which might have helped us to determine what was considered normal supervision. We accept that, up until the 1960s, supervision was likely to be more overbearing than has been considered acceptable in more recent times. However, the major issue is the overall objective of such supervision: no matter how strict, did it provide opportunities for Maori to gain experience and expertise in farm business management?

In this regard, we note the view of Dr Harris that there was a strong departmental view, which lasted for much of the life of the schemes, that Maori were 'incapable of being good farmers' and that the farming way of life was 'generally unsuited to the Maori temperament'.⁴⁸⁹ The evidence available to us indicates that the training and skills assistance provided through the land development schemes was based largely on the assumption that Maori would become farm workers or small farmers. In addition, the Crown's determination that even marginal lands should be utilised for farming as efficiently as possible and to make repayment a priority resulted in a preference for employing professional managers and skilled farmers ahead of owners. The emphasis on practical farm work was also coupled with a failure to encourage Maori into higher forms of agricultural and farm training. In 1962, for example, it was noted that, while a higher proportion of Maori than

Pakeha were entering farming, far fewer Maori, relatively, were being trained at agricultural colleges.⁴⁹⁰

We note that, from the 1970s, the increased role of owner advisory committees offered the potential for owners to gain experience in the business and management side of farm operations. Through these committees, owners in our region were able to take an increasing role in day-to-day farm operations. From the 1970s, but especially in the 1980s as part of its policy of returning all scheme land, the Government began to make more effort to assist Maori to gain the skills and expertise necessary to run farm businesses and large stations. We do not have sufficient evidence to determine how successful these initiatives were for individual schemes. However, we note that they took place over a relatively short period of time. We received claimant submissions that some felt rushed into forms of management that they had little experience of. In general, we are persuaded that the gradual development of advisory committees and the devolution of responsibility for the day-to-day management of schemes were reasonable steps in the circumstances of the time, although we agree that it may have come too late for some schemes. However, where these committees were limited to day-to-day operations and excluded from business management and strategic decision-making, the opportunity was missed to help build business management expertise. More recently, moves to restructure debt through farm lending services are also likely to have been a useful means of transition towards more commercial business management. However, we received little evidence of the impact that the Government's rapid withdrawal from lending services in the 1980s may have had for owners with newly-returned lands.

We agree that, in general, the level of training and expertise gained as a result of particular schemes is a matter requiring more detailed research. We are persuaded, overall, that the schemes provided significant practical experience of farm work and were successful in enabling some owners to become occupiers and successful farmers. The schemes were subject to strict supervision, and while this was to be expected, to an extent, we are persuaded

that for most of the life of the schemes the Government's chief objective was to ensure that the land was farmed as efficiently as possible without sufficient regard for the likely needs of owners once land was returned. This was reflected in policies that, in general, favoured those who the Government regarded as the most able and efficient farmers, whether or not they were owners or even from the owners' hapu or iwi. In terms of training and expertise, this limited the opportunities open to owners and their communities to gain benefits from the schemes that were conducted on their lands. For long periods, the Government's focus on efficiency lacked corresponding efforts to ensure that occupiers and owners were able to acquire business management experience and expertise. This was in spite of warnings, from the 1940s onwards, that both kinds of expertise would be required to meet the future needs of owners and their communities. The emphasis on encouraging small family farms also limited the possibility of a more flexible approach to considering what skills and expertise might be most useful in this region once land was returned to owners. This was in spite of mounting evidence that, in many cases, the ability to run large farm stations and manage trusts and incorporations was likely to be a major requirement for owners.

We agree that from the 1970s, especially, the Crown began to make more concentrated efforts in this direction. However, the Government's changing policies and its eventual complete withdrawal from the schemes left a relatively short time for Maori to build up necessary expertise. While the impacts will have varied for individual schemes, we note that claimants have identified a continuing need to gain familiarity with, and expertise in, managing and using entities such as trusts and incorporations for development purposes.

Addressing title difficulties

In chapter 11, we considered Crown responses to difficulties created by the system of Maori land title. In terms of the Maori land development schemes, we noted that the Government enabled these difficulties to be sidestepped,

for the time being, while land was developed for farming. It has been claimed before us that, instead of resolving these difficulties, the Crown then pressured owners into agreeing to create individual family farms for the benefit of only small groups of owners or even outsiders. It was claimed that, in many cases, the operation of the schemes also complicated title problems. Even when owners did manage to regain their lands from the schemes, the problems were not resolved. The underlying difficulties just reappeared. This meant that owners still faced continuing difficulties in managing lands with large and scattered ownership interests and utilising such lands in development opportunities in a commercial environment.

The Maori land development schemes illustrate how difficult it was for Maori owners to overcome title barriers to use their land for development. This was especially the case where lands were generally marginal and the costs of settling and rearranging title to enable farming were beyond what communities and owners could afford. In such cases, and with problems exacerbated by increasing economic hardship, Maori leaders appear to have become resigned, by the late 1920s, to agreeing to significant Government intervention, supported by legislation and requiring significant infringement of ordinary ownership rights, to set land aside in viable blocks and undertake farming development. In this situation, owners were given little choice but to agree to the schemes, and the Government took on an obligation of trust, in taking such powers, to ensure that owners' rights and interests were protected for the future. Ngata was careful to ensure that the schemes did not remove all rights of ownership, and it was assumed that land would eventually be returned to owners for them to continue to utilise for their benefit. This was accepted, in principle, by successive governments. However, the return of land was considerably more complicated than the term suggests when numerous and scattered interests were involved and underlying title continued to fragment as generations passed.

Initially, the development schemes simply set aside underlying title problems and placed a priority on

emergency economic needs and their resolution through farm development. This was achieved, as noted, by legislative provisions giving the State significant legal powers to control land gazetted within the schemes. At the same time, the work of establishing and implementing the schemes inevitably complicated underlying title issues. For example, there is evidence of confusion over the amount of Maori land originally included within some schemes. There is also confusion about whether it was intended that all this land would be farmed, or whether some was intended for contributory land uses, or as extra security for the Government's investment which could be released as the schemes progressed.

It seems that, in establishing the schemes, Ngata assumed that farming would be the main focus, but that he also believed that some flexibility in land use would be required to ensure that farming, and the needs of owners and their communities, were supported as far as possible. For example, the Haparangi scheme was established in 1935 as a tree plantation, intended to provide additional employment in milling as well as timber for fencing and other farm scheme needs. Other blocks were initially acquired and gazetted as schemes in order to provide healthy land for resting stock in cobalt-deficient areas, before a solution was found to this problem. Then, as more Government investment was committed and owners' agreement was obtained for including more land, some blocks were rearranged and re-subdivided so as to make better economic use of the land. In some cases, the viability of schemes was enhanced by exchanging Crown and owner interests or adding areas of Crown land. Ngata appears to have expected to have the flexibility to rearrange land in and between schemes and make changes in land use within a scheme, in order to best meet owner and community needs.

This flexibility, while assisting with economic viability for communities of owners, inevitably added to underlying title complications, especially if it was to be assumed that individual interests would be the main basis on which land would eventually be returned. As we have noted, by the late 1930s economic and demographic changes indicated

that retained lands could no longer be expected to be the sole support for rapidly-growing Maori communities. A decline in rural employment opportunities combined with a rapidly-growing Maori population to place further pressure on title. Attempts at consolidation and exchanges of title became increasingly impractical. This would have been true even if the Government had adequately resourced such work. As the Government was warned, it was time to consider assisting Maori into new forms of allied rural businesses, as entrepreneurs as well as workers. The Government also needed to consider how the schemes could best fit with the needs and rights of Maori landowners and their rural communities, and look forward to how best to ensure these needs and rights were considered when land was returned.

As we have noted, the Crown reviewed the operation of the schemes in the 1940s and began a new round of schemes with more clearly defined goals and policies. However, this was all based firmly on the assumptions that, first, the schemes should, as far as possible, promote the utilisation of land for farming and, secondly, once land had been developed and investment costs repaid, the land title should be divided as far as possible into that based on individual family farms. This was, of course, the most successful form of farm operation in New Zealand, but it also supported Government objectives of utilising as much land as possible for farming and assimilating Maori into individualised land holdings.

These preferences were reflected in policies, as we have noted, that primarily promoted efficiency in farming and the repayment of debt. There was also an emphasis on choosing the best farmers possible to become occupiers, regardless of whether they were owners or from owner communities, along with a focus on encouraging security of tenure for occupiers and on encouraging a reduction in 'inactive' ownership as much as possible. The Government's focus increasingly shifted to encouraging efficient farming of scheme land, on the assumption that this would inevitably benefit owners as well as being in the national interest, but without corresponding regard for the particular



Sheep at the Wairakei Farm Settlement, Taupo, with Mount Tauhara in the background (1960s). The online information concerning this image (accessed via <http://timeframes.natlib.govt.nz>) notes that the Wairakei Farm Settlement was established in the 1950s by the Department of Lands and Survey, on 4030 acres of land mainly covered in fern and manuka.

situation of schemes within this region or for the needs and preferences of particular groups of owners.

While the view that what was in the national interest would also benefit owners had some legitimacy, and while the Crown had a reasonable right to protect its development investment, the Crown had a corresponding obligation to consider owners' development rights and interests, both for themselves and for their communities. This was particularly so in the practical circumstances of this inquiry region. It became especially significant once it became evident, in the late 1930s, that the Government's preferred option of family farms could not possibly support all owners, especially in this region. We had evidence presented to us, for example, that these policies led to situations where owners had to fight for long periods to have lands released from the schemes, even when they

were clearly of considerable cultural value. Dr Hearn referred to the long struggle of Ngati Turamakina, a hapu of Ngati Tuwharetoa, to have land that had been gazetted in early development schemes released for marae, urupa, and education purposes.⁴⁹¹

We also heard evidence from a number of claimant witnesses, as we have noted, of frustration at being excluded from opportunities to farm family land as a result of policies that focused on the most efficient farming possible, regardless of community and owner preferences. A number of submissions noted that the Crown's continued emphasis on creating individual family farms – and encouraging rearranging title as a consequence – resulted in losses of interests and unnecessary title complications. These could have been avoided, had there been more consultation with owners and had some land been run from a much earlier period as

large stations managed by hapu or incorporations.

We have previously noted that owners accepted, from the schemes' inception, that viable farming would need agreements to reallocate or adjust their interests in lands set aside for the purpose. What owners and their communities required was the ability to make their own decisions on these matters and retain some kind of tribal oversight. Ngati Tuwharetoa and Te Arawa hapu indicated to the Government early in the twentieth century that they were willing to set aside land to enable some of their members to take part in farm settlements. They were agreeable to various kinds of farming, according to what seemed most economically viable at the time, and the advantages this might bring owners and their communities. We were presented with evidence, for example, of lengthy efforts by Ngati Tuwharetoa to establish dairying around parts of

Lake Taupo, in order to support some owners while also contributing to the support of core communities. There was a clear expectation of some overall tribal input into how this farming might assist overall community development objectives. The Stout–Ngata commission reported, between 1907 and 1909, on Te Arawa wishes to establish large hapu farms on some of their lands, but this was largely ignored in favour of an emphasis on developing individual family farms in the district. Even so, Te Arawa leaders were also ready to welcome the possibility of family farms if they could be made viable. Ngata himself often spoke in favour of family farms, if they could offer benefit to communities and remained under the ultimate direction of tribal leaderships. In all cases, however, it was expected that communities themselves would decide how and whether title needed to be rearranged and what part of their lands might be given over for farming.

We have explored the issue of title in more depth in part III of this report. We have also considered the options of trusts and incorporations, as they were established and gradually reformed, as mechanisms that – while not fundamentally addressing issues of title – at least allowed owners to overcome difficulties of title in order to manage their land more effectively. By using these mechanisms, owners were able to assert their full rights as property owners, including being able to use land for commercial business purposes. Trusts and incorporations became a significant means of returning development schemes to owners from the 1950s, and the Crown submitted that this provided a reasonable solution to the problem of enabling land to continue to be managed for development purposes.

In this inquiry region, trusts and incorporations were frequently used as legal mechanisms for the return of land. This was one means of enabling owners to avoid further individualisation of title. Such a model could have been used for schemes from their inception, and might well have avoided some of the problems with title and owner participation that were complained of during the schemes' operation. It is not clear, from the evidence available to us, why it was decided at the time the schemes were established not

to take advantage of the opportunity to use the land incorporation model for owners, when it had been available from the mid-1890s. We have noted that for some years it was very difficult for owners to form land incorporations. However, with Government backing and the encouragement provided by the schemes, it would seem, on the face of it, that such entities might have been useful in avoiding later problems with title and enabling more owner control and input. Possibly Ngata always assumed that some form of modernised system of incorporations, with more powers, would be developed at a later stage. However, at the time the schemes were established he does not appear to have seriously considered this option.

We can only observe, from the limited evidence available to us, that Ngata may not have been confident that the existing incorporation model was adequate for what was required, even though, as we have noted, he had made a number of efforts during the 1920s to enhance their powers. He may also have doubted that he could obtain Government support to extend the Crown land development scheme to Maori land if incorporations were involved. As we have previously noted, at that time the Crown was reluctant to promote incorporations if it was thought there was any chance that individual farm ownership could be encouraged instead. In the emergency situation of the 1930s, it may also have been considered too time-consuming and costly to go through the process of incorporating before establishing a scheme. Instead, Ngata appears to have been initially confident that the process of exchanging interests and consolidating titles, if pursued aggressively, would solve many of the problems of translating scattered shares in land into viable farm blocks.

This situation had clearly changed by the 1940s, when the schemes were reviewed and their operations further clarified and regularised. This would have been an opportune time for the Crown to begin to more actively encourage incorporations, and indeed this did happen on returned lands. However, the Crown's continued emphasis on creating individual family farms in this region, even where it was a noticeably less viable form of farming, resulted in a

missed opportunity for owners to gain experience in managing such enterprises with Crown encouragement and assistance before they were left on their own with their returned lands. We note the increasing use of owner advisory committees, which did offer a potential mechanism for protecting and recognising owners' interests and their preferences for title resolution. The Crown also had other forums available for consultation, such as the Maori War Effort Organisation and wider tribal leaderships. Some of the members of the owner advisory committees later became involved in management committees for trusts and incorporations once land was returned.

However, on the evidence available to us, these committees remained limited in terms of consultation and decision-making. The Crown retained powers, for example, to decide how and when land would be returned, even during the relatively hurried final return of lands in the 1980s and 1990s. The experience of owners in resolving issues of title in individual schemes requires further research. However, in general, the Crown's emphasis on what it perceived to be the national interest, and its continued pursuance of policies of assimilation, without concurrently providing suitable mechanisms that could adequately protect owners' interests in recognising and resolving title problems, were a failure of its obligation to actively protect the Treaty rights of owners in their lands.

We also received some submissions which claimed that trusts and incorporations, while enabling land to continue to be used for commercial purposes, carried limitations that were not faced by other landowners seeking to commercially utilise and benefit from their land. We do not have sufficient evidence to make findings on how successful these entities were for development purposes in the Central North Island. We have received evidence on a range of trusts and incorporations in this region, including some that were established to manage land returned from development schemes, as well as others that were established for a variety of purposes. These purposes included managing land released from leases under Maori land board supervision, and managing land vested as a result

of Maori Land Court orders to pay rates and other fees. Although more research is required into individual cases, this evidence indicates that, in general, and as we have noted previously, these entities at least offered the potential to overcome title problems so that land could be used for commercial purposes. This included enabling land held in multiple title to be managed for legally recognised and enforceable business decisions, enabling lending finance to be obtained, and negotiating business deals and other arrangements for land.

We have noted that, in many respects, the major issues with these entities centred on the extent to which they enabled owners to retain meaningful control when entering commercial arrangements. In chapter 11, for example, we noted the mechanism of responsible trustees, which could in some circumstances reduce owners' participation in management. We have also noted that trusts and incorporations were subject to considerable restrictions for most of the twentieth century, including, in some cases, restrictions on the enterprises they could participate in and how income might be used. In some cases, the restrictions were imposed by the Maori Land Court to provide protections for owners. It was suggested before us that owners were not encouraged to fully engage in development opportunities as they chose until the more fundamental reforms that began in 1974 and continued with the Te Ture Whenua Maori Act 1993.⁴⁹²

We note that trusts and incorporations continue to face legal restrictions and obligations, often for owners' protection, which nevertheless create burdens that other commercial businesses do not face to the same degree. There is, for example, the need to keep records of numerous owners and to have regard for wider community benefit. Many of these entities now represent many thousands of owners, who can no longer expect significant economic support even from those entities that have achieved considerable commercial success – as a number have in this region. Although a number of trusts and incorporations in this region now achieve a significant annual turnover of income, because the number of owners they represent has

also significantly increased, even commercially successful entities now focus on providing support in the form of community projects, cultural activities, and special projects such as educational scholarships.

In addition, in some cases, entities that have only relatively recently re-acquired lands from schemes and leases face considerable difficulties and restrictions, which limit their ability to continue developing their lands. In a number of cases, land has been returned from schemes or leases without adequate access or surveys. In other cases, returned land is now subject to local authority or national restrictions, such as those related to environmental issues. This can curtail potential land uses, which in turn limits the commercial returns that are required in order to pay the costs of retaining such land. At the same time, as the remnant of the tribal estate, such lands are not easily traded commercially for lands with more commercial potential. That is in accordance with owners' wishes, as reported to us. But such underlying difficulties and circumstances need to be recognised and taken account of in policy decision-making, as part of the Crown's obligation to protect the Treaty rights of Maori that include their rights to develop their properties and as a people.

The Tribunal's findings

We agree with parties before us that, in general, farming remained an important development opportunity in the twentieth century, and that the Maori land development schemes were a major Crown initiative in this region to address barriers faced by Maori in utilising their lands for farming opportunities. In particular, the schemes provided significant assistance to overcome title difficulties, gain investment finance, and obtain some of the training and skills necessary to enable owners to participate in farming opportunities of benefit to themselves and their communities. The success of the schemes and the benefits they provided for owners varied widely in this region, and it is not possible for us to make findings on individual schemes in this inquiry.

In general, we have found a strong theme running through the claims presented to us concerning the implementation and operation of the development schemes in this region. This concerns the extent to which the Crown, in taking significant legal powers to overcome title problems, provide investment funding, and develop farm skills and expertise, also took reasonable steps to protect the autonomy and Treaty development rights of owners to participate in decision-making over their lands. These reasonable steps included setting objectives for the schemes that met Maori needs and preferences, and allowing participation in the schemes in ways that contributed to the development of owners and their communities. It was claimed that, in placing significant powers in the hands of officials, the Crown failed to provide adequate mechanisms to ensure that owners' rights and preferences were recognised and protected. This resulted in policies and actions that gave priority to the Government's objectives of pursuing the perceived national interest, protecting its investment, and pursuing policies of assimilation and individualisation of Maori communities, to the detriment and prejudice of the owners and their communities.

We accept that some lack of clarity and infringement of owners' rights was probably unavoidable when the first schemes were established in the emergency economic situation after 1929. It was also reasonable for the Crown to seek some security for its investment, reasonable powers to implement the development work, and some flexibility in the operation of the schemes. In the circumstances of the time, the Crown had a number of mechanisms open to it to review schemes and to change and adapt policies as required. These included the periodic reviews of the schemes undertaken over the lifetime of the initiative, and mechanisms for consultation with owners and their communities, including the legal provision for owner committees that was provided by Ngata from the outset, as well as other wider forums for consultation. The latter included conferences, the Maori War Effort Organisation in the 1940s, Maori representation on the Board of Maori Affairs, and periodic meetings with tribal leaders.

We agree that, in general, the Crown accepted that owners needed to consent to their land being included in the schemes. However, we do not accept that owners had full freedom of choice in this matter, as for most of the twentieth century Maori who wished to farm their land had little alternative, and many communities faced severe hardship. Nor do we accept that consent meant that owners could expect no further rights in the schemes until lands were returned. The Crown had a Treaty obligation to protect owners' rights of development as the schemes were implemented and operated. It had an additional obligation of trust, in taking such extensive powers to undertake development, to take clear steps to ensure that its implementation and operation of the schemes recognised and protected the rights of owners and their communities as far as possible. We do not accept that the schemes were no more than a business arrangement between owners and the Crown as developer. From the beginning, the Crown (particularly the Native Minister) accepted that the schemes were also important for wider Maori community development.

The Crown had a number of mechanisms available to it to provide for adequate consultation with owners and for owners' participation in decision-making. However, the original owner committees were disestablished in the 1930s. Later owner representation, from the late 1940s, was limited in scope and function. It was not until the 1970s that owners gained a more meaningful say and participation in the management of the schemes, and even then the Crown retained authority over strategic decision-making, including when and how land might be returned from the schemes. We accept that the Crown had a right to protect its investment interests and to pursue its own objectives, but this could not justify it ignoring or overriding the rights of owners. The Crown failed to take reasonable steps, in the circumstances, to provide for adequate owner consultation and participation in decision-making, and to ensure that the policies it implemented infringed their rights and preferences as minimally as possible. This was a breach of the Crown's obligations to actively protect the

Treaty development right of owners, to act in partnership with the owners, to consult them on matters cardinal to their interests, and to respect and give effect to their autonomy.

This failure by the Crown to provide for adequate consultation and minimal infringement of owners' rights had significant impacts for owners and their communities in a number of areas. These impacts included the financial management of schemes, where the State sometimes required levels of investment protection and debt repayment that were in excess of what was appropriate for marginal lands at the time and without regard to the circumstances in which many early schemes, in particular, were established. Farming was placed (for the national good) ahead of a more flexible approach to what was most economically beneficial for owners and their communities in this region. In our view, the Crown's obligations did not require it to ensure that each scheme was economically successful. We also recognise that the Crown had the right to assert reasonable control over the development process to protect a fair repayment of its investment and to enable development to be undertaken. However, in taking significant powers over lands through the schemes, the Crown had an obligation to manage those lands in ways that recognised owners' interests and objectives as well as the Crown's interests. This included encouragement with experience and expertise in business management as well as farm work.

It is not reasonable to expect the Crown to have necessarily foreseen all the problems and difficulties that arose with some of the development schemes; nor to expect the Crown to have foreseen all changes in economic and other factors that impacted on the viability and profitability of the schemes throughout their duration. However, we note evidence of regular reviews of the schemes. We find that it was reasonable, with such an important initiative, sustained over such a long period, for these reviews to have considered how the schemes were likely to meet changing owner and community requirements, as well as how they could be made more efficient. We agree that there were

no necessarily 'right' answers to some of the issues faced by the schemes, which included the appropriate balance between commercial imperatives and the encouragement of family farming, the balance between the rights and obligations of occupiers (including outsiders) and owners, and the question of how land might be returned. Striking an appropriate balance in any given scheme required effective mechanisms for meaningful consultation and consideration of owners' rights and preferences. It was not consistent with the Treaty for the Crown, alone, to decide what interests and objectives would be pursued. Nor was it reasonable to unilaterally apply new criteria and requirements to schemes that had been established under quite different circumstances and with different objectives – here we refer in particular to those schemes established before 1949. We agree that, in many cases, parties did hold similar objectives for the schemes, and that it was possible to resolve differences through partnership. However, the Crown's failure to adequately provide for such partnership, and its decision to rely instead on the powers it gave itself, was a failure to actively protect Maori Treaty rights.

In making the land development schemes its primary means of assisting Maori to develop their retained lands for farming, the Crown had a responsibility to ensure that the schemes were flexible enough to take account of a wide range of development requirements for Maori land. This included reasonable provision for the needs of those Maori of the region whose lands were left out of the schemes or who needed to find some alternative to farming in order to support themselves and their communities. By not exercising its responsibilities, the Crown failed to take reasonable steps to actively protect these Treaty interests.

The land development schemes sidestepped the title problems faced by owners seeking to develop and manage their land for farming, by suspending many of the normal rights of ownership during the development period in favour of departmental management. Owners agreed to the Government taking some degree of control when they agreed to include their land within the schemes. However, the Crown was still obligated to suspend owners' rights

only to the extent required for land development operations, and then only for as short a time as possible. In taking a management role over land within the schemes, the Crown took on a duty to protect owners' interests in their land to the greatest extent possible and to find ways of eventually returning land to owners under a form of title that enabled them to continue to take advantage of development opportunities.

Where it was necessary, for reasons of national interest such as the development of hydro power, for the Government to allow the land development schemes to be limited or restricted in some way, appropriate compensation was required, extending beyond damage caused to land within the schemes. The Crown also had an obligation to consider the communities affected by such limits and restrictions on development and to provide appropriate redress or assistance with alternative forms of development.

In assisting Maori owners to overcome barriers to developing their lands for farming, the Crown had an obligation to take reasonable steps to assist them to develop skills and experience in farm and agricultural work. In large part, this obligation was met. There was a further obligation to assist with the skills and experience identified as likely to be necessary for owners' continuing participation in land development opportunities once land had been returned. These included, for example, skills and experience in debt management, governance, and administration of entities such as trusts and incorporations, and the operation and management of farming businesses. In our view, this obligation was not so well provided for.

CONCLUSIONS AND FINDINGS

We have considered the general evidence available to us, in order to answer the questions we posed at the outset for Maori Treaty development rights in farming in the Central North Island inquiry region. We have found that, even in districts with marginal lands, farming was identified as a

significant potential development opportunity in the nineteenth century. The Crown encouraged Maori to use their lands for farming. Maori were also persuaded that they could alienate some land without harm, because of the opportunities they would gain for their remaining land. Although large areas of this inquiry region were found to be stubbornly resistant to various forms of farm development, other parts were considered farmable, and this proportion increased as modern farming practices were progressively introduced to the region.

The Crown, therefore, had an obligation to protect iwi and hapu in the retention of sufficient lands to enable them to participate meaningfully in farming. A failure to take account of this obligation was a breach of the principle of active protection and of their Treaty development rights. A failure to take account of whether lands in the Kaingaroa, Rotorua, and Taupo districts were suitable for farming meant that the Crown failed to adequately ensure that its policies and programmes recognised that the quality of retained Maori land was crucial, if farming was to be able to significantly support iwi and hapu communities.

We have concluded that prevailing laissez faire economic philosophies of the nineteenth and early twentieth centuries did not prevent governments from taking an active role in promoting economic enterprises, if they were identified as important for national growth, or from providing active assistance to some sectors of the community to participate in those opportunities. From the beginning of colonisation, governments also accepted responsibility for actively assisting Maori.

In the period from the 1890s to the 1920s, in particular, the Government actively assisted New Zealand landowners with limited capital to gain access to rural lending to develop lands for farming. It actively established training, advisory, and regulatory services to assist and encourage the development of export-based production of refrigerated farm products. The Government also recognised an obligation to assist Maori to farm their land. In renewing its policy of purchasing 'unutilised' Maori lands in 1905, the Government promised to provide assistance

and guidance to Maori who wished to farm their land. However, the Government then relied on existing barriers, such as title difficulties and difficulties with debt management, to resile from such promises. It failed to take steps to require officials to relax their hostility towards lending on Maori land.

The Crown failed to take reasonable steps to extend the Advances to Settlers rural lending fund to owners of Maori land, while legislation to prevent private dealing in Maori land significantly restricted Maori access to private sources of mortgage lending finance. Although, technically, the advances fund was extended to Maori land, this was most probably accidental and almost completely undermined by the way in which officials were allowed to implement the scheme. It would, potentially, have been compliant with the Treaty for the Crown to have provided alternative sources of state funding more targeted to Maori needs.

Although the Crown recognised the need for such funding, it failed to take reasonable steps to ensure that it provided Maori borrowers with access to development finance on an equivalent basis with other citizens. The systems established for Maori borrowers gave much more limited access to sources of state finance and were further undermined by the way that lending was implemented. These failures also limited the ability of Maori land incorporations, which began to be established from the 1890s, to gain adequate lending finance for farm development.

The Crown failed to take reasonable steps to ensure that the system of Maori land councils and boards, which was established in 1900, was able to provide adequate access to sources of state lending finance, even while it increased their powers to lend money and initiate farm development. Instead, the Crown allowed this separate system to become an excuse for the increasing exclusion of Maori from access to general state lending finance. As a result, by the 1920s Maori landowners were restricted to a rapidly dwindling pool of mainly Maori sources of lending finance. The Crown also failed to adequately provide some reasonable contribution to resourcing Maori land boards to undertake some of the initial setting aside of land and

providing access to farm blocks, which it nevertheless did provide, through the waste lands boards, to prepare Crown lands for settlement in the national interest. In failing to take reasonable steps to ensure that Maori landowners were able to access either the main state sources of rural lending or a separate state system of equivalent sources of lending more particularly aimed at Maori needs, the Crown breached Maori Treaty development rights and article 3 equity guarantees.

The Crown failed to implement any of the reasonable steps proposed before 1929 for assisting Maori with training and farming advice, including those made by its own commissions of inquiry. This failure was a breach of the Treaty right of development for Maori of our inquiry region, and a breach of article 3 rights to positive assistance that was at least equivalent to that offered to other sectors of the community.

The Crown's failure to take reasonable steps to assist with lending finance and the provision of training and skills that could enable Maori to exercise their Treaty development right to utilise their lands for farming is likely to have caused prejudice to Maori communities in the Central North Island. We accept that many parts of this inquiry region were recognised as being marginal for farming, and that for this reason they may have been turned down for normal rural lending. However, we note that the Government regularly made changes to its Advances to Settlers scheme, in cases where difficulties were identified for particular groups of settler farmers.

Reasonable Maori access to state lending would have identified such difficulties in parts of this inquiry region, and alerted the Government earlier to the need for additional or alternative forms of assistance. This would have included recognition of the need to focus on development other than farming in some places. Instead, the lack of access to state lending contributed to an assumption that Maori were incapable or unwilling to farm. In parts of this inquiry region, Maori had begun to develop their land for farming by the 1920s, but they were limited by inadequate funding and continuing title difficulties. Expert advice

provided to the Stout–Ngata commission indicated that large hapu farms could be viably established in parts of this region. Large-scale, station-style farming was also being undertaken in parts of the region by Pakeha landowners.

These failures are likely to have contributed to the economic marginalisation of Maori in this region by the 1930s. A full assessment of any claims regarding underdevelopment during this time, however, also requires a consideration of other possible development opportunities. We consider these in more detail in chapters 15 and 16.

The Crown's insistence on limiting the lending it made available to Maori land held, as far as possible, in individual blocks with single owners failed to protect development rights for iwi and hapu communities. This impacted negatively on the autonomy of communities and their ability to undertake farm development on their retained lands for the benefit of their wider needs and objectives. Government policies caused prejudice to community development through a continued focus on encouraging the utilisation of Maori land for small family farms, rather than protecting the ability of Maori communities to utilise their lands for farming opportunities that would meet their needs. The Crown's failure to include Maori land within state guarantees for lending, at a time when state rural lending policies had a powerful influence on private lenders, is also likely to have caused long-term prejudice for iwi and hapu. It is likely as well to have contributed to the long-standing and persistent prejudice of private lenders against lending on all forms of Maori land.

It is clear that Maori land development schemes, which were established from 1929 to enable Maori retained lands in this region and elsewhere to be used for farming, were a major Crown initiative to address the barriers that Maori faced in utilising their lands. In particular, the development schemes provided a significant means of sidestepping title difficulties, gaining investment lending finance, and providing training and supervision for chosen owner-occupiers to participate in farming opportunities. The success of individual schemes, and the benefits they provided for

owners, varied widely in this region. It is not possible for us to make findings on individual schemes in this inquiry.

In general, claimants acknowledged that the schemes were an important Crown initiative to enable retained lands to be farmed. However, a strong theme in claims submitted to us concerning the schemes in this region was the allegation that the Crown, in taking significant legal powers to sidestep title problems and provide investment funding, farm skills, and expertise, failed to take reasonable steps to protect the autonomy and Treaty development rights of owners and their communities. Such reasonable steps included participation by Maori in decision-making and setting objectives for the schemes, and consultation over how the schemes might best contribute to the needs and preferences of owners and their communities.

We have found that, in placing significant legal powers in the hands of officials, the Crown failed to take reasonable

steps to ensure that owners' rights were adequately protected and infringed as minimally as possible. This resulted in policies and actions over such matters as the financial management of the schemes, the balance between the rights of owners and outsider-occupiers in schemes, and the kind of farming and development that was pursued that led to the exclusion of owners from effective participation in the schemes. Instead, the Crown's policies and actions gave priority to its own objectives of pursuing the perceived national interest, protecting its investment, and pursuing the assimilation and individualisation of Maori communities. This was to the detriment and prejudice of the right of owners to have the development schemes managed for the benefit of their communities.

SUMMARY

- By 1890, the main barriers to Maori participation in development opportunities were the state of their land titles, the Crown's failure to provide an effective governance mechanism, resultant limits on their ability to accumulate or borrow capital, and a lack of skills and expertise. The Crown was fully aware of these barriers.
- The 40 years from 1890 to 1929 were crucial for farm development in New Zealand. During that period, the State thought it appropriate to take an active role in the development of farming. It provided settlers with titles to ready-made land blocks, complete with access and infrastructure, as well as training and targeted financial assistance in the form of the Advances to Settlers scheme.
- During that period, Maori pressed the Crown for the same or equivalent assistance. Governments of the day recognised that Maori had a right to such assistance but failed in practice to provide it. This was a breach of the Treaty development rights and article 3 rights of Central North Island Maori.
- As a result, the possibility of creating large-scale hapu farms in the Central North Island at this time was foreclosed, more Maori land was alienated, and Maori continued to be castigated for leaving their remaining lands to lie idle and 'unutilised'. Their opportunities for farm development were 40 years behind the rest of the nation in 1929. Opportunities to develop skills, experience, and capital had been denied, while in the wider community

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the belief was perpetuated that Maori land was a worse risk for private lenders than were the classes of land and settlers (previously considered too great a risk) that the Crown had assisted.

- From 1929, Maori land development schemes were a significant Government initiative in the Central North Island, assisting Maori to sidestep difficulties of title, access to finance, and lack of expertise. Many schemes were ultimately successful and provided their owners with viable farms upon their return. This was a significant result in terms of farm development for Central North Island Maori.
- The manner in which the schemes were created and operated, however, was not consistent with the Treaty in certain respects. In particular, the schemes were initially planned with wider hapu community development in mind, and in anticipation of significant input from owners and tribal leaders. These aspects of the schemes were not maintained.
- The schemes were run in a way that largely excluded owners from participation in decision-making, despite their protest and the availability of mechanisms for their consultation and participation. As a result, the Crown took too much power to itself, and we are not satisfied that debts were always loaded fairly or that land was returned appropriately or promptly. Ultimately, the Crown gave up its vision of very individualised small farms, but too late to prevent delays in the return of much of the land to incorporations. Some land was returned too late to be properly developed now in commercial terms.
- This degree of infringement of the tino rangatiratanga of owners and their communities was unnecessary and in breach of the Treaty. As a result of this Treaty breach, the farm development schemes were less appropriate, and ultimately of less use and effect, for owners and their communities than had been possible or than they had wanted. This was to the prejudice of Central North Island Maori.

Notes

1. For example Michael Sharp and Jolene Patuawa, generic closing submissions on twentieth century land administration, 6 September 2005 (paper 3.3.81), p 21; Richard Boast, reply submissions on nineteenth century land alienation in Taupo, Kaingaroa, and Rotorua, October 2005 (paper 3.3.143), p 9; Kathy Ertel, closing submissions on behalf of Ngati Te Rangiunuora and Ngati Rongomai, 2 September 2005 (paper 3.3.71), pp 115–116

2. For example Michael Sharp and Jolene Patuawa, generic closing submissions on twentieth century land administration, 6 September 2005 (paper 3.3.81), pp 21–22; Richard Boast, generic submissions on nineteenth century land alienation in Taupo, Kaingaroa, and Rotorua, 1 September 2005 (paper 3.3.58), pp 45, 48–49; Kathy Ertel, closing

submissions on behalf of Ngati Te Rangiunuora and Ngati Rongomai, 2 September 2005 (paper 3.3.71), pp 115–117

3. For example Michael Sharp and Jolene Patuawa, generic closing submissions on twentieth century land administration, 6 September 2005 (paper 3.3.81), p 38

4. Ibid, p 39

5. Ibid, pp 39–40

6. For example *ibid*, pp 29, 43–47; Kathy Ertel, closing submissions on behalf of Ngati Te Rangiunuora and Ngati Rongomai, 2 September 2005 (paper 3.3.71), pp 119–122

7. Kathy Ertel, closing submissions on behalf of Ngati Te Rangiunuora and Ngati Rongomai, 2 September 2005 (paper 3.3.71), p 135; Karen Feint, closing submissions on behalf of Ngati Tuwharetoa, 9 September 2005 (paper 3.3.106), pp 239–240

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8. Karen Feint, closing submissions on behalf of Ngati Tuwharetoa, 9 September 2005 (paper 3.3.106), pp 227, 246–7
9. A wasting disease in sheep. In the 1930s, its cause was identified as a deficiency of trace amounts of the mineral cobalt.
10. For example Martin Taylor, generic closing submissions on political engagement, tourism, and geothermal issues, 2 September 2005 (paper 3.3.67), p 49
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TOURISM AND INDIGENOUS FORESTRY

In the previous chapter we considered a possible Treaty development right for hapu and iwi of this inquiry region to utilise their lands in farming. We found that the Government pursued a number of policy initiatives to encourage farming nationwide, and also in our region. This chapter is concerned with two significant economic opportunities, tourism and indigenous forestry, which were identified as important in this region from the nineteenth century. These opportunities had the potential to utilise the properties and resources of outstanding natural interest or beauty, and the quality indigenous timber, that were found in many parts of the region. They were not regarded as having quite the same long-term national economic significance, nor the same potential to achieve social and political objectives, as was the case with farming, and they were therefore not subject to the same strong focus of national Government policies. Nevertheless, they were identified from an early period as likely to have significant economic potential in this region, especially where lands were otherwise proving marginal for farming.

ISSUES

The claimants' case

The claimants submitted that the tourism and indigenous forestry industries were significant development opportunities for iwi and hapu with retained lands and resources in this inquiry region, from at least the 1870s and 1880s. As such, when it became interested in acquiring lands in

the region, the Crown had an obligation to protect iwi and hapu in sufficient lands and resources useful to these industries, so that they were able to participate in them. Instead, the Crown targeted these properties for the purposes of settlement and the perceived national interest without adequate regard for, or protection of, iwi and hapu development interests. This meant that some iwi and hapu of the region were left without properties that they needed to participate in these enterprises.

The claimants submitted that the Crown had an obligation to actively protect the Treaty development right of iwi and hapu with retained properties and taonga that they wished to use in the tourism and forestry industries. This duty of active protection included assisting them to overcome the barriers they faced in participating equal in the field with other sectors of the community. Barriers to participation in these opportunities that were identified at the time were difficulties with land title and problems gaining access to investment finance. The Crown's failure to take reasonable steps to address these difficulties resulted in the exclusion and marginalisation of Maori communities from these industries, and this created economic and development prejudice for them.

It was claimed that, by actively participating in and regulating the tourism and indigenous timber milling industries, the Crown had an obligation of active protection of Treaty development rights for iwi and hapu. This required the Crown to take account of the way its policies and procedures might impact on iwi and hapu development rights to utilise their properties in these opportunities, including

their right to make decisions and participate in ways that met the objectives and needs of their communities. The claimants alleged that the Crown implemented policies and procedures that failed to adequately take account of their development rights. These included the use of proclamations and other legal means to restrict private land dealings (which constrained the ability of iwi and hapu to participate in forestry and tourism), and regulations for conservation purposes that failed to recognise or adequately compensate iwi and hapu for the loss of their development rights. It was alleged that this caused significant economic prejudice and undermined the ability of iwi and hapu to provide for the economic and cultural needs of their communities.

The Crown's case

The Crown warned us to be careful of the dangers of applying present-day concepts of industry and enterprise to activities that were in a simple and rudimentary state in the nineteenth century. The Crown submitted, for example, that the claimants had overstated both the importance of tourism as an industry in the nineteenth century and the Crown's ability to identify it as a significant development opportunity at that time. The Crown submitted that tourism, as a significant enterprise, did not become established in the region until later in the twentieth century. The Crown could not be expected to have foreseen this development earlier.

The Crown submitted that, in the period before the 1880s, it did not recognise indigenous forestry as a major development opportunity. It was more interested in acquiring land and clearing forests for farm settlement than in considering indigenous forests as a development resource. The Crown was not involved in many of the early transactions between private timber millers and Maori landowners concerning these forests on retained Maori lands, and could not be held responsible for them.

Claims that Maori were marginalised from resources useful for tourism, the Crown submitted, were best

considered as part of land alienation or public works issues. It denied that there were any racist motives in acquiring resources from Maori for tourist attractions.

The Crown submitted that the indigenous forestry and tourism industries, as development opportunities, were not fully representative of the inquiry region as a whole and therefore not suitable for generic consideration. Indigenous forestry was really only important in parts of the Rotorua and Taupo districts. Insufficient evidence had been presented on tourism for the whole region; the only real focus was on some of Rotorua's geothermal attractions. This was not enough to allow an assessment of Crown actions with regard to tourism across the region as a whole.

The Crown reminded us that ownership of a resource useful for forestry or tourism did not necessarily guarantee success and prosperity in a commercial business utilising this resource. Other factors, such as sufficient capital, and skills and knowledge, were also important and not necessarily within the Crown's control. The Crown relied on the analysis of Gary Hawke that the Government was practically limited by what it was thought possible for the Crown to do in actively assisting Maori in the tourism and forestry industries in the nineteenth and early twentieth centuries. At the same time, much of the framework for economic growth and progress provided by the Crown, such as roading for access to tourism sites, was also available for Maori benefit. The Crown submitted that there is no Treaty principle that requires a reasonable Treaty partner to actively foster Maori business within the tourism sector. It submitted that recent court cases, such as *Ngai Tahu Maori Trust Board v Director-General of Conservation* and *Te Runanganui o Te Ika Whenua Inc v Attorney-General*, have confirmed this in finding that, no matter how liberally Maori customary title and Treaty rights might be construed, new enterprises such as tourism and whale-watching are remote from anything that was, in fact, contemplated by the original parties to the Treaty.

The Crown agreed that it became actively involved in regulating and participating in the tourism and forestry

industries from the 1880s. Through the Fenton Agreement, the Crown became involved in tourism in Rotorua township from 1881, although that agreement was about more than just tourism. The Crown increasingly acted as a protector of natural resources and scenic areas, as well as supporting participation in tourism businesses. The Crown invested significantly in tourism infrastructure in Rotorua and received little direct benefit. Maori did benefit from this infrastructure, along with other sectors of the industry. The Crown submitted that there is insufficient evidence about the regulation and administration of the Rotorua township and tourism areas where it acquired an interest. The Crown noted its support for such ventures as the Rotorua (later New Zealand) Maori Arts and Crafts Institute, and submitted that this requires further research. The Crown also submitted that in more recent times it has adopted policies that include recognition and promotion of Maori involvement in the tourism industry.

The Crown agreed that, from the 1880s, it became more active in regulating the indigenous timber industry for conservation purposes, as well as participating in the timber business. The Crown submitted that it took reasonable steps, in the circumstances of the time, to address barriers faced by Maori. Such steps included providing monitoring and assistance through the Maori land board system. The Crown cannot be held responsible for the commercial success of every timber venture Maori were involved in. The regulation of the forest resource for national interest purposes after the Second World War did not prevent Maori from gaining commercial benefits from their remaining forest resource.

Key questions

Based on the submissions and evidence placed before us, we have identified the following key questions:

- Was it reasonable for the Crown to have identified tourism as a significant development opportunity in the Central North Island and, if so, did it fulfil its obligations of active protection of iwi and hapu Treaty

development rights to utilise their properties to participate in this opportunity?

- Was it reasonable for the Crown to have identified indigenous timber milling as a significant development opportunity in the Central North Island and, if so, did it fulfil its obligations of active protection of iwi and hapu Treaty development rights to utilise their forest taonga in this opportunity?

TOURISM AS A DEVELOPMENT OPPORTUNITY

KEY QUESTION: WAS IT REASONABLE FOR THE CROWN TO HAVE IDENTIFIED TOURISM AS A SIGNIFICANT DEVELOPMENT OPPORTUNITY IN THE CENTRAL NORTH ISLAND AND, IF SO, DID IT FULFIL ITS OBLIGATIONS OF ACTIVE PROTECTION OF IWI AND HAPU TREATY DEVELOPMENT RIGHTS TO UTILISE THEIR PROPERTIES AND TAONGA IN THIS OPPORTUNITY?

Although large areas of the interior of the Central North Island region were found to be marginal for farming, many places, especially in what was known as the hot springs region, were recognised from an early period as being rich in attractive natural scenery including mountain peaks, lakes and waterways, and spectacular geothermal attractions. As we have noted in other chapters of this report, many of these natural resources were located on properties, or were valued taonga, of the iwi and hapu closely connected to them. As such, and as we have previously found, one of the Treaty guarantees for these properties and taonga was a right to utilise them in new development opportunities arising from colonisation. In this section, we consider the extent to which it was possible to regard tourism as a potential development opportunity in this region, and what obligations of active protection the Crown may have had in enabling the participation of iwi and hapu.



Tourists observing the Karapiti Blowhole at Wairakei, Photograph by Sydney Charles Smith, circa 1900.

The claimants' case

The claimants submitted that it was clear to the Crown, by the 1870s and 1880s, that tourism was likely to be a significant development opportunity for iwi and hapu in the Central North Island. This was because of the region's spectacular natural attractions and the relatively marginal nature of large areas for other development opportunities such as farming. Tourism was expected to become more significant as infrastructure and services developed and the area gained publicity as a result of colonisation and settlement. It was apparent to the Crown by the 1870s, when it became more active in acquiring Maori land in the

region, that a number of iwi and hapu were already actively engaged in a fledgling tourist trade. The Crown should have recognised that iwi and hapu needed to be protected in lands and resources thought suitable for tourism opportunities at this time, so that they could exercise their Treaty right of development in anticipated tourism development opportunities.

The claimants submitted, for example, that some Maori communities in the Rotorua district began guiding tourists to their more spectacular attractions, such as the Pink and White Terraces, as early as the 1840s and 1850s, and they clearly found this kind of enterprise well-suited to their preferences and requirements. It was submitted that although the tourism trade was relatively small at this time, and incomes may not have been high, it confirmed the potential value of tourism when settlement increased. In addition, even relatively small cash incomes and profits were significant for many Te Arawa communities at this time, as they were just beginning to enter the cash economy. This early period also enabled hapu and iwi to gain useful experience and business skills to grow the fledgling industry, including experience in setting fees and providing allied services such as transport and guiding. The fledgling tourist trade was also 'broadly compatible' with the way of life, cultural preferences, and spiritual world view of Maori, thus enabling communities to engage in economic development while still maintaining connections with, and reverence for, the resources and lands involved.¹ The claimants submitted that these early developments were stunted by warfare; significant loss of income and opportunity was one of the consequences of the wars of the 1860s.²

The claimants submitted that iwi and hapu continued their efforts to participate in the growing tourism industry once the fighting was over, and that they recognised the potential development opportunity of tourism in providing benefit for their communities. Those hapu and iwi involved were aware of the need for, and willing to take part in, more sophisticated requirements and provision of services as the industry grew. For example, there is evidence that they were aware of the need to set and publish



**Te Tarata, the 'Pink Terrace',
before the Tarawera eruption of 1886**

rates of fees, and amend them if necessary. They increasingly participated in a range of services allied to sightseeing activities. These included the provision of accommodation, transport to various sites, hospitality, and guiding. The income generated from these activities had become significant to the hapu and iwi involved by the 1880s and 1890s. It compared favourably with the land prices received at the time and constituted significant annual sums for a range of sites and tourist experiences. In the Rotorua district, the sites used for tourism purposes by the 1880s included Whakarewarewa, Waiotapu, Orakei Korako, Mokoia Island, Hamurana Springs, Tikitere, and the Pink and White Terraces.³

The Ngati Rangitihi submission claimed that the economic importance of tourism at this time was reflected in the conflict between Ngati Rangitihi and Tuhourangi over who would control the lucrative trade at the Pink and White Terraces.⁴ The generic submission on tourism noted that different interests in some sites were addressed by agreements for splitting income, such as the three-way

split agreed between Ngati Wahiao, Ngati Hingauao, and Ngati Tukiterangi by the 1890s.⁵ In the case of Ohinemutu, an early decision was made not to charge for access to the village, but residents still made an income from leasing hospitality and other businesses associated with the tourist trade. This developing tourist trade underlay interest in Rotorua township from 1880, and the initial good prices received for lots in the town.⁶ Even though the eruption of Mount Tarawera in 1886 disrupted part of the tourist trade, the industry recovered and continued to be regarded as having significant economic potential in the region.

Claimants acknowledged that not all communities in the Rotorua district were heavily engaged in tourism by the 1880s; nor did they all receive significant sums from it. However, even low-level engagement and small amounts of cash were useful for communities who did not otherwise participate in a cash economy. Even small incomes were a welcome contribution to easing the economic pressures that were a result of the Native Land Court process and increased pressure on lands. They enabled some owners to

Sophia Hinerangi of Tuhourangi, a well known guide to the Terraces at Rotomahana, prior to the Tarawera eruption of 1886. The eruption destroyed both Te Tarata (the White Terrace) and Te Otukapuarangi (the Pink Terrace), photographed by Alfred Burton before the Tarawera eruption of 1886.



supplement a subsistence living and avoid otherwise having to sell their land. The tourist trade was also a welcome alternative source of income for communities who found their retained lands were marginal for other development purposes such as farming. Claimants acknowledged that tourism income and opportunities were not spread evenly among all the iwi of the region and so the extent of any prejudice will differ, but it was submitted that the industry was generally important in the region and was expected to become even more so as settlement increased. This is the context in which the Crown's actions need to be assessed in this inquiry.⁷ Claimants with interests in the Taupo inquiry district submitted that, while the evidence for tourism developments in this district is less detailed, there is sufficient to enable consideration of general issues. For the major allegation concerning this district – alienation from major opportunities for tourism development – the claimants submitted that there is significant evidence.⁸

The claimants submitted that although, during the early twentieth century, the tourism industry may have grown

more slowly in this inquiry region than was initially anticipated, and although tourism did not become economically significant nationally until much later in the twentieth century, the industry nevertheless continued to be recognised as a significant development opportunity in this region, especially while farming opportunities remained limited. Claimants submitted that the industry experienced peaks and troughs over this time – the same as any other industry – but that there was steady growth in international tourism from the late nineteenth century and domestic tourism became a significant feature of the industry from the 1920s. It was alleged that Crown figures in this respect fail to take account of expanding categories of people who could be classed as tourists, such as soldiers who visited Whakarewarewa during the First World War, and visitors entering the region for multiple reasons. The claimants submitted that steady growth in tourism in this region continued to provide significant development opportunities for iwi and hapu, in so far as they were able to participate in them.⁹

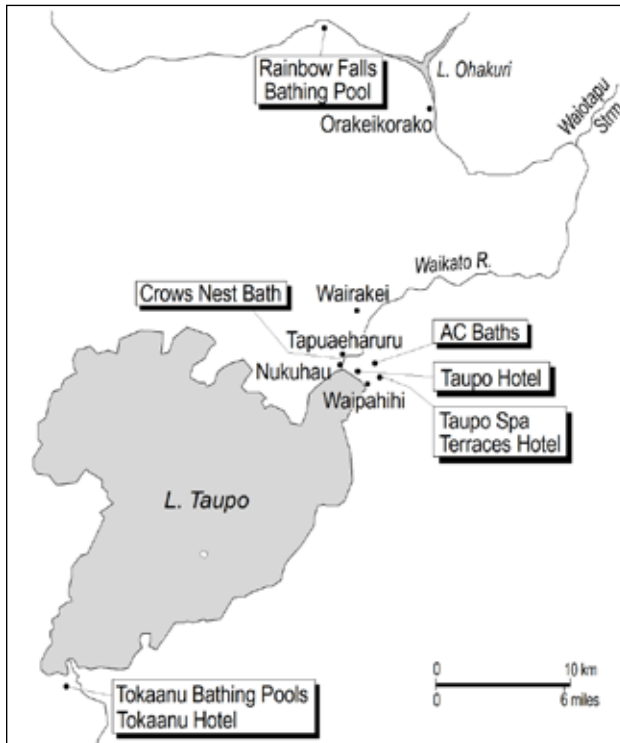
Claimants submitted that, by the 1870s, the Government had become more active in acquiring lands and associated resources in this inquiry region. The Crown was well aware of the potential value of tourism by this time and began to identify sites of likely tourist value. Given the Crown's recognition of the likely value of the industry from this time, iwi and hapu willingness to become involved in it, and the discovery that much interior land was difficult for farming, it should have been clear to the Crown that development opportunities in tourism were and would be an important source of development opportunity for Maori communities. The Crown had an obligation to consider and provide for this in developing and implementing land policies in the region. Claimants submitted that, instead, the Crown implemented land policies and programmes, and targeted Maori lands and resources believed to be potentially valuable for tourism through purchases and public works takings, without taking reasonable steps to protect iwi and hapu in sufficient resources for their participation in this development opportunity.¹⁰ This targeting process failed to have sufficient regard for, or to adequately protect, the development requirements and preferences of Maori, especially when much of the land in the region was known to be unsuitable for other major development purposes such as farming.¹¹

The claimants submitted that the Crown failed to take reasonable steps to provide protections for potentially valuable tourism sites, as they were understood at the time, in its general land purchase policies and programmes. The purchase methods used by the Crown, which included targeting individual interests, undermined community control and decision-making for future development needs. The establishment of purchase monopolies, including proclamations and legislative restrictions on dealings in lands, placed pressure on individuals to alienate lands. Maori were not always aware that resources such as hot springs and smaller lakes and rivers might be alienated along with land. In addition, Government land purchase agents deliberately identified and targeted land containing hot springs as part of the purchase process, on the

understanding that these were likely to be of future tourism potential.

The claimants alleged that the Crown deliberately targeted a number of tourist sites in the Rotorua and Taupo districts, as well as in parts of the Kaingaroa district, through purchasing. A major theme of claims concerning tourism opportunities in the Taupo district is the Crown's targeting of sites and resources, which resulted in the effective exclusion of iwi and hapu of that district from tourism opportunities from an early period. This targeting occurred by a variety of means and had a cumulative impact. Claimants submitted that the Crown had recognised the tourism potential of the spectacular scenery and geothermal features of the Taupo district – and parts of the Kaingaroa district – by the 1870s. They alleged that the Crown's active encouragement of what became Taupo township, for example, was at least partly based on a recognition that its location would be useful as the centre of a tourism trade in this part of the region. However, the Crown failed to protect iwi and hapu in a sufficient landholding in the new Taupo township area when it purchased lands and, instead, encouraged ex-Armed Constabulary men and other Pakeha to take up opportunities there in fledgling tourism and associated service industries. By the late 1870s, the Government had purchased the township lands and ensured Pakeha were in control of the developing tourism industry in and around the town, including important geothermal areas.¹² Hapu were left with very little land in the Taupo township and surrounding geothermal areas, and they were thus excluded from opportunities to participate in the development of the tourism trade based in the township.¹³

It was alleged that the Crown failed to protect a Maori landholding in any of the significant tourist sites in the northern Taupo area. The Crown also made several attempts to acquire the significant site of Tauhara Maunga and surrounding lands for tourism purposes and assist private tourist operators who had identified it as a possible attraction.¹⁴ It was also pointed out to us that the peaks of Tongariro and Ruapehu, although not within the



Map 15.1: Some early tourist sites in the Taupo district [based on CFRT, 'Maps of the Central North Island Inquiry Districts, Part 2', doc D35, plate 12]

boundaries of this inquiry region, formed a major scenic backdrop to the Taupo district and were a nearby recreational attraction, but were lost to Taupo iwi and hapu control in the 1890s.

Lake Taupo and its tributaries were the source of a fledgling camping and recreation enterprise based on introduced trout and hunting in nearby forests. Taupo Maori began guiding and providing fishing camps for tourists, based on their control of access to the lake and its tributaries, but these enterprises were undermined when the Crown gained control of the lake and river beds and marginal strips along the lake and waterways in the 1920s. The receipt of a share of fishing licence fees as part of the 1926 agreement over the lake bed was significant, but it did not make up for the loss of tourism development opportunities

associated with the lake. Instead, it locked communities into a limited fee structure in relation to fishing and tourism ventures, while other opportunities in such ventures increased dramatically over subsequent decades.¹⁵

It was submitted that the Crown also targeted sites in the Rotorua district identified as valuable for tourism. These included Hamurana Springs which, it was alleged, were acquired as a result of partitioning after the purchase of individual interests in land, rather than a willing and deliberate sale of the springs themselves. Claimants alleged that the Crown obtained interests in the Whakarewarewa thermal valley through similar purchases of individual interests and subsequent partitioning.¹⁶ Ngati Rangitihī alleged that the Crown had alienated large areas of their rohe, containing geothermal taonga potentially useful for tourism, by 1900.¹⁷

Claimants alleged that the Crown pursued the acquisition and control of the major natural features of the region that iwi and hapu were utilising for tourism-related purposes through other means as well as purchases. These included public works takings, without sufficient concern or protections for the impact it had on Maori participation in tourism development opportunities. It was claimed that the use of the Public Works and Scenery Preservation Acts was a major means of acquiring areas of tourism interest from Maori.¹⁸ It was alleged that, in some cases, public works takings were used to undermine iwi and hapu control of access to their sites for tourism purposes. For example, Ngati Whaoa relied on research evidence from Cybele Locke to allege that the toll gate at Waioatapu Valley was taken for public works purposes under the Public Works Act 1908. They alleged that the toll gate was financially benefiting Ngati Whaoa at the time it was taken, and that the taking was part of a Crown policy of closing down such toll gates and Maori use of them to participate in tourism opportunities.¹⁹ In this, the Crown pursued other sector interests and what it regarded as the national interest, without adequate concern for the need and right of Maori communities to be protected in their lands and resources for tourism development purposes. It was alleged that

this lack of adequate consideration of Maori development interests resulted in the loss of important taonga and the marginalisation of hapu and iwi from the developing tourism industry.²⁰

The claimants alleged that the Crown targeted potential tourism resources through the Fenton Agreement of 1880 and the Thermal Springs Districts Act 1881. These allowed the Crown to gain control over hot springs in the Rotorua township and gave it the sole right to purchase lands. It was alleged that the Crown's failure to keep to understandings over these agreements caused economic hardship to owners and forced some to continue to alienate their lands and resources with tourism potential.²¹

Rotorua claimants noted that, while there is a separate settlement process for the Rotorua lakes, in the general context of tourism opportunities the loss of their lakes and the introduction of trout had similar impacts for them as for the hapu of Lake Taupo. This should be seen in the general context of loss of tourism opportunities associated with the lakes and needs to be taken into account in any general consideration of marginalisation from the tourism industry.²²

The main generic submission on tourism alleged that in some cases the deliberate targeting of tourist sites had racist motivations. The Crown actively targeted Maori-owned sites to remove them from Maori control, pressured Maori communities to allow access to sites either without or with considerably reduced fees, and deliberately targeted and removed Maori tolls. It also encouraged and allowed Pakeha to take up enterprises that involved charging access to sites, and at times granted Pakeha leases to the same sites so that they could be managed as income-producing enterprises. The claimants alleged that these policies indicate that it was considered acceptable for Europeans to charge and make money out of tourist sites, but that it was not considered acceptable for Maori to do so. It was also submitted that the Crown may have lacked confidence in the ability of Maori to manage important tourist sites.²³ A number of claimants submitted that the Crown targeted some Maori-owned tourist attractions in order to obtain

the advantages of such valuable areas for itself as well as the benefits of general control of the tourist trade.²⁴ It was submitted that, whether or not the Crown profited from these activities, and whatever its motivations, the deliberate targeting of sites in ways that deliberately shut Maori out from what was expected to be an important development opportunity was an act of bad faith by the Crown and a serious Treaty breach.²⁵ It also meant that Maori were excluded from the benefits of further developments to the tourism industry such as the Crown's investment in building transport infrastructure.²⁶

Claimants alleged that the targeting of land and resources believed to have importance for tourism development in the late nineteenth and early twentieth centuries continues to restrict the present-day ability of iwi and hapu of this region to participate in the recent expansion of tourism opportunities. This is in contrast to those few taonga that have been retained, and which now provide the chance for iwi to participate in modern tourism. They pointed to the example of the Tikitere attraction, which is now run as an economically promising joint venture. However, they submitted that a failure of reasonable protection in such resources has closed off this kind of opportunity for other communities of the region.²⁷

In some cases, the Crown's acquisition of interests from iwi and hapu has limited them in the ways they have been able to utilise taonga and participate in the tourism industry. An example is the experience of Ngati Wahiao at Whakarewarewa village. They have managed to participate in tourism in spite of the Crown securing the majority of the valley's geothermal features through purchasing individual interests followed by partitions. They submitted that a significant part of their participation has been through the village life they have been able to maintain and bring to the tourist experience, which they feel adds value to the geothermal features and is more authentic than artificial attempts to portray Maori life and traditions. They submitted that they have been successful with this form of cultural tourism, but that they have also been limited by competition from the Crown, based on its interests in the area.²⁸

Claimants agreed that they have faced tensions, at times, between developing their taonga for economic purposes and protecting them for cultural requirements. However, they submitted that they were capable of collectively resolving these tensions. One of the most significant difficulties they have faced, in this regard, is that the Crown's failures to protect them in sufficient taonga and properties for all their needs have placed them under considerable pressure to utilise what they have retained for more intensive economic development than they might otherwise prefer. They said this was reflected, for example, in the current debates within Ngati Tutemohuta over the need to utilise their important taonga Tauhara Maunga for economic purposes through tourism.²⁹

The claimants submitted that the late nineteenth and early twentieth centuries was an important period for participating in opportunities in the growing tourism industry. The Government actively intervened to encourage the industry at this time. However, the Government's failure to take adequate account of iwi and hapu needs in this area when it purchased land and targeted likely tourist attractions meant that some iwi and hapu were excluded from or restricted in opportunities to participate in this development, and suffered prejudice as a result.

Claimants submitted that the Crown failed to actively protect those iwi and hapu who were able to retain suitable properties and taonga in their ability to participate in tourism development opportunities. This included a failure to take reasonable steps to address barriers preventing participation, and the implementation of policies and programmes that constrained or undermined iwi and hapu from participating in ways that met their own development needs and preferences.³⁰

It was submitted that the Crown failed to provide assistance to help Maori overcome barriers to entering and remaining in the tourism industry, even though this was clearly important to meeting their needs.³¹ In particular, the Crown failed to assist iwi and hapu to overcome barriers they faced in being able to participate on a level playing field with other sectors of the community in commercial

tourism opportunities in the region. Some of these barriers had been created by the Crown itself, including forms of title for Maori land that made it difficult to manage properties for commercial purposes and gain access to investment finance. Claimants submitted that the Crown's duty of active protection of their development rights extended to opportunities to utilise their properties and taonga to participate in tourism in this region at the level of business owners and entrepreneurs, as well as at the level of service workers and employees.³²

Claimants submitted that the barriers they faced by the late nineteenth century in being able to undertake necessary investment in a growing industry were significant in their marginalisation from tourism businesses at this time. In spite of the recognised importance of tourism to Maori in this region, they were unable to obtain lending finance for investing in this opportunity of a kind similar to what was being made available to settlers for farming through the Government Advances to Settlers Scheme. They were effectively excluded from this scheme, and no similar effort was made to assist with finance to enable them to develop their lands and resources for tourism, although this was at least as important as farming in parts of the region.³³ The experience of being shut out of Government financial assistance at a time when other settlers of small means were being given an opportunity (which also had the effect of changing the attitudes of private lenders), had long-term consequences for Maori. The exclusion of Maori from state assistance gave private lenders no incentive to change their attitudes, and in situations such as commercial tourism opportunities, where the Government was apparently not willing to open sources of state lending finance, Maori had few options but to seek private lending in order to participate in the growth of the tourism industry.

It was claimed that, in some cases, the Crown failed to ensure that its active encouragement of tourism in the region was also available in an equivalent way for Maori who wished to participate. It was alleged that Maori were much less likely to be assisted with roading infrastructure to sites they retained, and that such assistance was often

only provided once the sites had been transferred from Maori ownership. For example, it was submitted that the owners of the attraction at Orakei Korako were unable to raise sufficient capital to build an access road themselves and were obliged to lease the operation to a private concern.³⁴ It was alleged that the Crown was reluctant to assist with roading access to the site until after the lease had passed to Pakeha operators. Further, the Crown failed to adequately consider the tourism development value of the site to its owners when it flooded part of the site for hydro purposes.³⁵ It was submitted that leasing tourist sites to private operators did not necessarily indicate a lack of interest in participating in tourism businesses but was, rather, often a reflection of the difficulties involved in being able to manage and develop sites without adequate financial assistance. Owners leased on the understanding that they might in future be able to gain the sites back to run as businesses themselves. The Tikitere geothermal attraction is one example of this.

The claimants submitted that the Crown did recognise, in principle, that Maori required assistance to overcome the barriers they faced to participating in tourism opportunities. The Crown entered a number of joint-venture arrangements with Maori of this inquiry region on this understanding. However, the Crown then took control of the sites for its own purposes and the perceived national good, and pursued alienation of the lands from Maori ownership and control.³⁶ This occurred in the Rotorua township and thermal springs districts agreement, and in agreements over the native townships of Tokaanu in the Taupo district and Rotoiti in the Rotorua district. These agreements had the potential to be Treaty-compliant, in encouraging a cooperative partnership approach to the development of tourism in the region for the national benefit and the benefit of Maori communities instead of excluding Maori from participation. They could also have provided earlier models for the forms of joint venture with private interests that Maori have now begun successfully forging in developing their retained tourism attractions, such as the present Tikitere development. However,

claimants alleged that the Crown allowed the ventures described above to turn into initiatives for alienation rather than joint business ventures, and that this caused prejudice to Maori communities.

The claimants acknowledged that the Crown provided some assistance and investment at sites such as Whakarewarewa, but alleged that in doing so the Crown failed to adequately recognise or protect iwi and hapu development rights, including the right to participate in tourism opportunities in ways that suited the preferences and objectives of the communities involved. The Crown's refusal to allow Maori to use the model pa at Whakarewarewa was submitted to us as an example of this.³⁷ It was acknowledged that the Crown did provide some housing assistance for those who wished to remain in the living villages at Whakarewarewa and Ohinemutu, but it was claimed that this was well short of the recognised need.³⁸ The New Zealand Maori Arts and Crafts Institute was also acknowledged as an example of Government provision of assistance. However, it was submitted that this was established and operated in a way that failed to take sufficient account of local iwi and their connections to their taonga in the Whakarewarewa valley. It was submitted that this was a Government initiative, based on Crown land and run in accordance with Crown views. It was also a national initiative, and while Te Arawa did receive some benefits it was also established to serve other iwi. It was acknowledged that Whakarewarewa village has received significant financial benefits from the institute, based on a system of part shares of gate revenue. However, it was submitted that this has been at the cost of the Crown taking control of the Whakarewarewa tourist experience from local Maori, and nationalising and homogenising it, without regard for the special connections of the local people with their taonga and the way they wish to present and share this with visitors. An example is the taking of control of guiding from the local people.³⁹

It was alleged that Crown failures to address barriers to participation in tourism from an early period have had long-term impacts on the ability of iwi and hapu to enter

tourism opportunities with retained properties today. For example, Ngati Tutemohuta alleged that the Crown has failed to assist or facilitate reasonable access to sound governance skills, professional development, and sound business expertise.⁴⁰ This has resulted in continuing problems, both with raising capital on Maori freehold land and with the internal divisions and problems of governance that have developed historically as a result of the Crown's emphasis on individual title and its failure to recognise collective authority over land. This has contributed to marginalisation from development opportunities including tourism enterprises. We were referred to claimant witness evidence such as that from Hariata Cairns, of Ngati Wheoro, who explained to us the difficulties she still faced in attempting to develop lands abutting Lake Taupo for a present-day tourism enterprise, including being able to effectively utilise Maori freehold land and gain access to lending on it for business purposes.⁴¹

The claimants alleged that the Crown was 'indifferent' or 'careless' of Maori development needs and efforts to engage in tourism opportunities, when pursuing its own policy objectives in the national interest. This was even though the Crown was well aware of the actual and potential importance of tourism for iwi and hapu of the Central North Island inquiry region, particularly when alternatives such as farming were proving difficult, and of Maori willingness to participate in the industry. In recognising the potential value of tourism for the region from the 1870s, the Crown should also have taken care to ensure that its policies did not undermine Maori efforts to participate in expected opportunities in this industry.⁴²

It was submitted that, in fact, the Crown undertook or promoted works and projects for the public good or the national interest that damaged or undermined Maori tourism enterprises, and did so without adequate consideration or protection of Maori development interests and needs. The claimants referred to examples such as part of Taniwha Springs, which they alleged was taken for water supply purposes without adequate consideration of other alternative sources of water supply or the importance of

the springs for their owners' development needs.⁴³ The Ngati Rangitihi submission also referred us to their tourist venture in establishing a spa at their hot pools called Uhupokapoka at Onepu, from 1916. They submitted that this tourist venture operated successfully until 1953, when it was destroyed by the operation of the nearby Tasman Pulp and Paper Mill without adequate consideration of the impacts of this on their participation in tourism.⁴⁴

The claimants alleged that when the Crown became more active in regulating tourist activities from the early twentieth century, especially in the Rotorua district, it failed to take sufficient account of Maori rights of development and autonomy to engage in tourism according to their community needs and preferences. The claimants submitted that the Crown played a significant role in managing and regulating tourism, especially in the Rotorua district, through agencies such as the Department of Tourist and Health Resorts, which was established in 1901. They alleged that the Crown administered the township and tourism attractions in which it had gained interests in a heavy-handed and restrictive way that marginalised Maori participation in the industry, limited their ability to develop tourism as they wished, and restricted them to the roles of service workers, employees, and attractions with little participation in decision-making and business management roles.⁴⁵

The claimants alleged that the Crown imposed policies and practices that reflected and facilitated its views and interests in the tourism industry, in competition with those of iwi and hapu.⁴⁶ This had the effect of undermining or removing iwi and hapu control of the cultural dimension of the experience presented to tourists, limiting their role in the range of tourist services they wished to undertake (such as making and selling souvenirs), and excluding them from decision-making and business management of the sites. They were relegated to the position of workers and to being part of the tourist attraction. Claimants pointed to the example of Whakarewarewa village as a case study.⁴⁷ They submitted that the village experience is also evidence of a general failure by the Crown to take account of the wishes and preferences of the local people to utilise

their taonga as a tourist business, while also maintaining their close connections with their taonga. This includes their preference to remain closely attached to the area in a living village.⁴⁸

Claimants alleged that the Crown has failed to take reasonable steps to protect them in being able to participate in more recent tourism ventures to support and develop their communities. For example, Ngati Tuwharetoa submitted that they agreed to develop their lake-shore lands for forestry as a result of Crown encouragement of a venture that also protected the lake. However, they have been constrained in using those same lands for purposes such as subdivision by planning controls that have failed to take account of their development needs. They now face further serious constraints as a result of nitrate management proposals for the lake. Claimants also alleged that they still face constraints and barriers to utilising their remaining lands and taonga to participate in tourism opportunities that are not faced by other sectors of the community and are not adequately recognised and addressed in Crown policies and programmes. These include continuing barriers to private lending finance for land held in Maori title, lack of certainty and accuracy of Maori title information, continuing difficulties with governance entities, and the need to take account of the extra costs and compliance requirements for such entities when engaging in development opportunities.

The claimants submitted that current Crown policies still fail to take adequate account of the importance of tourism development opportunities in this region for iwi and hapu who have suffered prejudice from past breaches of the Treaty by the Crown, including the marginalisation of iwi and hapu from earlier tourism development opportunities. This has contributed to regional statistics showing the present relatively low rate of Maori participation as employers rather than employees, relatively low Maori retention of land and resources, and low relative levels of Maori wealth.⁴⁹ The claimants submitted that the Crown's policies continue to fail to take adequate account of how heavily the tourism industry, both nationally and in this

region, has been and continues to be sustained by the outstanding natural resources, taonga, and cultural traditions of iwi and hapu of this inquiry region. This connection with the tourism industry is very special, yet the benefits received by iwi and hapu have been marginal compared to the 'koha' given.⁵⁰

The Crown's case

The Crown submitted that the main allegation made by claimants in relation to tourism in this inquiry region was that iwi and hapu have been 'marginalised' from tourism despite the natural resources they owned. Some of the reasons given for this alleged marginalisation were that the Crown has failed to protect resources suitable for tourism, taken control of tourism developments, and undermined Maori efforts to participate in the developing tourism industry. This marginalisation was claimed to have been intentional. The Crown submitted that these claims are essentially based on two main issues. First, there are allegations that lands containing resources valuable for tourism were alienated. The Crown submitted that these allegations are essentially about land purchases or public works takings, which it was alleged the Crown used to control tourism. Secondly, a wider but linked issue concerns a claim of a right to economic development in tourism, and an allegation that the Crown should have fostered and supported Maori business interests in tourism. It was alleged that, instead, the Crown actively discouraged Maori business efforts in tourism. The Crown submitted that it recognises that these allegations are linked, in that ownership of a site that attracts tourists also aids participation and success in the tourism industry. However, the Crown submitted that ownership of such a site, in itself, is not a guarantee of success in business and future prosperity.⁵¹

The Crown submitted that claimants in this inquiry have made claims of development rights and a Crown obligation to foster Maori in tourism that go beyond what could have been reasonably contemplated by Treaty partners. They also go beyond what could have been reasonably

expected of the Crown. The critical issue is what concrete and particular steps the Crown should (or should not) have taken with respect to tourism. With regard to this, the Crown submitted that the evidence presented on tourism in this inquiry is cursory and incomplete, and should be given only limited weight. The Crown submitted that the evidence does not take account of important sources, such as available statistical sources, treats claimant allegations too uncritically, and is too limited and narrow in scope.⁵² It is focused very much on the Rotorua district, and on geothermal sites within that district, but even then the evidence is not extensive. The Crown submitted that the evidence before the Tribunal is insufficient to enable it to make concrete findings in relation to Crown obligations – and whether or not it fulfilled them – in this inquiry region. At best, some broad impressions might be gained, but these are not necessarily representative of the wider tourism industry. Given these limitations, the Crown submitted that there is insufficient evidence for the Tribunal to comment on tourism in the Taupo inquiry district, or to make findings in relation to geothermal tourism within the Rotorua district beyond observations on some core sites. ‘Wider analysis or any findings beyond that narrow focus cannot be supported on the evidence available.’⁵³ In consequence, the Crown’s response was entirely limited to the Rotorua district and claims regarding geothermal tourism there.

The Crown submitted that this is the first time a Tribunal has considered tourism as an issue for Treaty claims. The Crown therefore proposed that a workable definition of tourism is required, in considering what the Crown’s obligations might be and whether they have been fulfilled. The Crown proposed that tourism should be considered as a business surrounding the practice of travelling for pleasure, and the provision of related services including accommodation, access, infrastructure, food, and transport. The exact scope of related businesses is not always clear, as some businesses involved also provide services for a local and non-tourist market. Tourism does, however, imply some degree of enterprise and complexity. The

Crown warned that care must be taken in applying this to historical times, as the idea of a tourism industry ‘implies a scale of enterprise which did not exist until recently’.⁵⁴ The Crown submitted, for example, that mere ownership of scenic reserves and charging a fee for access could only ever have provided a subsistence level of income, and was not the same as being involved in providing the more complex range of services associated with a tourism industry.⁵⁵

The Crown submitted that it is difficult to adequately assess Crown actions with regard to tourism, as such, because the tourism industry is so diverse and is influenced by a range of legislative policy and actions in a wide variety of areas not necessarily primarily concerned with tourism, such as health and safety regulations, employment law, and the provision of infrastructure such as roads and airports for general purposes. Accordingly, the Crown’s regulation and promotion of tourism ‘is balanced against and fettered by its concerns in other areas’. The wider obligations the Crown has to Maori and the community also impact on tourism. This makes it very difficult to single out ‘tourism’ as a distinct area for assessing Crown actions.⁵⁶

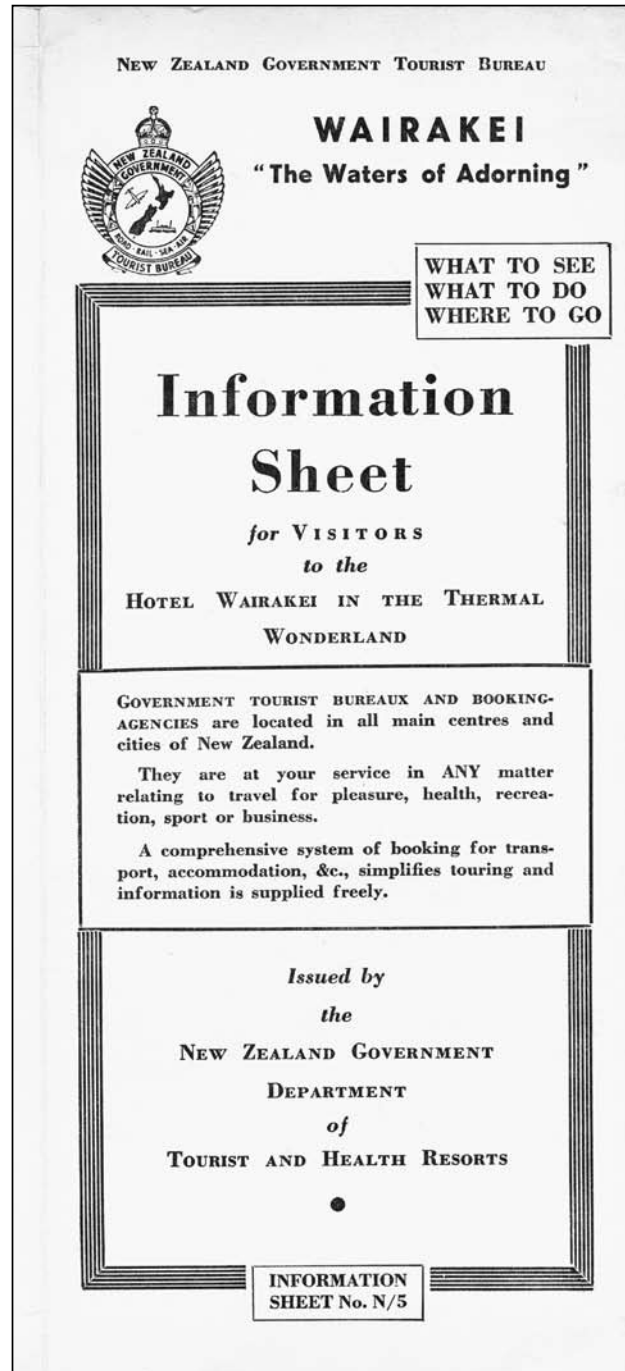
The Crown submitted that there is no Treaty principle requiring a reasonable Treaty partner to actively foster Maori business within the tourism sector. The Crown submitted that the *Mohaka ki Ahuriri Report* findings, that Maori were promised more than a subsistence lifestyle and had a right to develop which, when combined with the Crown’s fiduciary obligations, entitled them ‘to fully participate in the developing society and economy’, were ‘of a broad aspirational nature’. The Crown submitted that, in practical terms, any Treaty right of development cannot be construed without limits. The Crown proposed that we consider recent Court of Appeal findings as a guide. The Crown referred us to two Court of Appeal cases, *Te Runanganui o Te Ika Whenua Inc v Attorney General* from 1994, and *Ngai Tahu Maori Trust Board v Director-General of Conservation* from 1995, in support of this.

The Crown referred us to the court’s judgment in the former case, that no matter how liberally Maori customary title and treaty rights might be construed it could not think

they were ever conceived as including the right to generate electricity by harnessing water power, as this would have been far outside the contemplation of the Maori chiefs and Governor Hobson in 1840. With regard to *Ngai Tahu Maori Trust Board v Director-General of Conservation*, the Crown noted that that judgment referred back to *Te Runanganui o Te Ika Whenua Inc v Attorney-General* and confirmed, similarly, that, no matter how liberally Maori customary title and Treaty rights might be construed, modern tourism developments such as whale-watching were remote from anything contemplated by the original parties to the Treaty. The Crown acknowledged that the court did find that Ngai Tahu were entitled to a reasonable degree of preference in that case, but noted that this was only as part of a wider balancing exercise with other relevant rights. The court had been careful to stress that its view in that respect was unique and that its value as a precedent was limited.

The Crown questioned claims that tourism development was broadly compatible with the way of life and world view of Maori. The Crown submitted that tourism involved balancing development and other objectives, especially when important taonga were involved. The Crown referred us to evidence of present-day internal discussions within iwi about similar pressures, for example over possible tourism development for Tauhara Maunga.⁵⁷ The Crown questioned whether claims that tourism had a lesser impact on resources than other forms of economic development might be overstated, particularly in the modern tourism environment where infrastructure is required to facilitate the tourist experience. The Crown submitted that tourism, like any other development, raised issues of disruption to the lives

► 'Wairakei "The Waters of Adorning": What to See, What to Do, Where to Go': cover of brochure put out by the Department of Tourist and Health Resorts to promote 'the Hotel Wairakei in the Thermal wonderland'



of landowners and resulted in a degree of distancing of owners from their land and resources. This was evident, for example, from experiences at Whakarewarewa. Issues over control and development of taonga and resources for tourism purposes had caused tensions both within and between iwi, such as between Ngati Rangitihi and Tuhourangi over Rotomahana, Tuhourangi and Ngati Hinemihi over the Pink and White Terraces, and Ngati Whakaue, Ngati Wahiao, and Tuhourangi over Whakarewarewa.⁵⁸

The Crown submitted that claimants have overstated the importance and economic significance of a tourism industry in the region in the nineteenth and early twentieth centuries. A tourist trade only really began in the 1870s; at the time there was only a trickle of international visitors and very little domestic tourism as it is now understood. The Crown accepts that such early tourism, as it existed, was dominated by Maori, who enjoyed a natural monopoly. However, there is little evidence available about the income tourism generated for Maori in Rotorua in the nineteenth century, and claimants have tended to overstate the revenue Maori gained from tourism at this time. It is also unclear how many iwi benefited from what tourism there was. It is likely to have been significant for Tuhourangi and, to a lesser extent, Ngati Whakaue, but it is not clear how important it was for other iwi. It 'was not a panacea for Te Arawa'. There is also evidence that in some cases, such as Ohinemutu, few charges were made and there was significant sharing of facilities with visitors. The Crown submitted that in the absence of more detailed research it is easy to inflate the significance of tourism at this time. The small amount of evidence available suggests that this was relatively slight for most of the nineteenth century. The benefits were not widespread across the district and there is evidence, for example, that some Maori in Rotorua were already suffering shortages of food by the 1880s.⁵⁹

The Crown accepts that tourist numbers began to increase in the 1880s, when developments such as the Suez Canal cut the sailing time from Europe. However, even then, travel within New Zealand remained difficult, and this was particularly true of inland areas such as Rotorua.

It was only the exceptional nature of the Pink and White Terraces that drew tourists to Rotorua despite the hardships of travel.⁶⁰ The Crown acknowledged evidence that Ohinemutu had become a thriving settlement, but told us there is little evidence of other Te Arawa involvement in tourism at this time. The Crown noted that the Tarawera eruption in 1886 had a major impact on tourism, but submitted that the evidence indicates some significant Crown assistance to Maori after the eruption.⁶¹

The Crown submitted that it did not assume, in the late nineteenth century, that tourism would inevitably become as successful as it is now. Handicaps such as the known distance from international markets were obvious from the beginning. The technological developments that vastly increased tourism in the later twentieth century were not inevitable; nor were they obvious to the Crown in 1870.⁶² The tourism industry was more tenuous than claimants have acknowledged. There were many failures and the thermal environment, in particular, was unstable and could be precarious, as shown by the fate of the Pink and White Terraces. The Rotorua township was slow to develop, and tourism was inherently risky and vulnerable to changes in external forces such as an economic downturn. The potential for Maori to participate in the extension of tourism, even if they had retained more sites, has been overstated, and the reality of requiring capital and skills to successfully develop ventures has been ignored. This is clear from the variable success of sites that have been retained. Simple possession of a site was insufficient.

The Crown submitted that, although Maori gained some initial benefit from their natural monopoly over tourism, increased settlement inevitably required more sophisticated business participation in tourism, as was the case in all developing industries at this time. As the expectations of tourists increased, tourism became more capital intensive and dependent on specialist skills. Income tended to come more from the provision of services than just the receipt of a toll based on ownership of a site. The collection of tolls, alone, could never provide much more than a subsistence



A Burton Brothers photograph of McRae's Hotel at Wairoa, taken in 1886 after the Tarawera eruption. Damage to the hotel is evident, trees have died, and ash covers the surrounding landscape.

income, except possibly at the Pink and White Terraces. There were few other sites of such significance.⁶³

The Crown submitted that the Treaty principles concerning land alienation and public works takings apply in general to land acquisitions. The fact that a site may have special value for tourism purposes does not elevate the Crown's obligations or mean a higher standard should be applied. The Crown submitted that claimants have overstated tourism and the Crown's control of it during this early period as a motivation for purchasing Maori land.

The Crown denied that there was any Crown stripping of Maori tourism assets in the Rotorua district or that, by 1900, the only springs left entirely in Maori ownership in the district were at Tikitere. It denied that the Thermal Springs Districts Act was used to target tourism ventures in the Rotorua district. Of major sites mentioned by claimants, only Whakarewarewa was alienated to the Crown under the Thermal Springs Districts Act. The Crown noted that Maori now own a significant number of sites within the Rotorua district, including thermal areas at

Whakarewarewa village, thermal areas in Ohinemutu, the thermal area of Tikitere, springs on Mokoia Island, and the summit of Tarawera. The Crown noted that there is insufficient evidence about other areas, but noted that a number of sites now owned by Maori, including Tarawera summit, some thermal areas, and freshwater springs, are leased to other businesses. The Crown raised the possibility that some other sites still owned by Maori, including geothermal and freshwater springs, may well have some tourism potential but are not yet developed, although no evidence was presented on this point.⁶⁴

The Crown submitted that allegations concerning its acquisition of thermal areas amount to claims of bad faith towards Maori, and therefore require a consideration of Crown intent. The Crown had a number of motivations in acquiring thermal areas. There was a long-standing policy of guaranteeing free public access to places of scenic beauty, as seen in National Parks policy. The Crown wished to secure such areas for the public good and control them against all-comers, Maori or private. Financial

motivations were present, but were not the sole motive. Attracting tourists was a secondary motivation, and this is not addressed adequately in the expert witnesses' reports. There is evidence of Crown policies of dual concern for public access and tourism potential from an early period, for example from Crown official William Fox, in 1873, who was concerned that sites be protected from too much commercialisation. The Crown noted that it had a dual role, as a protector of natural thermal wonders as well as an entrepreneur promoting the investment of capital to serve the needs of visitors. The Crown also noted that a significant number of sites listed by claimants were actually taken for public works purposes and not for tourism reasons. The income from any tourism-related activity is a relevant consideration in terms of compensation paid to landowners, but the Crown rejected any suggestion that tourism potential (as opposed to any other way of making an income from the land) meant the land should be exempt from the possibility of public works acquisition as a matter of course.⁶⁵

The Crown acknowledged that it has participated in tourism in Rotorua since 1881. A majority of hot springs in the Rotorua township block were vested in the Crown in 1881 by the Thermal Springs Districts Act. Ngati Whakaue agreed to this as part of the Fenton Agreement, and they were aware that the springs would no longer be in private ownership as a result. The Crown's principal purchase of land with tourist potential was the Whakarewarewa valley. However, the Fenton Agreement was not only about tourism.⁶⁶ The Crown also noted that, in some cases, Maori were already informally leasing, or had sold, sites to private interests, and there might have been a continuing loss of sites without the restrictions in dealing the Crown placed on the land.⁶⁷

The Crown rejected any allegations that it intentionally marginalised Maori from tourism in the region on the basis of a racist ideology. The marginalisation of Maori from the industry (an industry that was not always an economic success) involved a far greater range of factors than simply

racism. In the early phase of the industry, economic forces which the Crown did not control – and saw no need to attempt to control – determined the nature of the industry and, to a great extent, Maori involvement in it. The Crown did not become involved in tourism in Rotorua until the 1880s. The Crown's involvement from that time has been overstated and the significance of the Crown's contribution has been marginalised.⁶⁸ The Crown submitted that the significance of the tourism industry in the region in the nineteenth century has been greatly overstated. There is very little evidence about the claimed industry at this time in Rotorua, but available statistics make it clear that tourism did not become nationally significant until relatively recently in the twentieth century. It was only with the development of jet travel capable of long haul flights, from the late 1960s, that international tourist numbers really started to increase, and it is misleading to read this back to the situation in 1880.⁶⁹

The Crown acknowledged that important issues have been raised about Crown obligations to foster Maori development in tourism. The Crown submitted that previous arguments, relying on Professor Hawke's observations concerning the Crown's financial imperatives and limitations on Crown assistance, are relevant. It was not an appropriate role for the Crown, especially in the nineteenth century, to intervene in the way sought by claimants. It is also very difficult to isolate the ways in which the Crown invested in and assisted tourism generally, because investment such as roading was not just for tourists. From the limited evidence available, it seems that tourism was not as lucrative as might have been expected. The Crown did, however, significantly invest in and contribute to tourism operations of significance for Maori. The Crown invested substantially in Rotorua township, for example, and invested money from leases in the development of the township. During the period the Tourist Department had responsibility for the town, no rates had to be paid. The Crown also significantly invested in infrastructure in the town such as the Bath House. These improved facilities

attracted tourists, but were costly to maintain, and allegations that the Crown profited substantially from its involvement cannot be sustained.

The Crown submitted that there was no early Government control or regulation of tourism. Increased settlement brought more competition and more demands in developing a tourism industry, but this was a normal consequence of industry development and outside the control of the Crown. As tourism developed, greater levels of capital and skills investment were required, including more complex business skills for financial management and investment. Operators had to cope with increased competition, develop infrastructure, and provide the kinds of additional services that tourists required. Many private entrepreneurs began entering the industry and the Crown had no role in directing tourists where to stay or which services to use. In a competitive market, there was little ability to control tourism, and simply owning a site of interest did not compel tourists to visit that site. Tourists would make their own choices based on a range of factors including price, the level of service provided, reliability, and their own whims and preferences. Tourists would, of course, visit some major sites such as the Pink and White Terraces regardless of any perceived inefficiency in service or overpricing. The Crown noted some evidence of racist attitudes by tourists, but this did not directly involve the Crown. Crown actions (and comments by officials) did not amount to preventing Maori from participating in the free market tourist economy.⁷⁰

The Crown submitted that there is evidence that tourism development became more capital intensive from the 1870s and that a lack of capital may have been a barrier to Maori participation in tourism-related services, although this would have been less of an issue for more affluent iwi. The Crown acknowledged that Maori were aware of the importance of technological developments such as improved transport services, and that they competed to provide these where they could, for example by replacing waka with whaleboats on Lake Tarawera. However, their

principal means of raising capital was by selling or leasing their land, and in many cases they were not able to acquire the capital to compete with technological advances.⁷¹

The Crown agreed that it did build some infrastructure that had an impact on tourism, such as the rail link between Rotorua and Auckland which opened in 1894. This brought more commerce and more tourists to Rotorua, but also more Pakeha entrepreneurs and increased competition. It also ended the Maori monopoly on some routes and services. The Crown submitted that improvements to infrastructure were intended to benefit the whole region. It rejected allegations of deliberate bias, for example that roads were provided to only some tourist sites. The Crown noted that there is insufficient evidence to prove such claims.⁷²

The Crown rejected claims that Maori did not benefit from the provision of new infrastructure because they were already losing their tourism sites. Maori who did retain sites and a role in the industry benefited from the Crown's provision of infrastructure and its general investment in tourism, along with everyone else. The Crown has not claimed that the establishment of infrastructure somehow entitled it to acquire tourism assets. Nor did the Crown directly benefit, to any significant degree, from participating in tourism. Many of the sites it acquired remained free of access charges, such as Kuirau Reserve. The Crown only charged access to the geothermal valley at Whakarewarewa after the creation of the Maori Arts and Crafts Institute, and the money was used to further the goals of the institute. The Crown did not run all the transport, hotels, and other tourism-related activities in Rotorua.⁷³

The Crown submitted that there is insufficient technical evidence about the more recent development of the tourism industry. It noted a number of claimant submissions that indicate mixed success, and also that there are successful Maori businesses in the district, whose owners are not affiliated to Te Arawa, which have not been discussed. The Crown noted that there is relatively little evidence on the development of the Maori Arts and Crafts Institute at

Whakarewarewa, which, it submitted, has been an important Crown initiative. The Crown submitted that there has been significant Maori support for the institute, and that it has made a valuable contribution to the preservation and advancement of Maori art and craft in New Zealand. The institute has had an ongoing financial relationship with Whakarewarewa village. There has also been considerable Te Arawa influence and involvement with the institute's board. The Crown has made very little money from the institute, but considerable profits have been reinvested and significant payments have been made to Whakarewarewa village.⁷⁴

The Crown denied that it has any general Treaty obligation to actively intervene in the market to favour Maori business. However, it noted that the Government is currently involved in pursuing a number of initiatives to facilitate Maori involvement in tourism, including some that are under the auspices of the regional tourism organisations. Similar initiatives took place in the 1980s and 1990s. The Crown submitted that the Tribunal does not have enough evidence to assess the level of Maori involvement in the current or recent tourism sector. It submitted that some claimants have an unrealistic expectation of the assistance that the Crown can provide and on what terms. Government funding requires accountability, and some claimants appear to be seeking unrealistic redress. Successful economic development is complex, and with tourism it is not sufficient to simply own an attraction that draws tourists. Other factors are required, most especially capital, skills, and experience. This is evident from the Tikitere venture, which is now run as a joint venture. Recent research indicates that title is not now regarded as such a major barrier. The challenges facing Maori in tourism development have been the same as for all forms of economic development. They include fear of land loss, internal divisions, and asset-holding entities (such as trusts and incorporations) being relatively slow to change and adapt to new opportunities, along with a lack of knowledge and skills. There have also been clashes between cultural demands and tourists' demands over the use of some

assets. The tensions between retention and development are complex, and the Crown considers that it has a role, as a responsible Treaty partner, to put in place appropriate governance mechanisms which provide the framework for Maori to be able to balance these tensions in the most appropriate way.⁷⁵

The Tribunal's analysis

We agree that we have received limited detailed evidence for this stage one inquiry about the development of tourism in the Central North Island inquiry region, especially for specific attractions and sites. However, it was agreed by parties before us that this would be a preliminary inquiry to consider generic issues, in order to assist parties with negotiations, and that, on some issues, more detailed investigation may be required. Having considered the evidence and submissions before us, we are able to make some general observations and findings concerning claims of Treaty development rights in tourism in this region, and Crown obligations with respect to these. We agree that the majority of the evidence submitted to us concerns tourism in Rotorua. However, we accept that the focus of tourism claims for the Taupo and Kaingaroa districts is on the Crown's targeting for purchase of properties and taonga that could be used by iwi and hapu to participate in tourism opportunities. On this issue, we do have sufficient evidence for consideration.

Tourism and a Treaty development right

We have previously noted that part of the property rights guaranteed to Maori in the Treaty were rights to utilise their properties and taonga in new development opportunities. We found that the Crown's obligation of active protection of these rights extends to protecting iwi and hapu in a sufficiency of properties and taonga to be able to participate in such opportunities, and to addressing barriers and taking account of policies and programmes so that iwi and hapu are able to participate in these opportunities equal in the field with other sectors of the community.

We agree that this does not mean there was any Treaty requirement on the Crown to identify tourism as a particular development opportunity. As we discussed in chapter 14, the Crown's identification of what were considered significant development opportunities depended on what was known and expected at the time. In that chapter, we found that, for a variety of reasons, governments tended to identify farming as the most significant development opportunity for lands, even in regions where lands were found to be not especially suitable for that purpose. Where the Crown identified such opportunities and based policies and programmes on them, and where these extended to this inquiry region, we found that the Crown had obligations to protect iwi and hapu in sufficient lands to participate in this opportunity, and to take reasonable steps, in the circumstances of the time, to do so.

We accept the observation made by parties before us that this is the first time a Tribunal has been asked to consider Treaty obligations in relation to development opportunities in tourism in any depth. We also note the Crown's submission that we have to consider what is meant by the term 'tourism industry'. We accept that the definition proposed by the Crown seems generally useful. That is, tourism can be broadly defined as the practice of travelling for pleasure, and the tourism industry as businesses associated with providing services related to this practice, including accommodation, access, infrastructure, food, and transport. We also accept that this definition assumes some degree of complexity.

However, we do not accept the Crown's view that complexity was the measure of identifying economic development opportunities in the nineteenth and early twentieth centuries in a young colony such as New Zealand. We spent some time, in our previous chapter, considering how New Zealand governments in the nineteenth century took an active and pragmatic role in identifying and encouraging potential economic opportunities for the young colony. Virtually no enterprise or economic opportunity could be considered sophisticated or complex at this time. The modern farm industry, based on the export of refrigerated farm

products, was, as we noted, only in its infancy when the Government intervened in the 1890s to encourage land-owners to participate. As we have seen, throughout the nineteenth century central and local governments actively identified and encouraged a range of potential economic opportunities for utilising lands and resources, including gold mining and flax milling. Although governments could not be sure which opportunities might prove most successful in the long term, their judgements were based on the experience, knowledge, and understandings colonists brought with them and the anticipation of economic opportunity based on this. This was at least as, if not more, important in identifying significant development opportunities at this time, as the complexity or size of an industry.

We need to apply the same reasoning to tourism in this inquiry region. We agree that Treaty obligations did not prevent the Crown acquiring sites from Maori in this region just because they were regarded as having tourism potential. The parties to the Treaty assumed that settlement would involve the acquisition of land and resources for all kinds of reasons. However, where tourism was recognised as a significant development opportunity, and where iwi and hapu had suitable properties and taonga and wished to participate, the Crown had a duty to actively protect them in sufficient properties and taonga for their present and future needs to enable them to participate. The Crown duty of active protection in their development right, as we found, also extended to addressing identified barriers facing those who retained properties and taonga and wished to participate in an identified opportunity, providing assistance equivalent to that offered to other sectors of the community, and taking account of development needs for iwi and hapu when setting policies and programmes.

We have already explained that we follow previous Tribunal and court findings that Maori had a right to apply new technologies and new knowledge not known or anticipated at 1840 to utilising their properties and taonga in new development opportunities. We have also considered issues concerning the application of recent Tribunal and court findings to Treaty rights of development and to

modern enterprises not known or contemplated when the Treaty was signed. We noted, in relation to this, that we are not constrained by having to consider what new forms of enterprise may be directly related to properties and taonga as at 1840. Nor are we restricted to developments that were able to be contemplated at 1840, although these are both important factors. This is because we are also required to consider the principles of the Treaty, and the findings of previous courts and the Tribunal that the principles require the Treaty to be considered as a living document, applicable to new and changing circumstances and not constrained by knowledge and understandings at 1840.

We note the Crown's submission that tourism did not really develop as an industry until after the 1960s, when strong growth occurred as a result of developments in international jet travel. We also note the Crown's submission that this new form of tourism was quite different from customary uses of properties and taonga, and involved enterprises that could not have been anticipated by parties in 1840. We also take note of the recent findings of the Court of Appeal in *Te Runanganui o Te Ika Whenua Inc v Attorney-General* and *Ngai Tahu Maori Trust Board v Director-General of Conservation*. We agree that we need to consider whether the Crown identified tourism as a significant development opportunity in this region in the late nineteenth and early twentieth centuries, and the extent to which any early trade is related to a modern tourism industry. However, we note that, from the time that one or other of the Treaty partners contemplated such a development for sites of cultural, spiritual, and economic significance to Maori, the Treaty right of development applied.

Tourism: a realistic development opportunity?

WAS TOURISM A REALISTIC DEVELOPMENT OPPORTUNITY IN THIS REGION IN THE NINETEENTH AND EARLY TWENTIETH CENTURIES?

We agree that, in overall economic terms, tourism as an industry does not appear to have figured largely in statistics on the national economy until after the 1960s.⁷⁶ We also agree that, although governments took an active role

in encouraging the growth of tourism from the late nineteenth century, the major long-term opportunity for land use nationally in that century and most of the next was overwhelmingly considered to be some form of farming. Major Government policies and programmes were focused on this. However, governments were also pragmatic. It was not known, in the late nineteenth century, how successful farming would turn out to be. As we have seen, a number of different types of farming had been tried before the 1880s, and had faltered. Although there was continued optimism about some form of farming, other potential opportunities for land and resource use were also identified, especially in more marginal areas.

As we noted earlier in this report, the central North Island was recognised as having spectacular natural scenery and attractions from a very early period. Tourism travel to sites of novelty and spectacular scenery was known to (and part of the experience of) many new colonists, as was the European spa tradition, based on thermal and natural mineral waters. The potential of tourism based on such natural attractions and resources was readily recognised. This region had an abundance of such attractions, including lakes, waterways, spectacular surface geothermal attractions, and a backdrop of snowy mountain peaks, all within a relatively confined area. The hospitality of local people and their ability to live amongst and make good use of geothermal areas were further attractions, which also appeared to confirm the health-giving properties of the thermal springs. Historians such as James Belich have pointed out that the economic potential of tourism was recognised as encompassing more than just the income likely to be directly derived from visitors, although that was thought to have considerable potential. The spectacular and novel aspects of the country were also identified as important to New Zealand's efforts to market itself overseas – and especially in Britain – as a destination for potential new immigrants and the attractive source of export products.⁷⁷ The Government's encouragement of the tourism industry, and the natural resources and features on which it was based, enabled it to portray New Zealand as a



Service car and passengers arriving in Taupo from Rotorua, 1905.
Photograph by Herbert Mourant.

healthier, more interesting, more scenic, and better version of Britain.

We have considerable evidence before us that persuades us that large areas of this inquiry region were recognised for their significant tourism potential from an early period, and that it was this identification of significant tourism potential that helped shape Government policies. This, in turn, required governments to consider the needs of iwi and hapu in respect of this potential opportunity. We received evidence that some iwi and hapu were already involved in guiding a 'a trickle' of travellers to natural attractions such as the Pink and White Terraces by the 1850s and 1860s, as well as providing food and accommodation on the way.⁷⁸ Richard Boast has found evidence that visitors in 1860 reported that a board, near what would later become the 'buried village' of Te Wairoa, listed the fares Maori set for tourists to the lakes.⁷⁹

We agree that the income from such ventures may not have been substantial. We also agree with claimant historian Cybele Locke that, at this very early stage, tourism was only for the hardy traveller. This early form of tourism was relatively simple, based on charging a fee for access to a particularly attractive site and the associated transport and accommodation. We note that iwi and hapu traditions of hospitality meant that, in some cases, travellers

were provided with hospitality without significant charges. Further, the early trade was limited to very spectacular sites and not spread evenly among all iwi and hapu of the region. However, there is also evidence that Maori were aware of the economic opportunities of this trade and were willing to participate in a wider range of business practices in association with it. Many of these were closely linked to, or easily extended from, traditional practices and understandings. Practices such as guiding and the provision of hospitality to strangers were a noted feature of Maori cultural traditions from the earliest period of European contact. There is ample evidence that iwi and hapu of the region were able and willing to adapt these practices to the tourist trade, so as to derive benefit for their communities from the increased settlement expected as a result of colonisation. We have received evidence of iwi and hapu beginning to charge fees for services such as transport and accommodation, and regularising this practice into set fees and charges as early as the late 1850s.⁸⁰ We also note evidence, by the 1870s, of Maori supplying and charging for accommodation and meals, employing a custodian to protect tourist facilities, and expanding into providing services for invalids wishing to bathe in mineral springs.⁸¹ Although incomes may have remained small overall, of greater importance in this early period was the economic potential identified for this kind of activity, the skills and experience gained, and the ability of communities to participate as they chose in ways that met their preferences and needs.

We also have evidence of European travellers and Government officials commenting on the geothermal attractions and their potential for a possible spa-based tourism industry, as they were familiar with it, from as early as the 1840s. For example, we note evidence presented by Dr Locke, citing the Reverend Wade's comments on the health-giving qualities of the springs at Ohinemutu and Mokoia Island, and similar comments from Edward Jerningham Wakefield concerning Tokaanu in 1841.⁸² We note evidence from tourism historian, Ian Rockel, of a report by the Colonial Surgeon Dr Johnson, in 1847,

which identified Tikitere hot springs as an ideal site for a resort for invalids, and Governor Grey's stated intention, in 1848, to build a sanatorium there.⁸³ Dr Locke also cites an account by Dr Johnson of the Rotorua district in 1847, which encouraged people to visit and to consider the district as an agreeable summer residence for leisure activities.⁸⁴ These comments, made as early as the 1840s, clearly reflect the understandings of colonists at the time of the potential for tourism and the perceived health-giving attractions of the district's resources for both local and overseas visitors.

Possible development opportunities based on travel and visits to natural attractions in this region (which were properties and taonga of iwi and hapu), and the potential development of businesses and services associated with them such as guiding and spa and health-related activities, were therefore well within the contemplation of parties in the 1840s when the Treaty was signed. Both Maori and colonists began to consider and try out such opportunities within a short period of time. The right to utilise such properties and taonga to participate in tourism development opportunities was, therefore, clearly part of the property rights of iwi and hapu that the Crown had an obligation to actively protect.

We accept the Crown's contention that a reasonable definition of a tourism industry is businesses based on the practice of travel for pleasure (including recreation, sport, leisure, and health), and includes the provision of related services such as accommodation, access, infrastructure, food, and transport. However, the definition of an industry does not necessarily require a large and sophisticated scale, such that all participants' income or time is involved solely in the activity of tourism. This was especially true of the less stratified New Zealand economy of the nineteenth century. We have significant evidence that there was an early tourist trade in our region, particularly in the Rotorua and Taupo districts, and that Maori were significant participants in this industry. The industry was not as sophisticated as might be expected today, but it did involve a range of services other than simply tolls for viewing an

attraction. These included transport, accommodation, guiding, food, and entertainment. The small population of the time meant tourism operators had to offer services to local residents as well as travellers, but the regular arrival of outside visitors, who wished to visit attractions and pay for services associated with them, did make this a form of tourist industry. However, of at least equal importance in nineteenth-century New Zealand, at a time when much economic development was beginning and the Crown was acquiring extensive lands from Maori for settlement, was the widespread expectation that a larger and more significant tourism industry would develop. This, in turn, significantly influenced Government policies and actions in the region.

It was not possible to accurately foresee how such a tourist-based opportunity might develop and grow, or how new technologies and knowledge, such as jet air travel, might eventually be applied. However, the possibilities of such an industry and participation in it, based on utilising spectacular natural scenery and geothermal resources, was well within what both Maori and Europeans could contemplate. We note evidence that this early form of tourist guiding by iwi and hapu was disrupted by the impacts of warfare from the early 1860s through to the early 1870s. However, we did not receive evidence on the extent of the impacts of the wars on particular communities in this region, and we leave this to further negotiation between parties.

We do have evidence, however, of a resurgence from the 1870s of efforts to develop tourism in this region, both by Maori and by Pakeha, with a continued emphasis on natural scenery, geothermal attractions, and allied activities. It was recognised that, in many parts of this interior region where lands were difficult to farm, tourism was likely to be an important alternative, or contribution to, income. These characteristics of the region were also recognised by governments, as interest turned to promoting settlement in the region and the possibility of acquiring land from Maori for this purpose. It is clear from a variety of sources, including the widely-quoted comments of Government officials,

that tourism was expected to be a significant opportunity in this region, either as an alternative to or in combination with farming.

We were referred to the comments of former Premier William Fox, himself an enthusiastic traveller and propagandist for the new colony, who remarked in 1874 of this interior region that:

The country in which the hot springs are is almost worthless for agricultural or pastoral, or any similar purposes; but when its sanitary [health] resources are developed, it may prove a source of great wealth to the colony.⁸⁵

Fox, like many of his contemporaries, was familiar with the long-standing European health spa tradition, and he identified similar tourism possibilities for hot mineral springs in this region. Pakeha officials, Government ministers, and entrepreneurs of the time tended to base their view of the potential of tourism on their own experiences and the potential they could see for attracting wealthy European and American travellers, along with the propagandist value to New Zealand as a whole of such attractions. Thus, the context for tourism in the region included the European health and mineral spa tradition, circuits of natural and scenic wonders of the world, and the leisure pursuits of the wealthy such as game fishing and hunting.

The Lake Hotel at Taupo, around 1900.



Grounds of the Spa Hotel in Taupo, circa 1890

We note that the introduction of trout, and the tourism possibilities associated with trout fishing, had become an important issue in this region by the early twentieth century.

A number of historians have commented that such ambitions seem unrealistic now, given the distance from Europe and the United States and the difficulties with travel at the time. In addition, New Zealand lacked essential factors that might have persuaded travellers to endure distance and discomfort, including a homegrown royalty and social elite to patronise the spas and make them fashionable, diversions such as casinos attached to the spas in the European tradition, and a developed infrastructure to cater to the demands of the wealthy.⁸⁶ However, as we have noted, the tourism opportunity was never regarded as being limited to the income overseas tourists were likely to provide. Governments recognised from an early period that the natural attractions and perceived healthfulness of the new colony were useful propaganda tools to attract more immigrants and help sell produce in overseas markets.

In addition, an emphasis on the interests of wealthy elites was not entirely based on wishful thinking. The British historian, Harold Perkin, has noted that by the

middle and later nineteenth century, the newly-emerging middle classes in Britain and the United States were gaining more wealth and leisure time. They wanted to emulate the rich elites in the fashion for travel, health tourism, and experiencing new and exotic locations, and they began travelling in large numbers, at first to local seaside resorts, but then to overseas resorts set amidst more spectacular natural scenery, such as the Swiss Alps. In response, the very rich began to seek out even more novel, exclusive, and exotic parts of the world, which in turn made such places more fashionable for the upper and middle classes.⁸⁷

New Zealand, and this inquiry region in particular, had the spectacular natural attractions, the resources on which to build health spa, and the exclusiveness that could attract the attention of the very rich and adventurous. Even if they only visited in very small numbers, they set fashions and trends for others to follow. Professor Belich has noted the apparent anomaly of the emphasis of the time on the relatively small overseas market for wealthy tourists, when even then the local market (which included Australia) was probably more important.⁸⁸ However, as well as the overseas propaganda value for New Zealand and its products, the value of attracting even small numbers of the wealthy and famous was not lost on New Zealanders. For example, the visits by British royalty to Rotorua's thermal attractions (and the naming of some attractions after them) were enthusiastically welcomed both by Maori and by the Government. The successful visit of the Duke of Edinburgh, Prince Alfred, to the Rotorua lakes district in 1870 (along with a large contingent of local and foreign press) began a long tradition of welcoming royals at Rotorua and linking royalty with Rotorua's tourist facilities. The Rotorua historian, Don Stafford, has noted, for example, that the Duchess Baths at the sanatorium in Rotorua were named after the Duchess of York and Cornwall, following a royal visit in 1901. The geyser at Waiotapu was renamed Lady Knox in 1903, after the visit of the Governor-General, Lord Ranfurly, and his wife.⁸⁹ It was rightly anticipated that these visits and such naming would help to make the attractions more fashionable for visitors.



Overseas visitors have included many famous people over the years. This photograph by John Pascoe shows Rangitiria Denna, a well-known guide at Whakarewarewa, walking with Eleanor Roosevelt during her visit, 1943.

We accept the Crown's submission that tourism nationally, as measured by overseas visitor numbers, did not grow as fast as may have been anticipated in the nineteenth century. Official records indicate that, while overall numbers were relatively small, numbers of recorded overseas tourists grew relatively steadily into the early twentieth century, but only began to expand at a much greater rate after the 1960s. The tourism industry, as such, only began to be recognised as contributing significantly to the national economy from this time.⁹⁰ However, as we have noted, recorded visitor numbers were not the only measure of the industry, and what we are most concerned with is when tourism was identified as a potential opportunity in this region.

Statistics on domestic tourism are much more difficult to access reliably, but there is evidence that domestic tourism was increasingly regarded by tourist operators of the region as a more significant and realistic market for income



HRH the Duke of York, trout fishing at Taupo during the 1927 tour

from actual visitors. Mr Stafford has commented, in his histories, that, while Rotorua township failed to grow as quickly as expected, tourism nevertheless remained as its mainstay into the early twentieth century, and associated enterprises, including accommodation houses, hotels, and transport businesses, remained the town's largest employers. Mr Stafford also notes the development of domestic tourism from the 1920s, with more widespread acquisition of private motor cars and the development of the touring car fashion, leading in turn to a revival of interest in boating on the lakes, the development of thermally-heated swimming baths in Rotorua township for recreational enjoyment, and the domestic promotion of the industry through carnivals, fairs, and publicity campaigns led by local businesses in cooperation with the railways and tourist departments.⁹¹ Trout fishing and, to a lesser extent, deer hunting, and the guiding and camping services associated with these activities, had also become important in this region by 1900, drawing the attention of Parliament. We will discuss this further in our chapter on Lake Taupo.

The importance of domestic tourism development is supported by evidence we received in relation to other development opportunities in the region. For example, we note

evidence in relation to Maori land development schemes, where attempts were made to diversify into tourism-related areas alongside popular lake and river edges to take advantage of an increase in the popularity of family camping and batches in the region from the 1920s. We also note evidence that the decision to use Okere Falls to supply hydro-electricity for Rotorua, from 1901, initially came about as a result of pressure to improve amenities for tourism, particularly domestic tourism. Visitor numbers increased so significantly after the opening of the railway to the township in 1894, that the town's existing water and sewage systems were unable to cope. The Government promised to remedy this in 1896, so that the town's reputation as a health resort would not be undermined. This resulted in the opening of the hydro station at Okere Falls in 1901. The electricity supply not only enabled the sewage and water supplies to be upgraded, but also enabled electric lighting of many of the town's tourist amenities, including the railway station, the Government baths, and the sanatorium grounds. This, in turn, helped increase the attractiveness of the town as a tourist destination while electric lighting was still a novelty in much of New Zealand.⁹²

We note that the Government's own actions indicate the extent to which it recognised tourism as a potential development opportunity in the region, even if this did not occur as rapidly as expected. The Government became involved in agreements with Maori, in what was then known as the hot springs region, in anticipation of the development potential of large parts of the region for tourism. A major reason for entering negotiations over the Fenton Agreement, for example, and then agreeing to cooperate over developing thermal areas, as reflected in the Thermal Springs Districts Act 1881, was for tourism-related purposes. We have also noted later arrangements over Tokaanu and Rotoiti townships in the Taupo and Rotorua districts. These were intended to eventually encourage the development of surrounding farm settlements, but in the meantime were expected to develop as a result of attractions or services for visitors. Parts of the Paeroa East blocks of the Kaingaroa district were also identified as containing



◀ Patients at the Government sanatorium and baths at Rotorua, around 1926–1930. The photograph shows them undergoing the 'Greville hot air bath' treatment, which used intense dry heat to ease stiff joints.

▼ The Government-owned Bath House, opened in 1908. Undated photograph by E Le Grice.



geothermal springs likely to be valuable for tourism, and the north-western part of the district was included within the Thermal Springs Districts Act.⁹³

The Government continued to invest in the township of Rotorua and in tourist attractions nationally in order to encourage the development of tourism. This active intervention by the State was also reflected, for example, in the creation of a new Department of Tourist and Health Resorts in 1901 to further promote not only the natural wonders of this region, but also spa and tourist resorts in other parts of the colony in following years, including Mount Cook, Waitomo, Waikaremoana, and Queenstown. In Rotorua, state investments included the building of the Bath House in the Government gardens and the appointment of a Government balneologist. For a period, the newly-established Tourist Department directly managed Rotorua township. The Government also took control of acclimatisation projects in this district, with the aim of further promoting activities associated with encouraging wealthy tourists, such as game hunting and fishing. The department also encouraged public works investment in the tourism facilities of the district, including the provision of access to identified tourist attractions. This included, for example, work to reopen the Rotorua–Te Wairoa road in 1900 and 1901, in order to complete the Tarawera ‘round trip’ tourist route.

This identification and then active promotion of the industry was influential in shaping official policies and programmes concerning land and settlement in this region. We accept that the Crown could not foresee the exact way that tourism would develop in this region, but we are persuaded that it did identify tourism as a significant development opportunity in many parts of the region and developed policies and programmes that took account of this, including some, such as the township initiatives, that impacted on iwi and hapu. The Government was also well aware that a number of iwi and hapu of the region were already engaging in and deriving benefit from early developments in tourism. We note evidence from Dr Locke, for example, that in 1884 it was reported that 1250 visitors



‘Through steaming hills and boiling water, Lake Rotomahana, Rotorua’. The date of this postcard image is unknown but, as at Lake Tarawera, it shows that whaleboats were being used to transport tourists.

had travelled to the lakes district that season, with more than £15,400 estimated to have been spent on accommodation, transport, guides, and so forth. It was estimated that Tuhourangi obtained between £2000 and £6000 as their share.⁹⁴ These were, of course, estimates, but they are an indication of the potential value of tourism development for Maori and Pakeha communities in this region.

We agree with the Crown’s submission that as settlement and the demand for tourist attractions increased, and as Pakeha entrepreneurs became increasingly involved, the fledgling tourist trade did become more complex, with a wider range of services and associated businesses. This was particularly true in the Rotorua district from the 1880s. We also received evidence that iwi and hapu were aware of these developments and willing to participate in them. We note evidence, for example, of increasing iwi and hapu willingness to regularise prices and adapt them to meet tourist demand. There is also evidence of increased awareness of, and participation in, associated businesses and services, including the commercial possibilities of illustrations and photographs of attractions and their use by local people.⁹⁵

Dr Locke also notes evidence of Maori development of traditions to extend the tourism experience, such as sharing aspects of their culture with visitors. This includes reports of singing to tourists during the boat trip across Lake Tarawera, and concert performances offered at Wairoa, with set fees for each show.⁹⁶ As the Crown acknowledges, those hapu able to accumulate sufficient funds were willing to compete to use new technologies and improve their services, for example by using whaleboats to replace waka on Lake Tarawera.

We are persuaded that there is sufficient evidence that iwi and hapu were ready and willing to take part in a much more complex role in the developing industry than simply charging fees to view a scenic attraction. The level of what could be provided was naturally limited at this time by, among other factors, the physical reality of difficult access and the numbers of tourists able to visit, but within these constraints it is clear to us that the beginnings of a tourism industry – and Maori participation in it – were already evident in this region in the nineteenth century. It was recognised as a significant opportunity in this region by governments of the time. As such, the Crown had obligations to actively protect iwi and hapu in their Treaty development right to participate in this anticipated economic opportunity.

The Crown submitted that, in considering this question, we also need to consider carefully just how amenable a possible tourism industry was for Maori communities of this region, as any close involvement in an extensive tourism industry would inevitably involve conflicts between development and conservation of resources and taonga. In this respect, it was submitted that claims that tourism was particularly attractive to Maori of the region as a development opportunity, because it fitted broadly with their world view, their connections to taonga, and their way of life, have to be treated with care and may well be overstated. The Crown submitted that there is evidence of conflict within Maori communities over the extent to which properties and taonga should be used for commercial purposes or for other needs such as cultural traditions,

and that conflict over possible development is still evident today. The Crown pointed to evidence of present-day discussions within iwi of this region over this issue, such as possible tourism development for Tauhara Maunga.⁹⁷ The Crown noted that any form of development has impacts on assets and taonga that some owners may not wish to accept. This is especially the case when tourism becomes more sophisticated and additional infrastructure is required to facilitate the tourist experience. This, like any other form of development, raises issues of disruption to the lives of landowners and a degree of distancing of owners from their lands and resources, such as was experienced at Whakarewarewa.

We accept that tourism development opportunities based on natural resources will often involve some tensions and requirements for balances to be struck between development and traditional cultural needs. However, we note that tourism is not unique in this respect; all development opportunities can involve this kind of tension. An important factor is the extent to which communities are able to resolve these tensions and create balances in ways that they find acceptable, so as to meet their needs and preferences. This returns us to our underlying theme of autonomy. We note that previous Tribunal inquiries have already considered this kind of tension over development issues, as the Treaty itself assumed development and provided a guide to its resolution. The *Report on the Muriwhenua Fishing Claim*, for example, acknowledged in relation to the fishery resource that there will often be such tensions. These exist in society as a whole, not just for Maori, and are necessary and beneficial. That Maori are concerned to develop in ways that balance various views and needs does not mean that Maori cannot or could not utilise or develop their resources for economic purposes. The evidence indicates that Maori were major developers of resources even before 1840, substantially modifying their environment under their own customary law. Maori also welcomed new forms of development opportunity that were made possible by contact with Europeans. They had customary means of reaching decisions over balancing the need to protect a



Guide's house and tearooms at Orakei Korako, circa 1940. The sign next to the visitor reads 'No admission to thermal area without a guide'.

resource for future generations with utilising the resource. In modern development terms, the requirement to protect a resource did not prevent commercial exploitation, but required account to be taken of the need for balance and caution.⁹⁸

We note that in this inquiry region, similarly, there is evidence that during the very early period of the development of tourism Maori willingly took up opportunities to develop a tourist trade involving their properties and taonga. They were willing to accommodate tourist needs and interests but controlled how this would be done. Communities utilised their traditional systems of authority and tikanga to make decisions about how their taonga and aspects of their culture would be shared with travellers. This required the balancing of tensions and was undertaken by communities themselves. It did not prevent them from taking part in tourism-related activities. The ability to adapt, to share aspects of their culture and taonga with travellers in a commercial environment while still retaining a living, independent culture, was a notable feature of the early tourist trade in this region

and continues to be impressive today. It is notable that the various communities and villages involved, especially at Ohinemutu, Whakarewarewa, and Orakei Korako, all decided on slightly different ways of engaging with commercial tourism according to community preferences and decisions.

We received evidence of other communities sharing taonga with tourists while at the same time balancing conservation and kaitiaki obligations to their taonga. We note the willingness of communities to utilise and modify traditional systems of hospitality in the commercial tourism trade, and for civic purposes such as welcoming dignitaries, while using those same events to retain and build on local cultural traditions. Tensions had to be resolved, but there is abundant evidence of willingness and ability to do this. While some development of tourism sites was unavoidable, the tourism trade at least provided a means of protecting and maintaining taonga, independent businesses, and community culture and traditions in ways that were less destructive and disruptive than other major



Protecting special places does not necessarily prevent their use. A group of tourists being shown Waikimihia, the warm pool where Hinemoa rested after she swam to Mokoia Island to be reunited with her lover Tutanekai.

Tour guide with a group of tourists. Although the photograph is untitled, the rock would appear to be Iriirikapua at Owkata, where Hinemoa would sit listening for the sound of Tutanekai's flute echoing across the water from Mokoia.



development options at this time such as sulphur mining, or draining and developing land for farming.

We accept the Crown's submission that there was some early conflict between communities of this inquiry region over control of tourist sites, including, for example, conflict between Tuhourangi and Ngati Rangitihi at Tarawera. We observe, however, that these conflicts were resolved, in many cases, by tribal authorities established by communities to deal with new challenges and opportunities arising from settlement, such as the Tuhourangi committee. As we showed in part II of this report, these committees received very little support from the Government and were constrained in their development by the Crown's failure to support them and recognise their authority. Such mechanisms, if given greater powers, could have enabled communities to make rational decisions about how best to use, develop, or retain their multiply owned assets and adapt to the changing needs of the developing tourism industry.

The development of a more sophisticated and complex form of tourism industry over time, with requirements for more services and infrastructure, was not something that Maori were unable or unwilling to deal with. We note the recent development of Tikitere, with associated development of thermal medicinal and cosmetic products, as an example of community-led development that can successfully balance conservation and development objectives. We would further note, as we have previously, that in many cases tensions have been exacerbated by the Crown's failures to protect iwi and hapu in sufficient properties and resources for their present and future needs, meaning that some communities now have no option but to try and make limited retained resources serve multiple purposes. We note again, for example, that current tensions over Tauhara Maunga are exacerbated by the Crown's failure to protect a sufficiency of properties and taonga in Maori ownership and community control.

In sum, it is our view that a tourism trade began developing in this region from a very early period. It was recognised as an economic opportunity by Europeans as early as the 1840s. Tourism based on taonga and natural resources

was well within what parties signing the Treaty could have contemplated at the time. The potential for a much larger and more lucrative tourism industry in this region, in the Rotorua district especially but also in parts of the Taupo and Kaingaroa districts, was identified by Maori, colonists, and governments in the nineteenth century and, as such, the Government had an obligation to protect iwi and hapu in their Treaty right to participate in this development opportunity. This included an obligation to actively protect iwi and hapu of this region in sufficient properties and taonga to be able to continue to participate when the Government began to buy and lease Maori land in this region from the 1870s.

Fair participation in tourism opportunities

DID THE CROWN FULFIL ITS TREATY OBLIGATIONS TO ACTIVELY PROTECT IWI AND HAPU OF THIS REGION IN SUFFICIENT OF THEIR PROPERTIES AND TAONGA TO FAIRLY PARTICIPATE IN TOURISM OPPORTUNITIES?

In part III of this report, we considered general issues of adequate Crown protection of iwi and hapu in sufficient lands to be able to participate in development opportunities. That discussion forms an important context to our consideration of sufficiency with regard to tourism. We have found that tourism was considered to be an important economic opportunity in this region from an early period, and that, as a result, the Crown had an obligation to protect iwi and hapu in sufficient of their properties and taonga to participate fairly.

We have considerable evidence that the Government considered potential tourism opportunities to be important in this region when it implemented purchase and land settlement policies. This was particularly so once the full extent of the natural attractions of the region began to be appreciated, and once it started to become clear that much land in some parts of the region was otherwise marginal for close agricultural settlement. We have already noted the comments of former Premier William Fox in the mid-1870s, as Government purchase negotiations were



'A party of tourists at Hamurana Springs' (undated)

beginning in this region, that while the hot springs region might be almost worthless for farming its potential as a spa and resort area might prove a source of great wealth to the colony.⁹⁹ In part III, we noted instances of the Crown targeting sites of recognised tourism value when it purchased land in this region, including land at what became Taupo township, Whakarewarewa, Hamurana Springs, and the alum caves and springs in the Paeroa block.

We have also noted that, when the Crown reviewed negotiations in the early 1880s, Government purchase agents took sites of 'great interest' and natural attraction on land blocks into account when they advised the completion of land purchases. This applied across our whole inquiry region and to a range of sites thought likely to be useful as tourist attractions, in addition to the better-known areas of geothermal activity in Rotorua. For example, the Paeroa block in the Kaingaroa district was identified for purchasing because it contained not only potentially fertile land and useful timber but also 'very fine' hot springs.¹⁰⁰ When the Native Minister, William Rolleston, commented on the review, he instructed that 'no land with hot springs or other features of great interest should be abandoned.'¹⁰¹ This policy continued through the 1880s and 1890s, with Gilbert Mair noting in 1886, for example, that he had been instructed to purchase the valuable hot springs, lakes,

and other scenic attractions of the Paeroa area.¹⁰² Sites of great interest included the scenic lake, thermal springs, and mountain backdrop of what would become Taupo township, the hot springs at Whakarewarewa, the freshwater Hamurana Springs, and the scenic lakeside areas in Rotorua, as we have already noted in chapter 10.

We are of the view, based on this pattern of evidence, that the Crown did actively target a range of natural areas of interest that were regarded as likely to be useful for tourism, and geothermal sites in particular. In some cases, for example at Hamurana Springs, this occurred when it was clear that Maori were already involved in developing tourism enterprises. The evidence from the time is quite clear that the most likely use for hot springs areas was expected to be tourism and associated health spa purposes. There was some secondary interest in geothermal minerals for other purposes, such as sulphur mining, but this is much less evident in the records. There was always hope that further uses might be found for mineral springs in the future, but at the time the most likely development potential lay in their value for tourism. We note that many allegations regarding the loss of mineral springs from Maori ownership by the early twentieth century refer to those springs believed, at the time, to hold the most potential for tourism development.

As the Crown submitted, not all the hot springs in this inquiry region were alienated from Maori ownership by the late nineteenth century. However, of the springs thought most attractive and of potential tourism value, the majority had been alienated from Maori ownership by the early twentieth century. We note the evidence of Professor Boast, for example, that 'by the 1890s few of the major springs remained in Maori hands.'¹⁰³ We further note the Stout-Ngata commission's 1908 report, which found that, apart from Rotorua township, the Government had used the Thermal Springs Districts Act 1881 to purchase areas it wanted, including land with hot springs identified as having potential tourism value, so that by March 1908 'the only springs of any importance' remaining in Maori ownership were those at Tikitere on the Whakapoungakau-Pukepoto

block.¹⁰⁴ We also note that this targeting often had a cumulative effect. In the Taupo district, for example, by the early twentieth century, the cumulative impact of purchasing in northern Taupo, the acquisition of the Taupo lake bed, chain reserve, and tributary rivers, the loss of thermal springs in Tokaanu township, and the acquisition of the mountain peaks just outside the district's southern boundary had helped to effectively exclude hapu of the district from opportunities to participate in developments in the tourism industry. Similarly, the acquisition of mineral springs in the Kaingaroa district also foreclosed opportunities for hapu who had already lost large areas of land.

We agree that the Crown did not have to refrain from purchases in this region just because the land contained sites that were suitable for tourism. The Treaty anticipated possible purchases for all kinds of settlement reasons. However, the Crown's obligation to actively protect a sufficiency of land for development also applied to properties and taonga anticipated to be important for the tourism opportunities that were already developing and were expected to be commercially valuable in this region.

We accept that Dr Locke and other historians presenting evidence before us made strong cases of evidence of racism among many Pakeha, whether visiting or competing with Maori tourism ventures in this region.¹⁰⁵ We note compelling evidence, for example, that, at times, the Crown does appear to have actively attempted to acquire sites from Maori ownership, only to encourage Pakeha to take them up and use them for tourism purposes. Bruce Stirling provided evidence for this claim with regard to the establishment of the township site at Tapuaeharuru, for example, later known as Taupo. We also note evidence of the Crown acquiring land, such as at Hamurana Springs, and then closing down Maori tolls, and evidence that the Crown was reluctant to provide roads useful for tourism until land had been acquired from Maori. For example, in the Paeroa block Government officials were reluctant to assist with improving roading until the Government had acquired the land. Once that had been achieved, it was felt that the sooner the road was completed the better,

not only for the development of the region and the country but because it was expected to be an important tourist route.¹⁰⁶

However, we do not have sufficient evidence to find that these kinds of practices were motivated primarily by racism. In many cases, however, the Crown was ‘careless’ of iwi and hapu interests when it pursued what it regarded as settlement and strategic goals in the general interest. For example, the Crown encouraged ex-Armed Constabulary men to settle in the new Taupo township and take up tourism-related activities, including accommodation, transport, and guiding services, as a means of supporting themselves while they provided some means of easily-called-upon security in an unsettled district. These men were unable to live off tourism services alone, but in the near future tourism-related services and businesses were expected to become an important part of their livelihood and they actively pursued this.¹⁰⁷ Similarly, the Government was reluctant to provide transport infrastructure such as roads if this increased the value of land it wished to purchase and would provide Maori with an income that made purchase pressure easier to resist.

We agree that Crown policies with regard to tourism at this time contained more than a little cultural arrogance, but we also note that policies were very strongly directed towards encouraging colonisation and settlement in the belief that this, in turn, would benefit Maori as well as Pakeha. We are not convinced these policies were deliberately racist, but they did emphasise the Crown’s purchasing objectives at the expense of adequately protecting the ability of Maori to participate in tourism opportunities. We also note evidence of the Crown’s concern that Maori, under pressure from speculators, were unable to prevent alienation of their lands and taonga even when they wished to. This risked important natural attractions of national value falling into foreign ownership or being ruined by unscrupulous private ownership. However, as we found in part III, the vulnerability of Maori to such purchasing reflected in large part the inadequate title system provided by the Crown. Any Government policies impacting on

Maori property rights, and development rights associated with them, required consultation, minimal infringement, and adequate compensation that also took account of impacts on development opportunities.

We do not accept that it was reasonable, in Treaty terms, for the Crown to acquire potential tourism sites simply because it was convinced that the systems it had established with regard to title and effective management meant that Maori would not be able to prevent their alienation to foreign interests or private speculators, in contravention of what the Government believed to be the public good. We note, in chapter 18 of this report, that a major reason for the Crown’s determination to acquire control of the beds of and access to Lake Taupo and its tributaries was the fear that such areas would inevitably fall from Maori ownership into foreign hands. We also note the Crown’s submission that former Premier Fox was concerned with Government responsibilities to protect some nationally important sites likely to be of tourism interest. In our view, it was not reasonable for the Crown to pursue this without also establishing mechanisms that took iwi and hapu interests and needs in tourism into account. Protection from speculation or inappropriate private acquisition did not require that the Crown exclusively own, control, and profit from Maori taonga.

We note the Crown’s submission that, when it purchased or took some sites for public purposes, it did not always do so with tourism in mind and did not deliberately intend to restrict Maori opportunities in tourism as a result. In our view, where the Crown was acquiring sites for any purposes, it still had an obligation to consider the impacts on Maori opportunities in tourism because of the acknowledged importance of these opportunities in this region. The Crown was also under an obligation to consider whether iwi and hapu were already beginning to develop the site for tourism and seeking to gain benefit from this. It had a responsibility to consider and take reasonable steps to protect iwi and hapu rights to utilise their properties as they chose, and their need to retain properties and taonga that were likely to be most useful to them in tourism when

this was acknowledged to be such an important economic opportunity in this region. As we noted in part II of this report, the Crown limited its ability to consult and negotiate with communities over such issues as the protection of nationally important sites when it failed to adequately support initiatives such as komiti, which were intended to enable Maori to more effectively exercise their autonomy and collective authority over their properties and taonga.

We are of the view that in this region the Crown failed to take reasonable steps to protect iwi and hapu in sufficient of their properties and taonga to enable them to participate fairly in the fledgling tourism opportunity that was widely anticipated to be a major economic opportunity for the region. We noted, in part III, how the Crown targeted those lands and resources identified as likely to be most useful for tourism opportunities in this region in the nineteenth and early twentieth centuries. They included most of the significant thermal springs in the Rotorua interior, for example, as identified by the Stout–Ngata commission in 1908, the purchase of much of the thermal areas in the Whakarewarewa valley, the acquisition of Hamurana Springs, the acquisition of thermal springs in Tokaanu township, and large areas of lakeside lands. These sites were either identified as likely to be suitable for tourism at the time they were acquired or, in some cases, such as Hamurana Springs, already being used by Maori for tourism purposes.

We note that many of the inadequacies we identified in part III in protections for land purchasing generally also had impacts on sufficiency for tourism opportunities. Protections such as the 50 acres per head minimum, for example, took little account of what actually might be required for tourism, even if they had been adequately implemented. Nor did such protections require any consideration of whether land purchasing was effectively removing iwi and hapu out of tourism areas and opportunities to participate in expected benefits. As we noted in part III, the Crown also failed to provide a form of collective title that might enable iwi and hapu to protect and manage their taonga as they wished. This, too, had a serious impact

on iwi and hapu wishing to protect and utilise such taonga for tourism opportunities.

In our view, the Crown breached its Treaty obligations of active protection in failing to protect iwi and hapu of this region in sufficient of their properties and taonga to enable them to fairly participate in developing anticipated tourism opportunities. The impacts on iwi and hapu varied over this inquiry region. In Kaingaroa and Taupo, losses were so significant that iwi and hapu were effectively marginalised from recognised tourism opportunities by the early twentieth century. Iwi and hapu of the Rotorua district also suffered extensive targeting of sites and taonga believed to be important for tourism opportunities. However, the impacts varied between iwi and hapu. We leave an assessment of the full extent of these impacts to be negotiated between parties.

Active protection

TO WHAT EXTENT DID THE CROWN FULFIL ANY OBLIGATIONS OF ACTIVE PROTECTION OF IWI AND HAPU IN UTILISING THEIR RETAINED PROPERTIES AND TAONGA FOR TOURISM PURPOSES IN THIS REGION?

We have received considerable evidence that the Crown had identified tourism as a major economic opportunity in this inquiry region by the 1870s. In promoting European settlement in this region, the Crown targeted sites and resources it had identified as likely to be useful for tourism purposes as part of its purchasing and, as we have noted, also accepted increasing responsibility for promoting, facilitating, and participating in what was expected to be a developing tourism industry. As such, the Crown had corresponding Treaty obligations to ensure that Maori also had opportunities to utilise their lands and taonga in tourism development opportunities. This was not an obligation to ensure that iwi and hapu faced no risks or could not fail in commercial tourism enterprises. It required the Crown to take reasonable steps, in the circumstances of the time, to ensure that Maori of the region had the opportunity to

participate in the developing industry at more than just a subsistence level, provide positive assistance to overcome barriers where required, and make available assistance and encouragement equivalent to that offered to other sectors of society. It also required the Crown to refrain from policies and actions likely to undermine such development opportunities unless absolutely necessary, in which case it was required to offer consultation and adequate compensation, or alternative development assistance.

The evidence available to us indicates that tourism in the Rotorua district began with Maori operations, which dominated the trade before the wars of the 1860s, during the 1870s, and even into the early 1880s. As parties before us agreed, the beginnings of increased settlement in the region, the participation of Pakeha entrepreneurs, and the development of better infrastructure all helped to encourage growth in the tourist trade from the 1880s. The industry became more complex, with a wider variety of associated businesses and greater dependence on capital investment. The ownership and control of access to important attractions remained important, but allied businesses and services also began to develop further and were not necessarily directly linked to ownership of sites. These included businesses associated with improved transport and accommodation services, provisioning and supplies, and allied attractions such as hunting and fishing.

From the 1880s, however, Maori participation at an entrepreneurial level in tourism ventures began to decline. This was partly attributable to loss of ownership of suitable sites and resources. Claimants also alleged that even those communities who managed to retain suitable properties and taonga faced considerable difficulties in participating in developing tourism businesses on an equivalent basis with other sectors of society. All parties agreed that access to investment finance was a particular barrier to this, along with continuing title and governance problems.

We have previously noted that the main ways Maori could obtain investment finance for development purposes

were by accumulating funds or obtaining lending finance from private or Government sources. Official inquiries regularly reported the difficulties faced by Maori in accumulating surplus investment income from the sales of land – the result of the expense of the land court process, the difficulty of managing judicious sales of land for investment income because of the system of purchasing individual interests, and the Crown's use of purchase policies that drove down prices for Maori land. The evidence available to us indicates that some iwi and hapu of this region were deriving a significant income from tourism by the 1880s, especially those with interests in major attractions such as the Pink and White Terraces and the Tarawera thermal area. These hapu appear to have invested some of their accumulated funds in their tourism enterprises. For example, we note evidence that they had replaced waka with steamers by the 1880s. However, revenue was drastically restricted by the disruption and dislocation caused by the eruption of Mount Tarawera in 1886, as well as by the costs involved in the land court process that began in the Rotorua area in the 1880s.

The other main source of obtaining investment finance at this time was through lending, from either private or Government sources. As we explained in some detail in chapter 14, Maori were largely shut out of the sources of Government lending that were made available from the 1890s. In addition, we received no evidence that the Government lent to support tourist ventures at this time. Private lending was the main source of finance, both for Maori and for Pakeha. However, in general Maori were also shut out of private lending. This was not only the result of the private sector's continued aversion to lending on Maori land. From at least the 1880s, much of this inquiry region was under Government proclamation, which prevented private land dealing. This was held to cover not only sales but also any form of alienation of lands including private mortgages. We received no evidence of whether Pakeha tourism businesses in this region were considered eligible to receive lending finance from the Government

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Advances to Settlers scheme, and therefore we are not able to consider equity issues in this respect. We do note, however, that the scheme was extended to cover a variety of non-farming enterprises as needs were identified. These included, for example, workers' dwellings, local authorities, and activities additional to farming such as fruit growing and fishing.¹⁰⁸ The Crown was well aware that tourism was of interest to Maori in this region and was likely to continue to hold important development opportunities for them. Although tourism was recognised as an important economic opportunity in this region – and one in which Maori were already participating – the Crown failed to provide any extension of lending finance to Maori of this region for this development purpose. In addition, the Crown allowed opportunities for Maori lending to be further reduced in pursuit of its purchase policies.

As we noted in chapter 14, the Maori land boards, established from 1900, became an increasingly important source of finance for Maori. But these boards were not able to gain access to sources of funding that were available to Pakeha; they relied instead mainly on a dwindling source of Maori funds. Even then it seems unlikely that these funds were available for Maori tourism ventures, because Government policies required the boards to focus on farming. As we have previously noted, the Government made some alternative sources of state lending available for incorporated Maori lands. Incorporation was possible from 1894, although it was an uncertain and expensive process until the reforms of 1953. However, again, incorporations were required to focus on farming in the late nineteenth and early twentieth centuries, at the critical time Maori required lending finance to continue to develop their participation in tourism opportunities.

The evidence available to us indicates that the Crown failed to take active steps to assist iwi and hapu of this region to overcome the barriers they faced in obtaining lending finance for tourism enterprises in the late nineteenth and early twentieth centuries. We agree that private tourism entrepreneurs were unlikely to have been eligible for Government lending finance at this time.



'Soaping Wairoa geyser' (Whakarewarewa). The introduction of soap reduces the surface tension of the water, encouraging the geyser to erupt.

However, tourism was recognised as a major opportunity for Maori in this region, especially as their retained lands were generally poor for farming, and the Crown failed to take steps to actively assist Maori when it was clear that they were effectively excluded from the major source of lending finance for their enterprises – private lenders. Further, the Crown implemented restrictions on dealing in Maori lands and resources, in pursuit of its purchasing policies, that restricted access to private lending finance even further.

We received evidence of the Crown's reluctance to provide assistance for Maori tourism ventures that was of a similar nature to that provided to other sectors of the community interested in using their properties for tourism. This included a refusal to provide roading infrastructure if it might make its own land purchasing more difficult. We note the Crown's submission that roads were built for all kinds of purposes, and it is difficult to isolate roads that were intended purely for tourism. The Crown submitted that roads brought benefits to the whole community and that there is insufficient evidence to support allegations of discrimination with infrastructure. We do not accept this. We have evidence before us which indicates a pattern of Crown reluctance to provide infrastructure such as roading when this was seen to conflict with land purchase

objectives. This affected not only Maori development opportunities in tourism but, as we note in the next section of this chapter, prevented some iwi and hapu of this region from commercially utilising their timber.

We accept that infrastructure such as roading was used for a variety of development purposes. It is difficult to separate out uses once roads are built. However, the Crown had to prioritise which roads it would build or improve, and for what reasons. The evidence available to us clearly indicates that when roading and railways were being developed, purposes such as potential tourism development were considered along with settlement requirements. The State was an active participant in encouraging and facilitating various forms of economic development in the nineteenth and early twentieth centuries, as we discussed in chapter 14. We have received a variety of evidence which indicates that the Government did consider likely tourism needs when providing roading in this region. This is confirmed in general histories of the Rotorua district, such as those by Mr Stafford. He describes pressure from the Tourist Department, for example, to reopen the Rotorua to Te Wairoa road in 1900 and 1901 and complete the Tarawera 'round trip' tourist route.

We also received evidence revealing failures on the part of the Crown to protect iwi and hapu development opportunities, while it pursued its own objectives. We note evidence, for example, of the Government's reluctance to improve what was expected to be an important tourism road from Waiotapu to Wairakei until after the land had been purchased from Maori.¹⁰⁹ We further note the examples provided by Dr Locke of official reluctance to risk spending public funds on Maori tourism operations when it was known they faced the barriers of limited sources of lending finance and insecure title. These include, for example, the Tourist Department's reluctance to provide and maintain a road to the Maori-run attraction at Orakei Korako in the 1930s until a lease was arranged, with more secure title, to a Pakeha company, which effectively ended Ngati Tahu control of the enterprise.¹¹⁰

We do not have sufficient evidence to find that these failures reflected a deliberate and consistent Government policy of excluding Maori from tourism opportunities. However, we do find a pattern of a lack of active protection of iwi and hapu when the Government and its agencies pursued wider settlement objectives. This had the cumulative impact of marginalising iwi and hapu at an important time in the developing tourism industry. We also note a pattern whereby the barriers (many of which were created by the Crown) that iwi and hapu faced in participating in tourism enterprises were used to justify withholding the kinds of assistance that were offered to other sectors of the community. We agree that the Crown had a legitimate interest in ensuring that it purchased lands on reasonable terms and took reasonable risks when spending public funds on infrastructure. However, the Crown had a Treaty obligation to ensure Maori could fairly participate in utilising their properties in new development opportunities. Tourism was acknowledged to be a particularly important opportunity in this region and Maori were clearly willing to participate as entrepreneurs. The Crown's failure to actively protect iwi and hapu in this regard was in breach of their Treaty development rights.

The Crown does appear to have recognised the desirability of assisting Maori in joint-venture tourism initiatives in the Rotorua, Rotoiti, and Tokaanu township ventures. These initiatives appeared to offer a means for the iwi and hapu involved to overcome title difficulties, the costs required in formally establishing townships, and commercial inexperience with leasing, while still being able to participate in the tourism opportunities the townships were expected to promote. We have already referred to these townships in the context of claims concerning land alienations. The township joint-venture arrangements in this region were implemented in the 1880s and 1890s, when the tourism industry was becoming more complex. Hapu and iwi provided some of the land and resources required, including for public reserves, amenities, and roading infrastructure to make the townships more attractive, and they maintained a presence in or adjacent to the townships to

more easily participate in commercial activities and benefit from them. The Crown assisted with legislative powers to sidestep title difficulties and delays in formally laying out the townships, establishing necessary amenities and making selected township land available for leasing. It also acted as a commercial agent to ensure leases were properly implemented, attractive to businesses, and beneficial for the communities involved. The ventures were expected to benefit Maori communities and promote the growth of the region.

The evidence available to us indicates that these townships met with varying success. Rotoiti failed to even start as a township, when expected roading infrastructure did not materialise. Rotorua did eventually become a successful tourist town, but Tokaanu less so, and Maori participation as joint-venture entrepreneurs was rapidly sidelined. The Crown adopted a policy of buying out Maori interests and taking unilateral control over decision-making about the townships. The marginalisation of Maori from any entrepreneurial role is reflected in the fact that township issues are now largely concerned with land and resource alienations. As far as they can be regarded as cooperative business ventures, intended to overcome the barriers iwi and hapu faced in continuing to participate as entrepreneurs in the developing tourism industry in this region, the townships have largely failed.

The Crown had acquired most Maori interests in Rotorua township by the turn of the century, and thereafter took an active role in promoting the township as a centre for tourism in the region. The Government attempted to develop the township along the lines of what it regarded as a suitable form of tourism, based on predominant European views of the time. Rotorua was developed and promoted as a major spa and health resort, with associated leisure activities such as game hunting and fishing. As we have noted, the Government began developing the massive bath house in the Government gardens and appointed a balneologist. From 1901, the aptly named Department of Tourist and Health Resorts administered the township for a period. The Government also took control of a range of

acclimatisation projects, which included releases of trout and deer.

This approach often brought the Government into conflict with Maori, whose nearby villages of Ohinemutu and Whakarewarewa were eventually incorporated into the expanding Rotorua township. At Whakarewarewa, especially, the Government began to actively develop Crown-owned parts of the geothermal valley for tourism. The Government's vision of a health spa required guides rather than tolls, empty natural landscapes rather than living villages, and service workers rather than traditional forms of hospitality. The evidence presented to us indicates that these conflicting views of tourism lie behind a long history of misunderstandings – and at times conflict – over Maori participation in the industry.

We accept that the Crown believed that it was required to undertake a regulatory role in tourism at this time, in what was seen as an industry with considerable regional and national importance. However, in also promoting and facilitating the development of tourism, the Crown had an obligation to provide for the development right of iwi and hapu to participate in the industry according to their preferences and to meet their own development objectives. The evidence available to us indicates a pattern of paternalism which included regulation of guiding, deciding when geysers might be soaped to impress visitors, closing down tolls, and attempting to control village life. In this, the Crown failed to take reasonable account of Maori development rights to participate as they chose.¹¹¹

The Crown's vision for Maori, as reflected in its policies and actions, was narrowly limited to service workers, entertainers, and providers of land and resources. It did not encompass entrepreneurs or business partners. The implementation of Government policies in Rotorua township reflected wider policies of assimilation and responses to urbanisation and population growth. We note efforts to deliberately shift communities out of their villages and into planned subdivisions, with the villages only being occupied by workers for set periods each day.¹¹² Even positive efforts to assist Maori with tourism-related cultural

initiatives, such as the arts and crafts institute and model pa, were established within very definite Government ideas of what constituted ‘Maori culture’. These failed to adequately reflect the connections of local people to their own culture and taonga.¹¹³ This, too, was a breach of Treaty responsibilities to protect full rights of development.

Modern tourism and Treaty development rights

The Crown submitted to us that it does not have a Treaty obligation to actively protect iwi and hapu to participate in the modern tourism industry. The modern tourism industry involves a range of services and activities not directly linked to taonga and properties or traditional usages, or to activities that could reasonably have been anticipated when the Treaty was signed in 1840. The Crown referred us to recent Court of Appeal judgments for practical guidance, especially *Te Runanganui o Te Ika Whenua Inc v Attorney-General and Ngai Tahu Maori Trust Board v Director-General of Conservation*, where it was found that Maori customary rights did not extend to modern enterprises that could not reasonably have been contemplated at the time the Treaty was signed.

We have considered these cases in more detail in our discussion of Treaty standards in chapter 13. We noted that the Court of Appeal felt itself constrained to consider Treaty development interests in terms of customary or aboriginal rights, unless legislation applicable to the case being considered required it to consider relevant Treaty principles. This Tribunal, in contrast, is required to determine and consider relevant Treaty principles. However, we have also noted that, where the court has felt able, as a result of applicable legislation, to consider Treaty principles, it has confirmed the well-established principle that the Treaty was not meant to simply confirm the status quo as at 1840. It is a living document, capable of application to new and unforeseen circumstances, guided by Treaty principles including the overarching principles of partnership and good faith. As we have noted, this circumstance applied in *Ngai Tahu Maori Trust Board v Director-General of Conservation*. That case is of interest to us, because it

refers specifically to new businesses in the modern tourism industry.

As we have noted, in that case the Court of Appeal felt able to consider Treaty principles because the Conservation Act 1987 applied, which required the Director-General of Conservation to consider Treaty principles in administering the Act. The case concerned the allocation of permits for tourism-related whale-watching enterprises. Ngai Tahu appealed to the court that, in considering the principles of the Treaty, the director-general should have considered protecting their whale-watch business for a reasonable period of time when deciding whether to issue an additional permit. In its judgment, the Court of Appeal observed that the Ngai Tahu whale-watch business was a recent enterprise, based on the modern tourist trade, and distinct from anything envisaged in or any rights exercised at the time of the Treaty. The court also found that commercial whale-watching could not be considered a taonga or an enjoyment of a fishery in the sense originally contemplated and guaranteed for properties and taonga in the Treaty. Nevertheless, as we have noted, the court found that whale-watching was so linked to taonga and fisheries ‘that a reasonable Treaty partner would recognise that Treaty principles are relevant’.

The court confirmed previous court and Tribunal findings that, in taking principles into account, such issues were not to be approached narrowly and required active protection of Maori interests. The court found that, while whale-watching might not be a taonga or the subject of te tino rangatiratanga, it was so close to fishing and shore whaling as to be ‘analogous’ to them. A significant ‘further analogy’ was that ‘historically, guiding visitors to see natural resources of the country has been a natural role of the indigenous people’. The court found it significant that the whale-watch business was a tribal enterprise. Given all these factors together, the court found that, while the legislation required conservation objectives to be paramount, the ‘special interests’ Ngai Tahu had developed in the use of the coastal waters in their rohe was a residual factor. Therefore, a period of complete protection, sufficient

to justify the development expenditure Ngai Tahu had incurred, might well be part and parcel of the Crown's Treaty obligation. Subject to the overriding conservation requirements of the Conservation Act, the court found that Ngai Tahu were indeed entitled to a reasonable degree of preference in the issuing of permits.¹¹⁴

Although the court noted that its findings were based on a set of circumstances that might make its precedent value limited, we find that the case has significant parallels with tourism in our inquiry region. In some cases there are even clearer links between early forms of 'guiding visitors to see the natural resources of the country' and much of the modern tourism industry as it has developed in this region, which, all the parties before us agreed, remains heavily reliant on natural resources, spectacular scenery, geothermal attractions, and cultural tourism. All of these forms of tourism, which remain a major feature of the region today, were well within the contemplation of Maori and Europeans at the time the Treaty was signed. There is also a long history of tribal initiative and enterprise in the tourism trade in this region, as we have shown. In areas such as Whakarewarewa and Ohinemutu there are unbroken links from the beginning of the trade. We also received evidence of iwi and hapu applying new technologies and adaptations to the tourist trade, including the use of whaleboats instead of waka, the development of medicinal and cosmetic uses for geothermal minerals, and the adaptation of hospitality practices for tourism purposes such as the entertainment and guiding of hunters and fishers and the provision of camps for them. In chapter 18, we describe how the Ngati Tuwharetoa practice of allowing coastal iwi to fish in the lake in return for gifts was able to be easily adapted to providing guiding and camping services to anglers. In our view, iwi and hapu of this region were pioneers of the tourist trade and have continued to make a significant contribution, although their role as entrepreneurs has been limited by the Crown's failures of protection.

We have noted that the courts and the Tribunal have found that the Crown has an even greater duty of active protection in cases where past Treaty breaches require

redress or have made taonga vulnerable, or where redress is necessary for the survival of communities and their culture. We have found that, in the case of tourism opportunities in this region, some iwi and hapu were prejudiced by Crown breaches in failing to actively protect them in sufficient properties and taonga to enable them to participate in recognised tourism opportunities, and in failing to adequately address barriers they faced in utilising those properties and taonga they had been able to retain, especially where some of those barriers, such as title problems, were created by the Crown.

We note that although the Crown rejected the notion of any Treaty requirement to provide special assistance for tourism, it has nevertheless outlined some recent initiatives to facilitate Maori involvement in tourism in this region, such as through regional tourism organisations. We agree that active initiatives by the Crown are appropriate and necessary. They are a practical acknowledgement of the importance of tourism opportunities for iwi and hapu in this region, given their long association with and contribution to the industry.

In response to the Crown's request that we delineate the practical ways a modern Treaty right of development could be provided for in this region, we are of the view that, with regard to opportunities in the tourism sector in this region, the combination of factors we have outlined means that a reasonable Treaty partner would consider modern tourism enterprises as opportunities where positive assistance is appropriate and required, in consultation with iwi and hapu. We accept that the Crown does not have an obligation to ensure that iwi and hapu are always commercially successful in these enterprises. We received ample evidence that iwi and hapu of this region do not expect to be especially 'fostered' in the tourism sector. They are willing to manage their own tourism businesses, for their own communities, and according to their needs and preferences. What they do require is positive assistance to enable them to overcome the barriers and constraints they continue to face in areas such as lending finance and governance structures, which prevent them from participating equal in the

field with others in the tourism sector. This positive assistance may, in some cases, appropriately extend to preference where Crown lands and resources are being made available for tourism enterprises or where the Crown has a regulatory responsibility for the utilisation of public resources for tourism enterprises.

The Tribunal's findings on tourism

We have found that any Crown obligation to identify tourism as a major development opportunity for iwi and hapu depended on the circumstances of the region involved and the preferences of iwi and hapu in utilising their properties and taonga. We found that, in the Central North Island, tourism was identified as a major potential economic opportunity from a very early period by Europeans and Maori. This potential was based on the outstanding natural scenery and resources of the region and the willingness of hapu and iwi to provide hospitality to travellers wishing to see their taonga.

We agree that the fledgling tourism trade was initially small in scale, becoming gradually more complex through the nineteenth century. By the turn of the twentieth century, the Government was committed to active involvement in the industry in Rotorua. As with other economic opportunities, the anticipated importance of tourism in this region was important in decision-making by Maori and governments in the nineteenth century. Maori took the lead in developing a fledgling industry, based on guiding visitors to sites of interest and providing a range of associated services including transport and entertainment. The Crown began identifying and acquiring sites of likely tourism value, and this was reflected in its land settlement and purchase policies. Given this, the Crown had an obligation to actively protect iwi and hapu in their Treaty development right to utilise their properties and taonga in expected tourism opportunities, according to their custom and preferences.

This obligation included protecting iwi and hapu of the Central North Island in a sufficiency of those properties

and resources identified at the time as likely to be important for tourism opportunities. The Crown failed to take reasonable steps to fulfil this obligation, especially when it targeted sites expected to be of tourism importance and set out to acquire as many of them as it could without regard for – and in some cases actively undermining – the Treaty development right of Central North Island tribes. The Crown also failed in its obligations of active protection when it acquired sites for other purposes without taking adequate account of their importance to Maori for tourism-related activities. This was especially important, given the shortage of other development opportunities.

We find that these actions of the Crown were in breach of the Treaty principles of partnership and active protection. The Crown neither consulted nor protected the interests of Central North Island Maori. We also find these actions of the Crown in breach of the principle of mutual benefit. They foreclosed on a particularly important set of opportunities for Maori to gain real benefit from the settlement anticipated by the Treaty. Finally, we find these actions of the Crown in breach of the Treaty right of development. They foreclosed on the ability of Central North Island Maori to use their properties and taonga in a new economic opportunity, and unfairly restricted their ability to develop in economic terms in one of the few significant opportunities open to them.

We accept that the Crown had identified some particularly outstanding sites in this region as having national value by the early twentieth century, and that it had legitimate kawanatanga responsibilities to seek to have these sites adequately protected. However, we do not accept that such protection required Crown ownership of sites of great cultural and spiritual significance to Maori. Nor was it reasonable, in Treaty terms, for the Crown to acquire sites of outstanding national interest because it was convinced that its land title systems were such that Maori would be unable to prevent the alienation of their taonga to foreign interests or private speculators, in contravention of what the Government believed to be the public good. The Crown had an obligation to exercise kawanatanga responsibilities

with due regard for article 2 guarantees, including Treaty rights to utilise such resources for development opportunities as appropriate. This required adequate and meaningful consultation, minimal infringement of Treaty rights, and adequate compensation for any losses. The Crown's failure to meet these requirements breached the Treaty development rights of iwi and hapu.

The impacts of the Crown's failure to protect iwi and hapu in a sufficiency of the properties and taonga identified as useful for tourism opportunities varied across this region. By the early twentieth century, iwi and hapu of the Kaingaroa and Taupo districts had lost the majority of those lands and resources identified at the time as likely to be important for tourism purposes. Much of this loss was cumulative, such as in Taupo, where the Crown's pursuit of its objectives resulted in iwi and hapu losing control of their lands adjacent to tourism towns, important hot springs, and their lake, its tributaries, and margins. The Crown's agreement to share fishing licence fees for Taupo, as will be discussed further in chapter 18, was a welcome compensation initiative for the loss of tourism revenue from activities associated with the lake and its tributaries. However, those who benefited were reduced to the level of passive beneficiaries, and the guiding and camping tourism enterprises dependent on the lake and river margins were fatally undermined without consideration of assistance for alternative tourism business opportunities for those concerned. Iwi and hapu with interests in the Rotorua district did retain some significant taonga of importance for tourism, but they were also subject to targeting of some of their most important resources. This had significant impacts on the way these iwi and hapu were able to continue to participate in the tourism industry in this region.

Iwi and hapu of this region pioneered the development of the tourist trade, but were marginalised as entrepreneurs from the 1880s. This was partly attributable to loss of ownership of suitable sites and resources, but the parties before us agreed that difficulties obtaining investment finance and overcoming title problems were also major barriers to continued participation as entrepreneurs in

tourism businesses. Given that tourism was identified as a major economic opportunity in this region, the Crown had an obligation, as part of its duty of active protection, to assist Maori to overcome unfair barriers to their utilisation of taonga and properties for tourism opportunities. This was especially so where those barriers were of the Crown's own making. The Crown's failure to address the difficulties that iwi and hapu faced in obtaining investment finance for tourism ventures, when tourism was acknowledged to be such an important economic opportunity in this region, was in breach of this obligation. The Crown also breached its obligation of active protection by withholding what was regarded as otherwise important road infrastructure in order to pursue its land purchase policies, and by refusing assistance because of concerns about the commercial viability of ventures under forms of title and governance that the Crown itself had provided. These actions and omissions of the Crown were in breach of the Treaty principle of active protection, the Treaty rights to develop properties and as a people, and the Treaty promises of mutual benefit in the settlement of the country.

The various township ventures in this region offered some potential for overcoming the title and financing difficulties faced by iwi and hapu in developing tourism ventures. The 1881 Thermal Springs Districts Act also offered opportunities for joint Crown–Maori partnerships in developing hot springs and other key tourism sites. However, the Crown failed to take advantage of these key opportunities with the township ventures, the Fenton Agreement, and the Thermal Springs Districts Act 1881. The failure of the Crown to act on these opportunities – which it had itself created in negotiation with Central North Island Maori – was in breach of the Treaty.

We agree that the tourism industry in this region did not initially grow as quickly as anticipated. The industry has expanded significantly in the years since the 1960s, boosted by the advent of relatively inexpensive air travel. Some modern tourism-related enterprises, such as adventure tourism, are different from activities contemplated in the 1840s. However, it is evident to us that a significant

part of the modern tourism industry in the Central North Island is very closely linked to the natural resources, spectacular scenery, and other taonga of this region, and to the hospitality and culture of the iwi and hapu connected with them. The modern industry is well within what could be considered 'analogous' to the tourism trade pioneered by iwi and hapu. Some iwi and hapu have maintained close and unbroken links with the industry since that time. In our view, the combination of, first, this close link with a long-established tradition of tourism; secondly, the close links of modern tourism to taonga and cultural practices; thirdly, the requirement to redress past Treaty breaches; and lastly the need to address economic disparities, requires the Crown, today, as a reasonable Treaty partner, to provide positive assistance for those iwi and hapu of the Central North Island who wish to participate in new tourism ventures.

INDIGENOUS TIMBER MILLING AS A DEVELOPMENT OPPORTUNITY

KEY QUESTION: WAS IT REASONABLE FOR THE CROWN TO HAVE IDENTIFIED INDIGENOUS TIMBER MILLING AS A SIGNIFICANT DEVELOPMENT OPPORTUNITY IN THE CENTRAL NORTH ISLAND AND, IF SO, DID THE CROWN FULFIL ITS OBLIGATION OF ACTIVE PROTECTION OF IWI AND HAPU TREATY DEVELOPMENT RIGHTS TO UTILISE THEIR FOREST TAONGA IN THIS OPPORTUNITY?

Indigenous forests once spread throughout the Central North Island inquiry region, especially in the western part of the Taupo district, the Mamaku Ranges, and around the Rotorua lakes. Parts of the southern Kaingaroa district were also well forested. In many cases, the indigenous forests were regarded as a barrier to settlement. They were often treated wastefully and burned to clear land for farming. However, the developing settler economy in the nineteenth century required timber products for everything from fence posts to fuel. New roads, railways telegraph

services, and buildings, together with machinery, equipment, containers, and transport vessels of all kinds relied heavily on wood products. The value of easily accessible stands of good-quality timber for settlement purposes was recognised from an early period.

The first timber mills were usually small operations. They were regarded as sources of short-term income before farms began to provide a stable return. Landowners often sold surplus better-quality timber in the process of clearing land for farming, which met local needs such as fencing and bridge and road building. Seasonal workers also supplemented their incomes by travelling around timber blocks and helping landowners to clear them, sometimes with portable milling machinery.

In the larger and better-quality timber blocks, small milling companies might be formed. They were sometimes made up of groups of landowners and farmers seeking to accumulate capital to invest in other enterprises. These companies could undertake more systematic and capital-intensive milling. They would lease rights to cut timber from landowners, including Maori, sometimes building bush tramways and using more sophisticated milling machinery. These companies were often deliberately short-lived, existing only to cut out agreed blocks and limited by available technology and infrastructure. However, while the timber companies came and went, a fledgling industry was developing. Mill owners were often involved in more than one company and investors were persuaded to back more than one milling scheme. The seasonal workforce in the Central North Island region (to which iwi and hapu communities made a significant contribution) began to acquire milling experience and expertise and to rely on logging and milling as part of the region's rural work opportunities. This grew in importance as iwi and hapu found that their retained lands were proving difficult to farm.

By the later nineteenth century, preferred sources of indigenous timber such as the northern kauri forests were in decline. Timber companies became more interested in the larger and less accessible forests of the Taupo and Rotorua districts. The construction of the North Island

main trunk railway and better roads opened potential opportunities for a more systematic and long-term milling industry in some parts of the region, particularly western Taupo. The Government was also becoming more aware of the need to conserve and manage the remaining good-quality indigenous timber resource, which, in this region, was mainly on retained Maori land.

The claimants' case

Protection in a sufficiency of timber lands

The claimants submitted that the indigenous timber resource in the Central North Island was identified as a potentially important economic opportunity from an early period of settlement. Even in the short term, the sale of timber for various settlement purposes provided an important source of income for iwi and hapu. It assisted them to meet their cash needs and contribute to the well-being of their communities. The Crown recognised the value of good-quality and accessible stands of timber for a variety of settlement purposes. It deliberately targeted land with such timber in its purchasing policies, without taking steps to protect iwi and hapu in sufficient timber resources for their likely present and future needs. In this way, some iwi and hapu were excluded from future development opportunities as settlement increased. The Crown purchased land without paying a fair price for the timber and this, too, excluded iwi and hapu from the full benefits of their timber resource. For example, Ngati Hineuru submitted that their Kaingaroa lands, which included the Pohokura, Runanga, and Pukahunui blocks, were heavily forested, unlike those in the northern part of the district. They alleged that the Crown's purchasing methods resulted in the loss of large areas of their forest lands, leaving them with little for future development opportunities even though it was clear that their lands were otherwise of only marginal use.¹¹⁵ Ngati Whaoa alleged that the Crown failed to protect them in sufficient forest resources for their needs, thus prejudicing their ability to meet their traditional needs as well as excluding them from future timber

milling opportunities.¹¹⁶ Ngati Manawa and Ngati Tahu alleged, in their closing submissions, that the Crown failed to pay a fair price for their forest lands in the Kaingaroa district.¹¹⁷

Ngati Rangitihi also alleged that the Crown targeted their forest lands in the Rotorua and Kaingaroa districts and failed to ensure that they retained sufficient timber for future milling opportunities. They alleged that Crown policies aimed at restricting purchasing also prevented the commercial alienation of timber or other resources from the land to private purchasers. This helped to pressure owners into alienating their lands to the Crown and prevented them from gaining the full value of their timber resources. The Government imposed its monopoly through proclamations which prevented private dealing on particular blocks and through regional restrictions such as the Thermal Springs Districts Act 1881.¹¹⁸ Similar allegations were made in closing submissions on behalf of the Tauhara hapu with respect to forest lands in the Taupo district, and by Ngati Whakaue concerning their forest lands in Rotorua.¹¹⁹ They alleged that this caused serious prejudice to those communities seeking to make the best use of their timber resources.

Ngati Tuwharetoa submitted that, when the Crown began renewed land purchasing in the early twentieth century, both for settlement purposes and to gain control of the valuable and now more accessible timber resource, it had become even more evident that iwi and hapu of the Taupo district needed to rely on their forest resource. However, the Crown implemented purchase methods and practices that were similar to those it had used in the nineteenth century to pressure Maori into parting with their lands for low prices. The Crown also prevented iwi and hapu from collectively managing their resources. This occurred in spite of criticism and opposition from tribal leaders, who warned the Crown of the continuing damage such purchasing was causing to their efforts to participate in the timber industry.¹²⁰ The methods at issue included the use of Crown proclamations to prevent private land dealings and so pressure land and timber alienations at low

prices, and the purchase of individual interests in land in the face of the collective efforts of iwi and hapu to manage their resources.¹²¹ The Crown also purchased at less than full value, because it was unwilling to pay for the value of the timber standing on the land.¹²² This period of purchasing caused prejudice to the communities affected, preventing them from fully benefiting from their timber resource and from participating in the timber milling industry as they chose.

Barriers to fair participation in the timber industry

Claimants submitted that the Crown failed to adequately assist those iwi and hapu of the region who were able to retain their forest lands to overcome barriers to their fair participation in the timber industry. The major barriers continued to be, first, the difficulties created by the Crown-imposed system of title for Maori land, and, secondly, barriers to accumulating and borrowing the necessary finance to invest in the industry. They alleged that the Crown's failure to adequately address continuing problems with scattered, fragmented, and unsettled titles undermined land management generally and, specifically, the ability of iwi and hapu to manage their timber resource as they chose. Low prices as a result of the Crown's purchase policies also caused iwi and hapu difficulties in accumulating investment capital. By the late nineteenth and early twentieth centuries, more investment in sawmills, bush tramways, and mill equipment was required. Iwi and hapu were largely unable to borrow finance to participate in the developing industry at a business and entrepreneurial level. These barriers left them at a serious disadvantage, relative to other sectors of the community, when it came to participating in the timber industry, although much of the remaining valuable timber stood on Maori land.

Ngati Tuwharetoa submitted, for example, that indigenous timber was clearly a major resource in their district by the early twentieth century, with recognised economic development potential. They were heavily reliant on timber, as much of their interior lands were marginal for farming and they were being largely shut out of opportunities

in tourism. However, the Crown failed to address barriers they faced in utilising this timber resource for the development and benefit of their communities. This left them at a disadvantage, compared to other sectors of the settler community, and they also suffered from being unable to gain the full value of their resource. They alleged that the Government's failure to enable them to gain access to reasonable sources of lending finance contributed to the failure of their early attempts to participate in the industry at a business level. For example, their Pungapunga Timber Company failed due to inadequate capital.¹²³ The general restrictions preventing private dealing in Maori land from the mid-1890s also prevented them from establishing joint ventures with private parties, except in an informal and marginal way. The uncertain legal situation surrounding their utilisation of their timber resource as a result of restrictions on private dealings in land obliged them to utilise their timber resource in ways that undermined its value. This, in turn, reduced the economic benefits to their communities. It also placed them in a marginal position in ventures they did engage in; this compromised their control over how their forests might be milled and how the full value might be obtained.¹²⁴ In an uncertain legal situation and with few other alternatives, some communities were obliged to turn to low-value uses for their timber, such as post-splitting, for economic survival, even though this ruined the value of the timber resource for other purposes.

A number of claimants submitted that they were placed under considerable pressure to either 'properly' utilise their timber resource for commercial purposes or face further pressure to alienate their land. This, and the barriers they faced to adequately manage their timber resource as they chose, meant that they were obliged to sell timber rights as they could. They had little real opportunity to balance the use of the resource in a way that met their immediate economic needs, longer-term forest management goals for the future, and their wish to preserve and manage some of the resource for traditional cultural purposes. They alleged

that, as a result, forest taonga of immense traditional value were lost.¹²⁵

The claimants submitted that, when the Crown did begin to provide some means of overcoming barriers to their management of land, these failed to adequately provide for their needs in managing timber lands. The Maori land boards, for example, were required to facilitate alienation rather than support Maori in commercial enterprises. They were under-resourced and out of their depth when it came to monitoring timber arrangements, and the Crown insisted that the boards increasingly take the place of Maori in these arrangements. This marginalised them to little more than beneficiaries, instead of assisting them as entrepreneurs. The boards were required to implement the Crown's policies on settlement and use of the timber resource without sufficient protections to ensure that there was adequate consultation with Maori communities about their development objectives for their timber resources.

For example, counsel for Ngati Raukawa submitted that the district Maori land board, in its monitoring role, failed to take reasonable steps to protect hapu interests in a venture with the Taupo Totara Timber Company when the company failed to honour lease provisions intended to ensure that cleared land on the Pouakani and Tihoi blocks reverted to its owners for farm development.¹²⁶ Claimants also alleged that the Aotea District Maori Land Board failed in its responsibilities to protect Maori interests in the Tongariro Timber Company agreement, and that the Crown used the board to further its own objectives and interests in the scheme, to the detriment of iwi and hapu interests.

The Tongariro Timber Company venture

Ngati Tuwharetoa and Ngati Hikairo submitted that their joint venture with the Tongariro Timber Company is illustrative of the Crown's failure, in the years before the Second World War, to protect Maori of this region in their development right to utilise their timber resource for the benefit of their communities. This major venture and its failure illustrates the way in which the Crown pursued

'national interest' objectives without adequate protection for the rights of Maori owners. It also illustrates the failure of the land board mechanisms the Crown provided to enable Maori owners to overcome the barriers they faced to utilising their most valuable resource for commercial opportunities.

The claimants submitted that their joint venture with the Tongariro Timber Company began in 1906, and that the venture had failed by 1930. Over this time, the joint-venture agreement reflected a major effort by iwi and hapu to utilise their timber resources in ways that would best contribute to the long-term development needs of their communities. The claimants submitted that the venture was more than just a commercial agreement over timber cutting rights by individual owners. It involved a carefully thought out development plan that intended to utilise the forest resource in the western Taupo area to maximise benefits for owners, while keeping the long-term development needs of communities in mind. It was a particularly important venture for these communities, as the timber on their lands was their most valuable commercial resource.

The terms of the agreement in the venture were carefully planned to overcome identified barriers to utilising the timber to its best advantage. They included an agreement to build rail infrastructure that would not only provide access to the timber resource for milling but also a link with the North Island main trunk railway for future passengers and goods. They also included an agreement to provide communities with employment in the industry. A new initiative in the agreement, the 'hotch potch' clause, attempted to address difficulties with scattered individual interests in land by a system of more fairly distributing income from royalties over whole communities and returning land after milling in economically viable blocks for future land development. The intention was to retain significant community management over the timber resource for overall community benefit, and avoid having this management and income dissipated through small and scattered interests in land, which left individuals vulnerable to pressure for land alienation. The venture

was, therefore, a planned attempt to utilise the timber resource for the long-term benefit of communities, while overcoming barriers of investment and title and protecting against continued pressures on individuals to alienate their shares.¹²⁷

The venture required Crown involvement because of the regulatory environment of the time, which had been developed by agreement between Maori leaders and the Crown and had resulted in the creation of the land council (and later land board) system. The councils (and, from 1905, boards) were intended to provide mechanisms to enable Maori to overcome barriers to utilising their lands and resources for commercial purposes. They would also provide a monitoring role for ventures involving private interests. Crown approval was required to lift restrictions on private dealings and enable the venture with the Tongariro Timber Company to go ahead. Continual changes and alterations to the venture, the terms of the agreement, and its administration also required land board involvement. The nature of the venture, along with difficulties and restrictions in utilising Maori land commercially, required several legislative interventions. It was submitted that the Crown, through the Maori land board system and its own interventions, took on a significant duty of active protection of the development interests of the owners in the venture.¹²⁸

It was accepted that the original venture agreements between Maori landowners and the company, in 1908 and 1909, were fair and reasonable. They were adequately monitored, and it was agreed that they offered benefits for the owners and, by promoting settlement, provided for the public good.¹²⁹ However, the Ngati Hikairo submission alleged that the Crown failed due diligence responsibilities at this time to investigate whether the company was properly capitalised to undertake its part in the agreement.¹³⁰ In the regulatory environment of the time, the Aotea District Maori Land Board was established as the agent for the owners. The board, as successor to the Maori land council, was the major means at this time by which the Crown claimed to fulfil its obligations to enable Maori to utilise

their properties and resources to meet their development needs. It was alleged that the board also effectively had a trustee responsibility for Maori land vested in it, as well as a monitoring role for Maori land and resources generally. It was through the board that the Crown maintained an active role in the venture.¹³¹

It was submitted that, in implementing policies that affected the venture and owners' rights and interests in it, the Crown had a duty to fulfil its Treaty obligations to owners. These included the active protection of their development right to utilise their forest resource in the timber company venture, and particular responsibilities of trust for lands vested in the board. This required reasonable steps to properly consult and ensure any necessary infringement of rights was minimal and compensated if property development rights had to be infringed in the national interest. It was alleged that the Crown failed to fulfil these duties. Instead, it pursued its national interest objectives of promoting settlement and managing the valuable timber resource without taking sufficient care to protect the interests of owners in the venture.

The claimants submitted that the owners taking part in the venture initially accepted the monitoring and oversight role of the land board, but did not accept that it could substantially interfere with their agreement with the company. They were reassured by initial legislative provisions which meant that no actions could be taken to alter the venture arrangement without the mutual consent of all parties. In the years from 1910 to 1915, the company sought a series of concessions from the owners in order to secure sufficient capital to enable the venture to proceed. These concessions were agreed and approved by the owners, with oversight from the board. Although they were concerned about the concessions, the owners recognised that they needed a strong partner to be able to secure capital in order to ensure that the venture succeeded. They were also aware that, if the venture was stopped and the agreement lapsed, they would find themselves back in the position of having poverty-stricken individual owners vulnerable to the

purchasing of their individual interests, to the long-term detriment of community development needs.

The claimants submitted that, from about 1914, the Crown began a series of initiatives that significantly undermined the venture and demonstrated a failure of the duties of trust and protection it had taken on through the Maori land board mechanism. The Crown gave the board increased powers to act in place of the owners and implemented legislative protections for some private parties in the venture, to the detriment of owners' interests. The Crown also began purchasing again in the Taupo district from 1918, including in lands subject to the venture, to promote settlement and to gain control of what was, by now, a nationally important timber resource. It also used its ability to monitor and intervene in the venture to promote its own objectives. All these actions put the Crown in conflict with owners' wishes and their development interests in the timber resource.

It was submitted that the Crown's interventions to increase land board powers in the venture and protect the interests of other parties were carried out without sufficient protection of the owners' interests. It was submitted, for example, that a 1914 amendment to the terms of the agreement allowed another company, the Egmont Box Company, to gain access to the proposed railway line in return for helping to build some of it. The legislation enabling this also guaranteed the Egmont Box Company the right to take legal action to protect its interests against the land board and the owners. This right, which was given to no other creditors or investors in the scheme, was to have serious consequences. The Crown also passed legislation to prevent the owners from taking legal action against any other parties to the agreement without its consent. The Native Land Amendment and Native Land Claims Adjustment Act 1915 prohibited the Aotea District Maori Land Board from exercising any legal remedies for company default of the terms of the agreement, and prevented the company from being wound up without the permission of the Governor-General. Section 40 of the Act enabled the board to vary any or all existing agreements,

so long as the owners were not prejudicially affected. Claimants alleged that this Act enabled the board to act independently, without consultation or agreement from owners. Claimants alleged that from 1920, especially, consultation and direct discussions and agreements with owners declined significantly.¹³² This took considerable control from owners, was an inadequate form of representation, and reduced consultation and consent requirements to little more than formalities. The board was now closely subject to Government policy. It was also submitted that, by intervening so substantially in the venture and infringing on the owners' property rights in this way, the Crown took on even greater responsibilities to ensure it protected and promoted the interests of Maori landowners.¹³³

Claimants alleged that when the Crown began to purchase land in the district again, from about 1918, its objectives were to acquire land for settlement purposes and to acquire control of the timber resource. Crown agencies tasked with regulating and conserving the indigenous timber resource in the national interest, especially the Forestry Department, set up in 1920, regarded themselves as directly in competition with the Tongariro Timber Company's milling objectives and supported Crown purchasing to gain control of the indigenous timber resource. It was alleged that the Crown undertook this purchasing without taking care to respect the venture agreement or the rights of owners and their efforts to develop their communities. The Crown made purchases by acquiring individual shares when necessary. This undermined collective decision-making. It took advantage of the poverty and distress of individual shareholders and the discontent that had resulted from delays in the venture. Until the agreement ended, in 1929, the Crown maintained prohibitions against any other private dealings on the lands subject to the venture, thus ensuring that for many years the owners had no way to commercially utilise their lands and timber other than by selling to the Crown.¹³⁴

It was alleged that the Government prolonged the venture for almost a decade after the owners withdrew their support. Yet, while the owners were losing confidence in

the venture, they had difficulty in exercising reasonable rights to withdraw from it due to legislation that tied them in and prevented them from taking legal action to recover losses from company defaults.¹³⁵ Even the land board's efforts on behalf of owners to end the venture in 1927 were ignored. Instead, as the Crown, through its purchasing, became a part-owner in the forest lands subject to the agreement, it acted to protect its own objectives without adequate regard for the owners' interests.¹³⁶ The Crown attempted to wrest control of the company, in an effort to gain control of the timber resource as cheaply as possible while keeping owners tied in to the venture. Officials sought to actively undermine the commercial viability of the company; they imposed conditions that were designed to undermine its efforts to acquire capital; and they sought to buy up shares in the company in order to gain control of it and the timber venture.

While the owners were prevented from taking legal action over any company defaults, the position of the company deteriorated. The Government was informed of this by its own officials as well as by lawyers for the owners. The venture ended in 1929, but the legislative rights provided to the Egmont Box Company to take legal action meant that it was able to obtain £23,500 in damages from the owners. The claimants submitted that the results of Crown policies and actions in relation to the Tongariro Timber Company joint venture meant that owners' efforts at development through the venture were undermined and the benefit they received was severely limited, thus reducing their ability to address continuing poverty in their communities.¹³⁷ The failure of the venture proved to be a major blow to their efforts to establish an economic base for long-term future development.¹³⁸

It was submitted that, as a result of these Crown failures, the owners felt obliged to take court action to try and protect their position. They began legal action to fight the decision by the Native Minister to settle £23,500 as compensation for the Egmont Box Company's interests. The land board was required to pay this amount and apply it as debt over their land. The owners mounted a

legal challenge, along with general claims of negligence and breach of duty by the land board. However, the courts found that the board, acting as their agent, was required to make the payment. Owners then sought a commission of inquiry into the Crown's role in the venture, but this was refused. The owners appealed the decision and took their case to the Privy Council, relying on protections afforded by the Treaty of Waitangi. However, the courts felt unable to recognise claims based on Treaty guarantees, where those guarantees were not also included in some legislation. The Privy Council referred the matter to the New Zealand Government for remedy.

While they had been unsuccessful in legal action, the claimants submitted to us that the Crown, through its involvement and interventions in the venture, nevertheless failed to fulfil its duty of active protection of their Treaty development right to utilise their forest resource as they wished for the benefit of their communities. This included the failure of the Maori land board mechanism to adequately enable and monitor their fair participation in the industry, and the Crown's interventions in pursuit of its own objectives without adequate protection of owners' interests and their right of development. Claimants submitted that this Crown failure was made more serious by the fact that it was clear to the Crown, during the time covered by the venture, that the owners were already in a vulnerable economic and social position as a result of previous Crown actions.¹³⁹

It was submitted that, while the western Taupo timber lands were subject to the venture, they produced little or no benefit to their owners. They remained 'locked up' by Crown proclamations from early in the century until 1940, when the owners were finally able to resume control over, and benefit from, this timber resource. This period of enforced exclusion resulted in severe economic hardship, not just in terms of lost income from the resource at a time when it was badly needed and while rates and land taxes continued to mount, but also in terms of lost development opportunities from being denied opportunities to establish alternative ventures and, with these, the possibilities

of building needed transport infrastructure, employment opportunities, and business experience.¹⁴⁰

Crown regulation of the indigenous timber resource and the timber incorporations

The claimants alleged that as the Crown began to implement policies designed to conserve and manage the indigenous timber resource for the national good, from the 1890s, it failed to adequately consider or consult with Maori over their rights to develop their timber resource and their overall development objectives. For conservation purposes, the Crown imposed controls and restrictions on the utilisation of the timber resource on Maori land in ways that seriously prejudiced the ability of Maori to utilise their forests and enjoy the full value of this resource. Further, the Crown's actions impacted more severely on Maori than on other forest owners. Maori were left with little option but to enter the short-term, low-value black market for their timber, effectively leaving them with even less control over managing their forests.

When the Crown began to seek to purchase, for national conservation and management purposes, those lands in the Taupo district containing the most valuable remaining timber, it believed that Crown control would ensure public benefit from a valuable 'national' resource. Claimants submitted that this purchasing policy reflected a conviction that public ownership of the timber resource was necessary because Maori owners were only interested in short-term gains and neither interested nor able to manage of their forests for the long term. Claimants submitted that this perception arose largely because Maori had had little option, up until then, but to sell their timber for low returns, and had had little ability to manage and utilise their forests to their best advantage.

The Crown failed to consult when it imposed conservation requirements. Nor did it acknowledge that Maori needed to continue to utilise their timber resource. Instead, the Crown employed practices similar to those it had used when purchasing land to try and regulate milling on Maori-owned land. Proclamations, which prevented

private alienations, interfered with the private property rights of owners. As a means of regulating the resource, they were a blunt instrument, as whole blocks were controlled even if they were only partly covered in forest. This prevented Maori from utilising the rest of a block for other income-generating purposes. The Crown's use of proclamations and regulations to preserve indigenous forests had a disproportionate impact on Maori, as they held most of what remained.¹⁴¹ These measures would not have been tolerated by the general community of landowners. Claimants submitted that this was in breach of their article 2 guarantees of rangatiratanga and active protection and the Crown's article 3 duties of equal treatment.¹⁴²

Ngati Tuwharetoa claimed that their leaders attempted to engage with the Government on a number of occasions to discuss their indigenous forestry resource. They attempted to meet the Labour Government in 1938, for example, and they sought the release of their land blocks from Crown proclamations. However, Government officials insisted on retaining these controls into the 1940s, which caused considerable hardship for owners.¹⁴³ Counsel for Ngati Tuwharetoa reminded us that conservation and regulation of the timber resource, at this time, meant not only preserving the resource but ensuring that the Crown participated in and benefited from the indigenous timber market for as long as possible. They submitted that the Crown was, therefore, a competitor in actively participating in and profiting from the timber market, and that this was reflected in its policies and practices.¹⁴⁴

Ngati Rangitihi, in their closing submission, referred to their remaining forest lands in the Rotomahanga Parekarangi block and the Crown's efforts to seek increasing control of this resource after the creation of the Forestry Department in 1920. The Crown's exercise of restrictions on cutting rights and requirements for timber appraisals, from 1922, effectively constrained owners' use of the resource and the value they could obtain from it.¹⁴⁵ Counsel submitted that the appraisal process required was time-consuming and expensive, and that the Forestry Department was unable to keep up with appraisals in a timely manner and

set many values too low. The controls were heavy handed, and Maori owners were forced into illegal cutting to survive. This resulted in much unmanaged cutting for very low returns. The Government also continued many controls for much longer than was reasonable. Wartime controls of the 1940s were extended for lengthy periods and severely hampered the ability of Maori owners to enjoy the full value of their resource. As a result, some owners were obliged to sell their lands, which led to further exclusion from timber development opportunities. Claimants alleged that in implementing these measures and policies the Crown failed to consider the impacts on the Maori owners and on their exercise of rangatiratanga over their resource.¹⁴⁶ Ngati Hineuru similarly noted their reliance on their remaining timber resource in the Kaingaroa district and restrictions that prevented them from fully utilising and managing this resource to meet economic and cultural objectives.¹⁴⁷

The claimants identified three issues that, in the period before the Second World War, contributed to economic marginalisation and the underdevelopment of iwi and hapu in the Central North Island region. These were: first, the Crown's failure to protect some communities of this region in a sufficient timber resource; secondly, its failure to address barriers to fair participation in the timber industry for those who were able to retain timber lands; and lastly, its failure to take adequate account of iwi and hapu needs and rights to utilise their timber resource while it pursued timber conservation policies. Ngati Tuwharetoa further alleged that, through these policies, the Crown required Maori to pay the price of development of the region in this period while it failed to actively protect Maori development interests in their resources.¹⁴⁸ This marginalisation later limited the capacity of some communities to participate at all levels in the development of the exotic forestry industry.¹⁴⁹

Ngati Tuwharetoa agreed that, from 1945 until the 1960s, owners who had managed to retain valuable timber resources, especially in the western Taupo forests, and who were able to have proclamations over their lands removed,

were able to begin new efforts to commercially utilise their timber to meet their development needs. They submitted that they had to do this despite significant restrictions on investment capital and business experience. They had to work within the limitations and restrictions of the Maori land board system and legal provisions for incorporations. Nevertheless, and in spite of the scepticism of Government officials, they began to use the incorporation system to gain community and owner control of milling. They used innovative methods to control the milling and marketing of their indigenous timber resource, assisted by good returns for high-quality timber. This enabled them to achieve commercial success. The Puketapu 3A Incorporation, established in 1947, was a leader in this new era. Ngati Tuwharetoa submitted that their achievements came in spite of what were (at best) paternalistic attitudes and actions and (at worst) institutionalised racism on the part of Crown officials towards their management and use of their timber resource.¹⁵⁰

Counsel for Ngati Tuwharetoa submitted that, during this brief post-war period until the 1960s, owners of the western Taupo forests were finally able to properly manage their forest resource themselves and gain value and benefits for their communities. They were able to distribute income and accumulate funds for development purposes, while resisting the Crown's attempts at interference. It was submitted that, although the timber incorporations did achieve commercial success during this time, success came in spite of the Crown and cannot be used to hide the facts that for the previous 50 years iwi and hapu suffered loss and exclusion from opportunities to utilise their forest resource and that this contributed to their poverty and social dislocation.¹⁵¹

The Crown's case

The Crown submitted that, in general, issues concerned with indigenous forestry are most relevant to the Taupo district and especially the western Taupo forests. Historically, much of the Kaingaroa Plains did not have indigenous

forest cover. There is relatively little evidence about the indigenous forests of the Rotorua region, where, in any case, it appears that hapu and iwi were not actively involved in early milling and much of the land was purchased and cleared for agricultural purposes before a significant sawmilling industry was established.¹⁵² The indigenous timber milling industry in the Taupo district developed relatively late; much of the western Taupo forests remained standing until construction began on the North Island main trunk railway later in the 1880s.¹⁵³ The Crown submitted that the evidence available on indigenous forestry in the region was prepared in a relatively short timeframe and covers the issues to varying degrees. Caution is therefore required in making findings on some of the issues identified.¹⁵⁴

Land alienation and the timber resource

The Crown agreed that some of the underlying issues concerning the utilisation of indigenous forests relate to land alienation transactions. These include issues of adequacy of price and sufficiency of forest lands for the present and future needs of iwi and hapu. The Crown noted that extensive areas of forest lands were retained in Maori ownership in the Taupo district. However, until approximately the 1880s, the Crown did not specifically set out to purchase indigenous forests. Its primary aim was to acquire land for settlement. Forests were seen as an impediment that had to be cleared. The Crown was not involved in many of the early private transactions between Maori and sawmillers over access to, and cutting timber from, Maori lands.¹⁵⁵

The Crown submitted that there was Maori support for its policy of restricting private dealing in lands and associated forest resources as a protective measure. The Crown cited, as evidence, the views of Hone Heke, in parliamentary debates in 1903. The Crown submitted that, by the late 1890s, there was considerable private speculation in cutting rights on Maori land in the Taupo district, as a result of the construction of the main trunk railway and the decline of the kauri timber industry. Parliamentary inquiries were instituted to consider a legislative loophole that enabled timber cut from Maori land to be regarded as a chattel,

rather than as part of the land, and which speculators were apparently taking advantage of to evade restrictions on the private alienation of Maori land. The Government's preference was to treat forests as part of the land, for alienation purposes, but it had to drop legislative provisions intended to clarify this in 1903, due to pressures of time. Hone Heke complained, preferring the protections offered by restrictions on private alienation and alleging that private speculators' acquisition of cutting rights from Maori in western Taupo lands was causing damage to bona fide sawmillers and to Maori, who he claimed were receiving royalties below those charged by the Crown on its lands.¹⁵⁶

The Crown submitted that large areas of indigenous forest were retained in the Taupo district by the 1880s, when a sawmilling industry began to develop. Iwi and hapu of the district were actively involved in utilising their forests from this time, but faced the same difficulties with capital and expertise as they did in all development opportunities. They did try to establish a number of sawmilling ventures, but these failed through a lack of capital. The Pungapunga Timber Company venture, for example, was wound up by 1909.¹⁵⁷

The Crown acknowledged that Maori also turned to joint ventures with private milling companies in order to utilise their timber resource. It accepted some responsibility for the conditions under which private companies engaged in milling and operated milling rights on Maori land. However, in the early period of milling there was very little direct Crown involvement in milling arrangements, which took place as a result of private agreements between sawmillers and Maori owners. Maori were limited in their choices with these ventures, 'but this was inherent in the economic nature of the industry, where skills and capital were of critical importance'. The Crown rejected allegations that this led to the 'rape' of Ngati Tuwharetoa forests. The Crown denied that it had any obligation to actively protect Ngati Tuwharetoa interests in participating in the developing indigenous forestry industry, such as by providing capital to enable logging ventures to be estab-

lished. This amounted to a claim of economic development rights, which the Crown rejected.¹⁵⁸

State regulation of the timber industry

From the 1890s to the 1920s, state regulation of the timber industry increased, largely because of concerns over future supply and resource allocation and in response to industry lobbying. By the end of the First World War, as a result of very real fears of a timber famine, the Crown became more actively engaged in policies intended to conserve and manage the national timber resource. In the Forests Act 1921–22, the Crown provided for the establishment of the State Forest Service, with a range of responsibilities for forestry matters. The Crown submitted that conservation of the timber resource was a legitimate matter of national interest.¹⁵⁹ Maori shared concern for protecting forests, counsel argued, noting that Apirana Ngata criticised the watering down of some of the proposed protective provisions in the Act, which were the result, he claimed, of the Government responding to settler land development interests and conflicts between land settlement and forestry interests. Ngata complained that settler interests had resulted in a reduction of the forestry resource.¹⁶⁰

The Crown submitted that the new Forest Service, established in 1920, attempted to change the general view that forests were a mine to be gutted. Forests were, rather, a crop that could be perpetuated by sound management. Policies were developed to encourage the industry and smaller milling businesses within it, to encourage the managed supply of indigenous timber, while avoiding waste and overproduction, and to minimise the undue influence of large timber business monopolies. These were legitimate policy objectives, pursued in the national interest. They were not always popular with the timber industry, but in the Crown's view they did result in an increase in prices for wood from state forests.¹⁶¹

The Crown submitted that, as part of its responsibilities, the Forest Service conducted an inventory of forest resources and acted to protect future timber supplies. This resulted in the amount of land designated as permanent

or provisional state forest being significantly increased. Government control over the sale of Maori forests was part of these overall reforms, which included designating land as 'Maori forest'. In later years, senior Forest Service officers assisted the Maori Land Court in appraising Maori forests and setting royalties.¹⁶² The Forest Service encouraged Government purchases of forests from Maori and private owners to protect the resource, because speculative buying of Maori forests was regarded as having no benefit to the community.

The Crown agreed that concerns about conservation and management of the timber resource coincided with the beginning of a new policy whereby the Crown actively attempted to purchase forested Maori land.¹⁶³ There is no evidence, however, to suggest that the prices paid for parts of the western Taupo forests were not fair. The purchase procedure proposed by land purchase officers at the time was fair and reasonable, and included separate valuations of the lands and the timber. As part of this, the Crown noted proposals that, if railway access was built, leading to a rise in the value of the timber and the land, and if the Crown made a large profit as a result, then extra payment should be made to the former Maori owners.

The Crown submitted that the indigenous forestry industry suffered from the economic depression of the 1930s. With overcapacity and competitive North American imports, price controls were introduced in 1936. During the Second World War, timber prices continued to be regulated and an office of Timber Controller was established. The wartime controls were aimed at meeting the war effort, and the emphasis on maximum timber production did contradict sustainable management policies. The Timber Controller was given greater controls over private forests, including those on Maori land, than had been the case with the Forest Service under the Forests Act. Most indigenous forest in private ownership, by this time, was owned by Maori. There is evidence, however, that the office of the controller offered some protection for Maori owners against more dubious private millers.¹⁶⁴

The Crown agreed that it continued wartime price controls until 1947 and reintroduced controls intermittently at times thereafter. It noted that the Forest Service objected to price controls, on the ground that it was contrary to maintaining future supplies of indigenous timber. However, price controls were not finally removed until 1965. Most of the remaining indigenous forests in the Taupo district were cut out in the 1950s. The Forest Service was unsuccessful in substantially reducing the indigenous forest cut until 1952, when Cabinet began to authorise its reduction as far as was practicable. There was relatively little Crown proclamation or regulation during the 1940s and 1950s to limit or prohibit Maori from utilising their indigenous forest resource.¹⁶⁵

The Crown argued that, during this period, Maori owners were able to work some of the western Taupo forests themselves. This included the successful Puketapu 3A Incorporation. Some owners continued to sell cutting rights to outside companies. Maori owners also entered agreements requiring minimum amounts to be cut annually, in order to gain maximum benefit from price rises. As a result, most of the resource was cut out during the 1950s, which made state forests subject to increased demands from millers. The absence of any controls during this period had a serious impact on the national timber resource.¹⁶⁶

The Crown agreed that regulations requiring Forest Service permission before timber cutting rights were approved also applied to Maori-owned forests. The Crown urged care, however, in considering Tony Walzl's criticism that the regulations interfered with private contracts, as the private sawmillers making these complaints were also furthering their own interests. The Crown submitted that the full economic context has to be taken into account when considering complaints about regulations and proclamations locking up the timber resource. For example, there was an economic depression during the period of heaviest regulation, when domestic and international prices for timber collapsed. The Crown submitted that Mr Walzl failed to respond convincingly to other factors that, in its

view, need to be taken into account when considering these regulatory measures, including the sound policy basis of these measures and that they were legitimate objectives in the national interest. Regulation ensured that Maori received an equitable return on their timber resource and that it was sustainably managed in the long-term national interest. The Crown submitted that, without such restrictions, it is likely that the whole resource would have been quickly cut out for a very low return. This would have left owners with few other alternatives for development, due to the poor quality of their lands for farming. The Crown submitted that the proclamations did not prevent continuing traditional uses of the land.¹⁶⁷

The Crown submitted that it is far too simplistic to claim that regulations and controls imposed on the indigenous timber resource reflected the Crown pursuing kawanatanga responsibilities at the expense of rangatiratanga rights. The interactions between the Crown, Maori, and private interests were complex and evolved rapidly in response to domestic and international pressures. However paternalistic it may have appeared, a key plank of Crown policy was to protect Maori interests from exploitation and wastage. The fact that the indigenous resource was finite and could be milled only once also needs to be taken into account. Regulation and control was in the Crown's interest, but this should not obscure the protections it also provided for Maori.

The Crown noted that some of its attempts to purchase western Taupo lands were unsuccessful. The Crown wanted to acquire these lands for a legitimate purpose – the protection of the resource in the national interest – but did not succeed because of a failure to agree on a price. That Ngati Tuwharetoa rejected the price offered does not reflect any diminishment of their rangatiratanga rights.¹⁶⁸

The Crown also submitted that assessing any prejudice from this time is difficult. There is insufficient evidence of specific prejudice to Maori of this inquiry region as a result of the regulation of the indigenous forestry industry. Serious social and economic deprivation is a result of complex factors, and a good deal more evidence and analysis would be

required to isolate particular outcomes or prejudice arising from these allegations. It is not clear, for example, what was done with the considerable purchase money for timber lands received from the Crown. The claimants placed a great deal of emphasis on the failure of the Tongariro Timber Company venture, but gave less consideration to the benefits received from other sawmilling ventures. Without systematic analysis of these factors, and without consideration of other relevant factors such as the input of settlement moneys through the lakes agreements, including for Lake Taupo, and the impact of land development schemes, it is not possible to be clear about the relative prejudice of logging prohibitions. This is further complicated by the higher prices that were realised later. The Crown submitted that, in the western Taupo forests, its regulatory and protective measures had the effect of retaining a significant timber resource, which Ngati Tuwharetoa were able to utilise and gain benefits from when timber prices rose significantly after the Second World War. This is likely to have contributed to the later success of the Ngati Tuwharetoa timber incorporations. It was submitted that these same 'effective and far-sighted' Crown policies are also likely to have assisted Ngati Tuwharetoa to make the transition from an indigenous to the later exotic forestry industry. The Crown also assisted this transition, through its direct investment in the Lake Taupo and Lake Rotoaira forest trusts. The Crown submitted that these broad countervailing benefits from regulation and control of the industry do not allow for simple assessment and are not properly addressed by the evidence. The Crown found the apparent confidence of the claimants as to their prospects under a more laissez faire regime to be speculative and implausible.¹⁶⁹

The Tongariro Timber Company venture

The Crown agreed that it played a role in the Tongariro Timber Company venture.¹⁷⁰ The Crown did not generally challenge Mr Walzl's description of events leading up to the establishment and eventual demise of the venture, but did take issue with his interpretation of its motive and culpability in its role in the venture.¹⁷¹ The Crown submitted

that to describe the arrangement as an 'iwi development plan' or a 'regional development initiative' was to overstate the facts. The venture was a straightforward commercial deal, negotiated between the Tongariro Timber Company and Ngati Tuwharetoa to advance their respective objectives. It required Crown approval to be established, but 'in other respects it was simply a negotiated commercial arrangement'. Inherent in any such arrangement is the negotiated assumption of benefits and risks. All development involves risk, and the Crown submitted that Ngati Tuwharetoa knew the risks from their previous experience in failed timber ventures.¹⁷²

The Crown submitted that the true nature of the agreement was described by the Stout–Ngata commission, when it recommended approval for the venture. The commissioners commented that, if the Government was not prepared to give better terms than those offered by the company, then no reason could be raised against Maori owners utilising their lands and timber in this way. The company expected to make a profit from the venture – as did all settlement ventures – and the question needed to be asked whether the Government should be expected to undertake all such ventures. The commissioners found that the agreement seemed fair and equitable for Maori and seemed to be in the public interest, and they recommended that it should be approved. The Crown rejected claimant allegations that it failed any 'due diligence' obligations at this time. If it had intervened and stopped the deal, on the ground that it was an undue risk for owners, it would stand accused of paternalism and breach of rangatiratanga rights.¹⁷³

The Crown submitted that 'without question' the Tongariro Timber Company venture agreement provided for benefit for the Maori owners. They successfully negotiated preference for employment and favourable financial returns for cutting rights in the agreement. As part of the agreement, the company also agreed to take on the burden of building an access railway from Kakahi to Lake Taupo – which was the main reason the venture eventually failed. The company was unable to raise sufficient capital to build this railway between 1908 and 1914, and the outbreak of war

made further efforts untenable. The Government agreed to an extension of time in building the railway, and in 1921 it imposed higher building specifications for the railway than those required in the 1908 agreement. There is no evidence that this higher standard was imposed for improper purpose or motive. The Crown did not seek to deliberately undermine the agreement through this or any other intervention. The Crown agreed that the higher standard required caused investors to pull out of an arranged loan agreement. The Egmont Box Company agreed to become involved in helping to build the railway, but this, too, turned out to be a financial disaster. The Crown submitted that the concessions it allowed to the terms of the agreement were a genuine attempt to ensure the ongoing viability of the project. They were made in the expectation that the scheme would succeed to the mutual benefit of owners and investors.¹⁷⁴

The Crown submitted that there is no evidence that it sought to purchase land covered by the venture agreement from motives of bad faith or without due regard for owner interests. The Crown's objective was to gain control of the remaining indigenous timber resource in order to implement proper management and preservation policies. Some owners with interests in land covered by the venture did want to sell to the Crown at Government valuation, due to ongoing delays with the venture. The Crown also faced other complications in purchasing lands covered by the venture agreement. However, the Crown's acquisition of such lands did not prejudice the venture arrangement itself. Any such land acquired by the Crown remained subject to company cutting rights, and for such purposes the Crown would 'stand in the shoes' of those Maori who sold.¹⁷⁵

As it happened, all parties suffered substantial loss as a result of the venture. However, because the company never got to mill a single tree, the forests retained in Maori ownership also remained available for their future use. The Crown rejected allegations that it should have intervened more actively to make sure the scheme succeeded. It submitted that it is neither plausible nor credible to compare this scheme with the Government's investment in land

development schemes at this time. It was a commercial deal that was ultimately unsuccessful. The Government did approve, and subsequently extend the life of, the scheme, but it cannot be held responsible for its ultimate failure. The Crown submitted that the Treaty does not guarantee successful commercial outcomes in every instance, and it rejected any general claims of a Treaty development right in relation to this industry.¹⁷⁶

The Tribunal's analysis

As we noted in our chapter on Treaty standards and a right of development, the Treaty of Waitangi clearly specified forests as being among the properties subject to Crown guarantees of protection. Iwi and hapu in some parts of New Zealand were already selling timber from their lands, for purposes such as naval spars, when the Treaty was signed. The utilisation of timber for commercial purposes, therefore, clearly fell within the kind of development opportunities contemplated at the time. The value of forest resources for Maori traditional living and cultural purposes was also noted by early European observers. A Crown obligation of active protection of iwi and hapu in their property rights, including their Treaty development rights to utilise their properties for new opportunities to meet their present and future needs, clearly also extended to active protection of their right to utilise their forests.

Claimants before us in this inquiry region emphasised the cultural and traditional importance of their forest resources, as well as their wish to utilise some of these resources for economic development opportunities. Here, we are particularly concerned with the latter. As with geothermal taonga and tourism development opportunities, the wider cultural importance of the forest resource for iwi and hapu for a variety of purposes – and their ability to manage this resource to meet all their needs, both economic and cultural – provides important context.

We accept that we do not have detailed evidence on the full extent of iwi and hapu utilisation of their indigenous timber resource for economic development purposes in

this inquiry region. This is partly because, as the Crown submitted, a great deal of indigenous timber milling in the nineteenth and early twentieth centuries took place by private arrangement. A large amount of this milling was also conducted on an informal and illegal basis, as the Stout–Ngata commissioners noted when they reported on timber lands in the Rotorua district proclaimed under the Thermal Springs Districts Act 1881.¹⁷⁷ It is unlikely, therefore, to be covered by official records of the time.

We agree that much of the evidence presented to us was drawn together within a short timeframe. Parts of this region, and particular issues, are covered to varying degrees. However, as we have previously noted, by agreement of parties in this stage one inquiry we are not required to investigate specific issues in detail. We have been requested to consider those generic issues we identify, from evidence available to us, concerning the exercise of iwi and hapu development rights in the utilisation of their indigenous forest resources in new opportunities arising from settlement in this inquiry region. We are of the view that we have received sufficient submissions and evidence to consider the following generic issues.

Protection of sufficient timber lands

TO WHAT EXTENT DID THE CROWN FULFIL ANY OBLIGATIONS OF ACTIVE PROTECTION OF IWI AND HAPU IN SUFFICIENT OF THEIR FOREST RESOURCE TO PARTICIPATE IN NEW ECONOMIC OPPORTUNITIES?

We accept the Crown's submission that, at the time it began purchasing land from iwi and hapu of this region, during the 1870s, its land purchase policies were focused on the assumption that farming would be a major long-term land use. We also accept that the Crown preferred to purchase all interests in Maori land outright, rather than negotiate for separate resources such as forests. It was assumed that, where forested land was purchased, much of it would eventually be cleared for farming. In many cases, forest cover was regarded as an impediment to settlement.

We do not accept, however, that this meant there was no attempt to identify and acquire good-quality, accessible timber for settlement purposes, as part of the Crown's purchasing policies. We have received considerable evidence that, from the start of Crown purchasing in this region, good-quality, accessible timber was identified as a useful resource for settlement and a potential source of income. We received evidence, for example, of Government officials and purchase agents regularly reporting on the desirability of acquiring accessible, good-quality timber for various purposes, from the time pre-title purchase and lease negotiations began in this region, including on land being considered for Government purchasing. Bruce Stirling, in his Taupo–Kaingaroa overview report, for example, notes a Government official, Mr Locke, seeking to purchase land and timber for the Armed Constabulary redoubt at Opepe in the Taupo district in 1870.¹⁷⁸

We also received evidence that iwi and hapu of this region quickly recognised the commercial value of indigenous timber for settlement purposes and became active in logging and selling their timber. Mr Stirling produced evidence of Maori communities in the 1870s selling timber, separately from land, for purposes such as telegraph poles.¹⁷⁹ The Government purchase agents Mitchell and Davis also appear to have felt obliged, at least initially, to purchase timber separately from land. For example, they attempted to purchase pohutukawa timber along the Taupo lake shore in 1874, as fuel for the steamer that was shortly due to begin service on the lake.¹⁸⁰

While Maori communities regarded the opportunity to sell timber separately from land as an important and welcome economic opportunity arising from settlement, Mr Stirling reports the reluctance of Government officials to continue this practice.¹⁸¹ Instead, it became Government policy to purchase lands outright, together with all interests regarded as being legally associated with them, including timber. Mr Stirling notes the determination of land purchase agent Mitchell to purchase land near Waihi at Lake Taupo in the 1870s, for example, in spite of warnings not to purchase in Kingitanga-associated areas at

this time, because he had identified the land as containing the only good timber near to the shore 'and its possession must at some time become of importance to the public'.¹⁸² Similarly, in the Rotorua district, Mitchell and Davis began negotiations in the mid-1870s for the purchase of the Rotohokahoka block and the 'very desirable' forest on it near Ohinemutu.¹⁸³ In 1879, Mitchell also recommended purchasing land in Rotorua, where the timber was expected to be useful for the 'rising townships now being established at the lakes'.¹⁸⁴

We agree that timber was not always a factor in some early pre-title purchase and lease negotiations in this region, especially where the suitability of non-forested land for purposes such as runholding was of more concern. The mere presence of trees on an area of land was not necessarily an indication of the existence of valuable timber. Some tree-covered lands were still considered 'worthless', or too inaccessible to be worth purchasing. Nevertheless, where officials and land purchase officers recognised the commercial value of accessible timber for settlement purposes, they routinely regarded this as an important factor. Given that the commercial value of the timber was recognised, the Crown was under an obligation to protect iwi and hapu in being able to participate in the utilisation of this resource. This included paying a fair price for transactions involving timber of identified commercial value, and ensuring iwi and hapu were protected in sufficient of their timbered lands for their expected present and future needs. Failure to do this meant that some iwi and hapu were excluded from development opportunities for their timber resource.

As we noted in part III of this report, the 1880s was the decade when most purchases of Maori land were completed in this inquiry region, even if many of these were based on earlier negotiations and advances. This was also the decade, as parties agreed before us, in which a fledgling sawmilling industry began to develop in this region based on the identified good quality of much of the timber. There is even more evidence, by this time, of Government land purchase agents taking account of the quality of timber in their purchase decisions, both for immediate settlement

needs and for a possible timber industry, even though by now it was rare for them to purchase timber separately from land. The modern farming industry had not yet been established, and the Government was seeking to encourage a variety of possible enterprises to encourage the economy out of recession.

In the early 1880s, for example, while the Government reviewed its earlier negotiations in the region and decided whether to complete or abandon some purchases, official reviews took account of the identified value of timber on Maori lands. Mr Stirling reports that, in the Taupo district, for example, reviews resulted in senior purchase official Gill recommending the abandonment of negotiations in blocks such as Tauranga-Taupo, where much of the land was described as of only fair quality or else pumice plain covered in stunted fern and ti-tree. In Opureke, the land was described as rugged and 'covered with birch and other worthless timber'.¹⁸⁵ On the other hand, blocks with valuable stands of timber were identified as worth purchasing, especially where the timber was easily accessible or expected to become so. For example, the purchase of the Paeroa block, in our Kaingaroa district, was identified as worth completing not only because it was believed to contain potentially good lands but also because it contained hot springs and plenty of available timber.¹⁸⁶ In the Rotorua district, the Ratoreka area was targeted for purchase in the 1880s not just for its thermal features but also for its 'fine totara forest'.¹⁸⁷ In a few cases, the Government's review recognised that purchases might have to be abandoned because Maori were already obtaining a significant commercial return for their timber. In 1881, the review recommended abandoning the purchase of the Kahakaharoa block, near Waihi, although some advances had already been paid, because it was reported that Maori were already earning 40 shillings per tree from the block for building purposes. They refused to part with other parts of the block containing 'very nice timber' as this was a famous place for catching birds. This resulted in official advice to abandon the purchase at the price the Government wished to pay.¹⁸⁸

The provision of road and rail access to the region was expected to make some stands of timber in the Taupo and Rotorua districts more accessible and thus likely to support a substantial milling industry. This included the North Island main trunk railway, where construction began in the mid-1880s. Government purchase agents noted the potential value of blocks that had previously been inaccessible but were now expected to be opened up by the railway, and especially lands believed to contain high-quality timber such as totara. Mr Stirling notes reports from the 1880s and 1890s of Government purchase agents identifying such forests for proposed purchases.¹⁸⁹

The development of the modern farming industry, from the 1890s, increased the demand for quality timber for farm buildings and other farm improvements, such as fencing, along with the containers, such as barrels and boxes, required for storing and transporting produce, and the necessary roads and bridges required to transport the produce and necessary farm supplies.¹⁹⁰ Although land purchase policies continued to be primarily based on the eventual primacy of farming and agriculture, and on an assumption of inexhaustible supplies of timber, there is evidence of the beginnings of official concern about the long-term timber resource as early as the mid-1870s.¹⁹¹ Although little was done for some years, however, to practically address this concern in policy terms. Government land purchase agents nevertheless took account of the availability and quality of timber when purchasing, anticipating that, at least in the short to medium term, accessible, good-quality, millable stands of timber would be required for settlement needs and would be a welcome supplementary source of income, especially in more marginal farming areas. Purchase reports regularly noted stands of merchantable timber, including rimu, totara, matai, and kahikatea.

While land purchase and survey officials reported regularly on stands of valuable timber, the standard protections implemented by the Government for land sufficiency, as we found in part III, failed to provide any particular protections and monitoring to ensure that Maori were protected in a sufficiency of their timber resource. There was no requirement

to consult with iwi and hapu or monitor the impacts the purchasing of timber lands had on them. The minimum acreages requirements and purchase reserves, even if fully implemented, were set at subsistence levels for agriculture and included no requirement to protect timber resources.

As we noted in part III, it was Government land purchase policy to drive prices for Maori land as low as possible. This included the price paid for any timber on the land. The evidence we have indicates that, on occasion, if necessary, the presence of quality timber might cause land prices to be increased slightly per acre, but that no attempt was made to value timber separately in nineteenth century purchasing. We note Mr Stirling's evidence concerning purchasing in the Tahorakuri blocks in the 1880s, for example, where it was recognised that the land included valuable totara forest near to the proposed new road north from Tapuaeharuru. The Maori owners appointed a Pakeha agent to sell timber separately to the Government, which the Government refused to agree to. The Government was, however, willing to offer two shillings more per acre for the land with the forest, while eventually recognising that the true market value for such timbered land was likely to be considerably more.¹⁹²

In the 1890s, as we noted in part III, Crown purchasing began tailing off over large parts of the interior of the region, apart from areas identified as particularly important for purposes such as tourism. Much of the rest of the Government land purchasing during this decade was aimed at tidying up purchases begun earlier, to ensure the Crown reduced any losses on earlier advances as much as possible. At the same time, the Government's focus on acquiring as much suitable land for settlement as possible caused the reprioritisation of purchasing in more marginal parts of the region. This was especially the case where Maori land titles were still subject to litigation and where there were now very large numbers of owners with very small shares in blocks, complicating and delaying purchases, as had become the case in large parts of the Taupo district and the interior of the Rotorua district.¹⁹³ In addition, the various forms of prohibition on private

dealing over large areas of Maori land in this area meant the Government was under no compulsion to purchase immediately to avoid competition. Even so, purchase agents in the districts continued to note the availability of good-quality accessible timber in their proposals.¹⁹⁴ Government land agents also remained reluctant to pay the higher prices asked by Maori for land containing commercially valuable, accessible timber.¹⁹⁵

We agree that, by the early twentieth century, significant areas of high-quality forest remained in Maori ownership, including the large western Taupo forests. In 1908, the Stout–Ngata commissioners noted that parts of the interior Rotorua district still owned by Maori contained good-quality forest, and that this millable timber could well be ‘the most valuable crop the land will ever grow’.¹⁹⁶ The commissioners found that there was still quality milling timber on Rotorua blocks such as Okoheriki, Waiteti, Tautara, and Rotoma.¹⁹⁷ They noted valuable milling timber in parts of Rotoiti, Te Haumingi, Kaitao, and Rotohokahoka blocks.¹⁹⁸ The Ngati Tarawhai hapu also retained land in south-eastern Rotorua that contained valuable milling timber.¹⁹⁹ The commissioners’ emphasis on ‘proper’ utilisation of lands, including those containing good-quality timber, left little room to consider preferences for traditional uses.

These forests in iwi and hapu ownership remained available for utilisation for future development opportunities. However, as we have noted with respect to lands, the overall picture does not necessarily indicate that all iwi and hapu in this region had been left with a sufficiency of their timber resource for their present and future needs by this time, or that they had achieved full benefit from this. The evidence available to us in this inquiry indicates that the Crown failed to implement protection mechanisms to monitor and protect iwi and hapu in their timber resources, just as it failed with land. This included a failure, where land contained valuable stands of timber, to monitor the likely needs of iwi and hapu when purchasing, and the failure of minimum protection measures such as 50 acres per head (even if they had been properly implemented) to take account of timber needs. While the large

stands of timber retained by some iwi and hapu by 1900 were of considerable potential value, we note that many were not immediately accessible for present-day needs, while the Crown closely targeted timber of more immediate use, such as that in the Tahorakuri blocks.

We received evidence that, while the presence of identified valuable timber on land blocks might cause land purchase agents to raise their payment per acre slightly to ensure acquisition, there was no attempt in nineteenth century purchasing to ensure a reasonable payment for the estimated value of timber on land blocks.²⁰⁰ As with land generally, the Government was able to use a combination of its monopoly powers, Maori poverty, and the heavy costs of the land court system to drive down prices for lands identified as containing valuable timber. While the Crown remained unwilling to pay separately for timber, the same restrictions on private dealings in land in this region that we detailed in part III were also held to apply to the sale of the timber on the land to private interests. The only way for Maori to gain an income was to either sell timber informally or illegally to private parties, or sell the land and timber together to the Crown. We are persuaded that this could not help but drive the prices paid for timbered lands below what were regarded at the time as reasonable values.

The report of the official Stout–Ngata commission in 1908 confirms our view. The commissioners reported that, in only considering land for long-term uses such as farming, the Government had neglected to take proper account of the commercial value of timber on some Maori land – including the commercially valuable timber on Maori land in this region. The commissioners noted that Maori land, once purchased, was now handed over to the waste land boards to administer, and that these boards were focused on dealing with lands for farm settlement, not timber utilisation. There was, therefore, little reason for Crown purchasing to take account of timber values on Maori land – and it did not. However, this excluded Maori from obtaining the full value from their merchantable timber. This was especially the case when restrictions made any private

dealings, at best, legally uncertain. The commissioners warned the Government that Maori were effectively being penalised, because of the way the Crown chose to administer Crown lands without making the most of valuable milling timber.²⁰¹ This was a clear warning to the Government that, by this time, its policies were causing harm to the ability of Maori in this region to gain fair value for their timber resource.

In summary, we are of the view that a number of iwi and hapu of our inquiry region had stands of timber on their lands of recognised potential commercial value. This was particularly important where it was recognised that their lands, generally, were proving marginal for other purposes. The Government's recognition of the commercial value of timber and timbered lands required it to actively protect iwi and hapu in retaining sufficient of what was recognised as accessible and valuable timber when it was purchasing. Where the Crown refused to buy timber separately from land, and restricted Maori from participating in a private market, its obligation to actively protect Maori in a fair price for their timber and in a sufficiency for their present and future needs – which included, from the 1880s, a developing sawmilling industry – was even more important.

The Crown failed to implement protective mechanisms to ensure that iwi and hapu of this region were protected in a sufficiency of their timber resource when the Crown conducted land purchasing in the nineteenth century. This is likely to have impacted on some iwi and hapu of this region. In general terms, impacts appear to have varied, as was the case with land. We do not have sufficient detailed information before us to make findings on the extent of this impact in each case. In some districts, particularly western Taupo and parts of inland Rotorua, substantial timber resources for future, if not immediate, use were retained. In other areas, around new townships such as Taupo and in southern Kaingaroa, the Crown targeted timber resources heavily and some smaller iwi and hapu such as Ngati Hineuru appear to have suffered as a result. We leave the extent of any impacts by the beginning of

the twentieth century as a matter for further research and negotiation between parties.

The Crown began purchasing in the Taupo district again in the early twentieth century. By this time, the improved road and rail infrastructure in the district had made the large western forests more accessible, and therefore more valuable, but also more open to extensive milling at a time when concerns were growing about a possible timber famine. There was also increased Government interest, by this time, in encouraging the settlement and development of even the more marginal lands of the district. We have already considered Government land purchasing at this time, in part III of this report, and our findings there provide context for our consideration of forested lands. We note that the Crown has agreed that it did begin purchasing forest lands at this time, both to better manage the timber resource and to provide land for settlement. As we noted in part III, the Crown undertook purchasing of Maori forest lands both through the new system of meetings of owners and through purchasing individual shares, which it made possible again from 1913. The Crown also made continuing use of monopoly provisions, restricting private dealings in lands, in order to further these purchases. The practices of purchasing individual shares outside the collective will of communities and exercising Government monopolies were effectively a reversion to nineteenth century practices. The same Treaty breaches that we have already found in part III, with regard to these practices, also apply to purchasing in the Taupo forests at this time. On the question of how much forest land the Crown was able to obtain, it appears that timber leases and other agreements complicated and delayed the Crown's purchase efforts. Substantial areas of the western Taupo forests remained in Maori ownership by 1930, at the time the Tongariro Timber Company venture finally ended.

While the Crown did not purchase extensively in the Rotorua district, as we have noted in part III, it did establish mechanisms by which, after the thermal springs districts legislation was repealed in 1910, private purchasers were able to resume significant purchasing of Maori lands. Mr Walzl describes how, in the years from 1909 to 1930,

when private purchasing was permitted again, almost half the retained Maori timbered lands in the Rotorua district, as identified by the Stout–Ngata commission, were privately purchased.²⁰²

In our view, it was evident to the Crown by the early twentieth century that the indigenous forest resource of this region was a major economic opportunity for many iwi and hapu of the Rotorua and Taupo districts. In deciding to allow the resumption of Maori land purchasing, the Crown had an obligation of active protection of these iwi and hapu in their development rights to utilise this resource for the benefit of their communities. This required consultation – which, we note, did occur in Rotorua, at least through the Stout–Ngata audit – and adequate protections based on this, to ensure that Maori continued to be protected in sufficient of their timber resource. The establishment of purchase processes and procedures that had the potential to impact on Maori development rights for their timber required clear and determined steps to also protect Maori development interests in this resource. The general failures in Crown provision for purchasing at this time, which we have already outlined in part III, also impacted on retained forest lands and led to major and rapid losses for iwi and hapu in the Rotorua district. The Crown's failure of active protection at this time was a breach of the Treaty development right of Maori in this region to utilise their forest resource.

The development of the indigenous sawmilling industry

TO WHAT EXTENT DID THE CROWN FULFIL OBLIGATIONS OF ACTIVE PROTECTION OF IWI AND HAPU IN THE DEVELOPING SAW-MILLING INDUSTRY IN THE CENTRAL NORTH ISLAND?

From the 1880s, a fledgling sawmilling industry began to develop in the Central North Island, utilising extensive stands of quality timber including rimu, totara, matai, and kahikatea. In the Taupo district, the first European sawmillers began exploiting the more accessible northern and southern margins of the western Taupo forests.²⁰³ Sawmillers also began operating in the Rotorua district,

concentrating in the Mamaku Ranges.²⁰⁴ There was a range of activity in early sawmilling, from landowners cutting timber on their own lands to companies with capital and machinery, which employed workers in small mills and were at times involved in constructing infrastructure such as bush tramways. Initially, mills produced timber to meet local demand, such as materials for road and bridge building and sleepers for railways, as well as timber for building. By the early 1900s, sawmillers were beginning to look to larger markets further afield, as railways opened markets to the north and south and the timber resources in the remainder of the island were depleted.²⁰⁵

According to forestry historian Michael Roche, the early mills of this region tended to be smaller, with simpler company structures, than in the northern kauri milling industry. Many were operated by just a few owners and had small workforces. They were often temporary in nature, deliberately intended to last no more than the time it took to work out selected areas of timber.²⁰⁶ Participants in the industry also varied, ranging from landowners milling their lands, to contract workers and more established companies. Timber was milled from a variety of tenures. Sawmillers gained freehold of some blocks, and on others took leases on the basis of agreed royalty payments for timber. The mills employed small labour forces. Sometimes small settlements grew around them, while in other cases groups of contractors, including Maori, hired themselves out to work set timber blocks on a piecemeal basis, before moving on to new areas when the valuable timber had been cut out.

The nature of investment in milling also varied, ranging from relatively small concerns – sometimes groups of landowners or aspiring farmers seeking to gain an income before their farms became productive – to larger companies with considerable financial backing. The industry grew quickly in this region. Crown historian Donald Loveridge notes the first steam-powered sawmill in the Rotorua area, for example, operating on the Tapuaekura block on the southern side of Lake Rotoiti from 1884, with agreement from Ngati Rongomai owners (and some three years before title was determined).²⁰⁷ The sawmilling

industry nevertheless remained limited by the technology and infrastructure of the time. This, and changes in what were considered commercially valuable timber species, meant that by the late nineteenth and early twentieth centuries some land was being cut over again.

The extensive nature of some of the most valuable timber stands in this region, the possibilities of cutting regrowth and newly valuable species, and the marginal nature of much of the region's land for farming meant that, by the 1890s, the timber industry was regarded as a significant economic opportunity. The Government encouraged development of the industry, including the possibility of managed indigenous and exotic plantations. We note evidence that serious consideration was given to the possibility of managing regrowth and plantations of indigenous species from at least the 1870s, and the possibility was not clearly abandoned by officials until 1911.²⁰⁸ The Government also considered the possibility of encouraging an export market in timber, and in 1894 it made attempts to sponsor a timber trade with the United Kingdom.²⁰⁹ Although this initiative was unsuccessful, an Afforestation Branch of the Lands Department was established from 1896, and experimental plantation nurseries were established, including one at Rotorua.²¹⁰

By the mid-1880s, the completion of the North Island main trunk railway finally appeared imminent. A number of speculators entered the timber market, attempting to acquire cutting rights near the railway in anticipation of their likely increase in value when the railway arrived, especially as it was anticipated that alternative sources of merchantable timber elsewhere in the North Island would decline. The western Taupo forests were among those targeted in this way.²¹¹ The anticipated rail infrastructure also confirmed views that the valuable timber stands of this region would remain an important commercial resource for a significant period. The Government, too, became involved in sawmilling early in the twentieth century, in order to better provide for its own extensive public works requirements. A Government mill was established at Kakahi on the main trunk line from 1904, for example,

to supply public works requirements for timber and take advantage of earlier Crown purchases of valuable timber lands near the railway.²¹²

The development of the sawmilling industry in this region appeared ideal for those iwi and hapu who retained the timbered lands on which much of this sawmilling development was based. However, it was alleged by claimants that the Crown failed to actively protect Maori to fairly participate in this industry at a full range of levels using their retained timber resource. It was alleged that a major reason for this was the Crown's pursuit of its own purchase objectives without adequate regard for the developing interest of iwi and hapu in participating in the sawmilling industry. We received evidence, for example, of the Crown's reluctance to improve roading, when told that to do so would help hapu to utilise their timber resource. Mr Stirling notes evidence of this in the Paeroa block, for example, where Government officials were reluctant to respond to hapu requests to improve the Waiotapu to Wairakei road to enable them to access their bush for milling on the block. The same officials agreed that, once purchasing was complete, work on the road should be pushed on as soon as possible to open up an important tourist route.²¹³

The Government's use of purchase monopolies was also identified as a major restriction on the ability of iwi and hapu to gain full value from their timber and participate more actively in the industry with private partners. As we have seen, the market for timber, separate from land, was largely private, as the Crown refused to deal in this way. However, as we noted in part III, in pursuing Maori land purchasing in this region the Crown implemented a range of purchase monopolies, which prevented Maori from otherwise dealing in their lands and resources, including timber. The definition of 'alienation' of Maori land was generally held to include any form of property alienation, including mortgages, leases, and sales of royalties and rights to resources, as well as outright sales of land. 'Land' was understood to include the resources growing on it, such as trees or flax. This substantially restricted the ability

of iwi and hapu to participate fully in the developing private market in timber for milling purposes. They were placed at a significant disadvantage to other general landowners, who retained rights to benefit from resources such as flax and timber on their lands. These policies, therefore, undermined an important potential source of income and opportunity for iwi and hapu.

In practice, the evidence indicates that many iwi and hapu of this region simply sold timber rights to sawmillers, regardless of restrictions on private dealing proclaimed over their lands. This was done through informal deals, likely to be regarded as illegal, but beyond the capacity of the Crown to fully control. The difficulty was that, as with any black market, iwi and hapu risked losing control over the way their timber was milled. They were generally required to accept lower prices, because of the element of risk involved to the purchaser participating in the deal. Further, iwi and hapu were limited in the type of deal they could risk. Generally, it was much easier to simply sell timber rights. It was far more difficult, in an uncertain legal situation, to enter the sawmilling industry as a business that needed to be able to engage in more complicated commercial dealing.

We note claims that, even as there was increasing recognition of the commercial value of timber in this region, the Crown failed to adequately address the major barriers iwi and hapu faced to participating in the industry as they chose. As we have noted, many of the early sawmills were run by relatively small concerns with simple organisational structures, relatively low levels of capital investment (compared to the northern kauri industry), and small workforces. Many were started up with relatively little capital, by landowners who had gained previous practical experience working in the milling industry or similar ventures.²¹⁴ Dr Roche found that the average capitalisation of milling companies in the western Taupo forests (which were regarded as extending to the west of our Taupo inquiry district) ranged from £2000 to £7000, although larger concerns had capitalisations in the order of £20,000 to £50,000.²¹⁵ A substantial number of sawmilling ventures

were deliberately intended to be medium-term ventures, milling a single crop of timber off a block of land, perhaps over a 10-year period, before being wound up.²¹⁶

This kind of opportunity seemed ideal for Maori landowners, if they could overcome title difficulties and obtain or accumulate the capital required. As parties before us noted, iwi and hapu were keen to participate at this level in the industry. We note evidence, from the Stout–Ngata commission's reports, of Maori landowners' efforts to engage in sawmilling in the Rotorua district, for example. We also note evidence concerning the Pungapunga Timber Company, in the Taupo district. According to Dr Roche, this company was established in 1903 with cutting rights over 7000 acres of Maori land near Mananui. The original directors included Tureiti Te Heuheu, and many of the shares were held by Maori with interests in the forest land. However, the company eventually failed due to difficulties in raising working capital, and although a number of rescue attempts were made it was wound up in late 1909.²¹⁷

It was alleged before us that the Government's failure to assist Maori with necessary sources of finance contributed to the difficulties they faced. This was compounded by a failure to address problems of governance that resulted from the title system imposed for Maori land. We noted, in part III of this report, that Government efforts to overcome title difficulties before the 1930s were largely ineffective. The Government provided the mechanism of owner incorporations, from 1894, to enable collective control of lands, but until the 1930s these were of only limited practical usefulness in this region. They were required to concentrate largely on farming and were expensive to establish. They were not widely promoted by the Crown in this region and, as the Stout–Ngata commission found in 1908, they had uncertain legal powers. The only real opportunity for Maori to overcome title difficulties, after 1900, was the machinery of Maori land councils and boards. However, Maori wishing to utilise their timber and retain their land remained concerned about the land-vesting requirements of these agencies. Dr Loveridge notes, with regard to the Ngati Pikiao timber lands, that the land councils initially

felt themselves limited in agreeing to timber leases unless lands were vested in them.²¹⁸

We have previously noted, in chapter 14, the difficulties Maori faced in accumulating investment funds and obtaining lending finance for development purposes. It does not appear that Government sources of funding were made available for investment in the timber industry, despite its recognised value in this region. As we have noted, the Government was focused on providing cheap finance for farm development. The Government did make special arrangements to extend its state advances scheme to other industries identified as requiring lending assistance, including fishing and orcharding. We received no evidence that the Government was interested in providing such assistance, however, to any sector of the community for sawmilling enterprises. The temporary and commercially risky nature of the industry, the perceived short-term life of the companies involved, and the perception that the industry was not a long-term land use are also likely to have made it less attractive for Government lending. In any case, as we have noted, Maori were, in practice, largely excluded from state sources of lending finance. As far as we are aware, no state lending finance was available at the time the sawmilling industry was developing in this region in the late nineteenth and early twentieth centuries, for any sector of the community.

Thus, the sawmilling industry was largely privately financed. This left iwi and hapu who required finance to rely on private lenders. However, as we have noted, this was a very restricted market for Maori. Private lenders remained averse to lending on Maori land for development purposes, and there was little chance of these attitudes changing – as they did for high-risk Pakeha, who were able to prove themselves with state advances while Maori remained effectively excluded. Further, Crown purchase policies further restricted Maori access to private lending, as the widespread restrictions on alienations imposed on Maori lands in this region also prohibited private mortgages. Maori had much less opportunity to gain access to lending finance that would have enabled them to

participate in the developing timber industry at a business level.

The only real option for iwi and hapu who wanted to participate in the sawmilling industry at this level, in these circumstances, was to seek out private joint-venture partners who could provide significant capital and business skills (and political influence, in an uncertain legal situation), in return for Maori agreements to mill their forests. This offered Maori the possibility of gaining the necessary infrastructure to access their timber (which the Crown was reluctant to provide), a source of necessary capital, and an opportunity to negotiate agreements that offered long-term development benefits for Maori communities. However, their major difficulty was that the restrictions on alienations affected their ability to gain the best from these agreements, forcing them to lower prices and preventing them from enforcing those parts of the agreements intended to benefit their communities.

We received a great deal of evidence that the Crown was well aware, by the early twentieth century, of the difficulties these policies were causing iwi and hapu of this region who wished to utilise their timber resource and gain full benefit from it. These difficulties had become more critical by the 1890s, when commercial sawmilling was clearly becoming a major opportunity in parts of the region. They also became a political issue, as timber companies and their backers began to challenge the legality of the Government's view on alienation restrictions in the interest of more security for their now more extensive dealings over timber on Maori land. This challenge was supported by a number of Maori leaders in this region, who recognised that, on otherwise marginal lands, the timber industry was likely to be the most important economic opportunity their people had.

In 1905, the Ngati Tuwharetoa leader Tureiti Te Heuheu gave evidence to a parliamentary select committee on the difficulties his people were encountering in utilising their timber, which in large parts of their district made up the most valuable part of their lands.²¹⁹ Te Heuheu made many of the same complaints that had already been referred to

by the Rees–Carroll commission, in 1891, and would be emphasised again by the Stout–Ngata commission in 1907 and 1908. These included the serious difficulties Maori faced in utilising their properties for economic opportunities because of the title system imposed on them. He warned that these title difficulties also impacted on their efforts to utilise timber from their lands. He gave an example, where his hapu had entered into a timber agreement that was found to be fair and would have resulted in thousands of pounds in benefit for them, only to have it fall through because they could not convince their Pakeha partners that they had a clear title to the land the forest stood on.²²⁰

Te Heuheu also complained that the earlier system of Crown purchasing of Maori land had resulted in low prices being paid that did not take full account of the value of the timber. He claimed that the Crown was now reselling the land at a considerable profit – and profiting further from selling the timber on the land. Te Heuheu gave a number of examples where, he claimed, this was happening to land Ngati Tuwharetoa had interests in, including the Taurewa and Waimarino blocks just outside this inquiry region. He claimed that the Crown had been able to buy the blocks cheaply, despite the valuable timber they contained. Based on prices being obtained from similar timber, he said, the Crown stood to make thousands if not millions of pounds profit from the timber alone. In Waimarino, for example, the Government had paid the relatively low price of 2s 6d per acre for the land, but it stood to gain a further estimated £2 million from the value of the timber, based on estimates of royalties for timber gained from similar blocks nearby. In Taurewa, the Government had also paid 2s 6d per acre for some of the land in the block, while the part retained by Maori was now earning them £10 per acre for the timber rights alone.²²¹ These effective losses contributed to Maori inability to accumulate necessary funds for investment in sawmilling.

Te Heuheu complained that legal restrictions imposed on Maori land alienations were further contributing to Maori landowners being shut out of potentially lucrative

deals with their timber, even while the Crown was making considerable profits from lands it had acquired. He claimed that such restrictions were costing Ngati Tuwharetoa considerable sums in lost opportunities. For example, he explained that they were currently being offered deals of around £10 per acre, for blocks of 50,000 acres, for timber royalties over a 50-year period. This stood to enable them to earn around £500,000 for the timber off the land, over that period, and once the land was cleared it would still remain in their ownership to be developed for other income-generating purposes.²²²

Te Heuheu was speaking at a time when sawmilling companies were beginning to challenge the legality of applying restrictions in private dealing to sawmilling. The commercial value of the forests was now such (and especially as the main trunk line was shortly due to be completed) that sawmillers found it worthwhile to seek legal loopholes or challenge the Crown's view of what its alienation restrictions actually applied to. Dr Roche notes how European sawmillers began moving into the southern and northern fringes of the western Taupo forests from the mid-1880s, as construction of the main trunk line progressed from each end. In many cases, groups of farmers formed private sawmill ventures, buying up milling rights on a variety of tenures including Pakeha leasehold land, Crown land, and Maori land, as blocks became accessible through railway construction, in order to earn an income from timber before the land was cleared for farming. The income enabled them to accumulate capital that could be used to further develop and extend their farms. Much of the initial income from sawmilling came from supplying the needs of infrastructure construction, such as providing railway sleepers, although private millers faced some competition from the Government sawmill at Kakahi. By the early 1900s, it was also apparent that other North Island forest resources were becoming depleted, making the Taupo forests even more desirable for sawmillers who wished to take advantage of national demand for timber, once the railway made transport to other regions viable.²²³

The anticipation of better access to the major forest resources in the central North Island led to bouts of speculation in timber cutting rights. Some companies were apparently primarily established to buy up cutting rights and resell them later, at higher prices, to companies that actually did want to mill the timber. Investors and sawmillers had considerable political influence, and they strongly supported legal opinions that cut timber should be regarded as chattels rather than as a part of land – a view that was also supported by Maori communities who wanted to be able to utilise their timber resources, as Te Heuheu had indicated in 1905. Even though they were restricted in the prices they obtained, Ngati Tuwharetoa also supported this challenge, as it at least offered them some commercial benefit from their timber. Te Heuheu referred to this a number of times in his evidence, insisting that cut timber should be regarded as separate from the land and more in the nature of a chattel that could be sold privately.²²⁴

Even so, Te Heuheu was clear that the uncertain legal situation with the Maori land title system, and the restrictions on private dealings, meant that Maori owners were obliged to accept lower prices than the average for their timber. Where the average price was about three shillings per 100 feet for totara, for example, or £20 per acre of land containing an average 30 totara trees, Maori could only expect 2s 3d per 100 feet for their totara, or around £10 per acre for leasing equivalently timbered land. Maori claimed that Pakeha sawmillers would be willing to pay more, but for the uncertain legal situation with timber on Maori land. The title system, which required all the scattered and numerous individual owners to sign lease agreements for cutting rights in a similar way to what was required for signing land sale agreements, was considered time-consuming and expensive and helped to reduce the price sawmillers were willing to pay.²²⁵ We note that historians have generally supported Te Heuheu's views on this point. In his history of the industry, Dr Roche has also found that the Crown was generally able to gain higher prices for timber than Maori owners were able to obtain

for comparable timber on their lands.²²⁶ Nevertheless, with so few alternative development opportunities, Ngati Tuwharetoa communities clearly felt that they had little choice. As Te Heuheu informed the select committee: 'My people have been saved through their ability in dealing with their timber.'²²⁷

Ngati Tuwharetoa were also concerned about how to utilise the timber on their more inaccessible lands. In the western Taupo area, very large areas of valuable forest between the main trunk line and Lake Taupo remained relatively inaccessible. Ngati Tuwharetoa recognised that, without access to the necessary capital themselves, they would have to rely on either the Government or private companies to build the rail access required. Te Heuheu explained to the select committee that only the most accessible areas of timber had so far been utilised, and they felt they had to find strong companies with sufficient capital, able to help build rail access, to mill their more inaccessible forests.²²⁸ The Government appeared unwilling to provide such infrastructure, even though it was likely to be valuable for longer-term settlement requirements for the district, and they were therefore left with trying to find private venture partners who would be willing to construct rail access to the timber, even if this meant that owners would need to agree to cheaper timber royalties. This need to develop infrastructure, rather than simply sell timber rights for the best commercial price, meant, as Te Heuheu explained, that Ngati Tuwharetoa could not rely on public auctions of cutting rights. The prices obtainable for their timber on more inaccessible land would inevitably be low, and they would never be able to accumulate the income needed to build the necessary rail access for future development opportunities. This, of course, also narrowed their options for finding willing joint-venture partners. They also had to accept even cheaper prices for cutting rights, in order to attract the joint venture investment they needed.

Te Heuheu was giving evidence at a time when the Crown was considering abandoning its earlier agreements with Maori not to engage in any new land purchases

and to administer Maori land through the new system of Maori land councils. As we have previously noted, the Crown decided to resume purchasing Maori land, but it also promised to provide a more effective system for Maori who wished to utilise their lands (and associated resources). This renewed debate among Maori over how sales of Maori land should be conducted. It was recognised that judicious sales could assist communities with their development needs (by raising funds for investment purposes, for example), but Maori wanted to avoid the kind of unmanaged purchasing of individual interests that had previously caused them so much difficulty, as we have found.

On this issue, the Crown submitted to us that Crown pre-emption could actually be protective for Maori, and that some Maori leaders supported restrictions on private dealing in Maori land and resources because of this. We note the evidence submitted, for example, that Hone Heke had commented, in parliamentary debates in 1903, in connection with private dealing in timber on Maori land, that he opposed private speculation in timber rights and alienations of Maori land generally. He appeared to be supportive of Crown restrictions on alienations to private interests. This was in the context of the challenges that Ngati Tuwharetoa and powerful private sawmilling interests were making to the legality of applying Crown restrictions on Maori land dealing to the timber resource on that land.

The context to this was a number of parliamentary inquiries, established around the turn of the twentieth century to consider the issue of speculation in timber rights.²²⁹ In response to this, in 1903, James Carroll introduced his Maori Land Laws Bill, which sought to confirm the Crown's position and clarify the application of the 1894 restrictions on dealing in Maori land to make it clear that they included timber. However, this proved contentious and was subject to powerful lobbying by sawmilling interests. Carroll was obliged to drop this provision from the Bill, as a result of select committee delays in considering this matter, or face having his other measures also lost. In debates on this Bill, Hone Heke criticised what he claimed

was a Crown failure to address the speculative acquisition of Maori timber cutting rights at this time, claiming that this was detrimental both to bona fide sawmillers and to Maori owners. In submissions to us, the Crown suggested that Heke's comments are evidence of substantial opinion from Maori leaders of the time that such restrictions, which prevented alienations of Maori land and timber to private interests, were actually seen as being protective rather than damaging of Maori interests. This view seems to have some support from Dr Roche, who observes, with regard to these debates, that Heke had urged, 'to no avail, that some legislative restrictions ought to be imposed.'²³⁰

We agree that Crown pre-emption was often discussed in terms of potentially protecting Maori from unscrupulous private dealing. Potentially, the Crown could have used these restrictions to remove perceived dubious private dealing from transactions and ensure adequate mechanisms were in place to protect owners' interests in transactions with the Crown. It was also possible for the Crown to lift these restrictions, on application, so that Maori could take advantage of commercial opportunities to sell valuable resources, such as timber, separately from the land. We accept that, in theory, at least, the mechanisms restricting Maori land alienation other than to the Crown could have been used to enable Maori owners, through the mediation of the Crown, to deal more effectively and fairly over their lands, timber, and other resources.

We also agree that there was substantial Maori support for Crown protections for Maori land (and resources) in cases where purchasing was found to be detrimental, especially under systems where Maori communities found it difficult to control or judiciously manage such alienations. However, in considering the context of the debates at this time, we note that Heke and other Maori members of Parliament made it very clear, on numerous occasions, that they were not opposed to Maori being able to utilise their lands and resources (including timber) for their present and future benefit. What they objected to were unfair alienation practices that undermined community control and prevented collective, careful decision-making

over alienations, leading to extensive, uncontrolled, and unmanaged land loss for very little benefit and with few effective protections for retaining sufficient for their future needs.

In an effort to address this matter, Maori had supported a variety of responses at various times, including support for legislative restrictions on how their land and resources could be alienated. This was not unconditional or indiscriminate support for Crown restrictions, as such, but only where they were truly protective. Heke and others had fought hard for the Crown to agree to stop all purchases of Maori land by 1900, because allowing purchasing as it was occurring meant that individual interests could be alienated without collective control, thus undermining collective decision-making. The prohibitions against private land dealing generally, from 1894, and the Government's agreement to stop new purchases of Maori land, had effectively achieved this aim. The same Maori leaders did support a new and fairer system of enabling Maori to utilise their land (and resources such as timber) in a more controlled and judicious manner, and with an emphasis on leasing rather than selling land, which they hoped would be implemented through the district Maori land councils established from 1900. The new system provided for the alienation of timber cutting rights under land board monitoring.

The purpose of much of the 1903 Maori Land Laws Bill, according to Carroll, was to clarify and rectify loopholes and uncertainties in the Maori Land Administration Act 1900, which had emerged from the legislature in a 'sadly mutilated form' and now seemed, in practice, to undermine the intention of the original agreement.²³¹ In this context, Hone Heke's comments were not simply a reflection of unconditional support for Crown restrictions on dealing in land and resources, as they were practically implemented. Instead, Heke was concerned that the Government was actually bowing to pressure to allow elements of the old purchase system to re-emerge, effectively allowing loopholes that had enabled uncontrolled alienations of Maori properties to return, outside of the agreed

new system of Maori land councils. He criticised the efforts of those who, he claimed, wished to overturn the new policy by 'nibbling' away at it. He saw the speculative acquisition of cutting rights on Maori land at this time as very much in the old style of alienation of Maori land. It was based on the collection of individual signatures for deeds, in much the same way as old-style purchasing, and it often used similar tactics. It risked the same negative impacts for collective management and rational decision-making over resources. By treating timber as a chattel, rather than as a part of the land, this speculation also managed to evade land council monitoring of land alienations. Heke explained, in debates in 1903, that he was concerned with loopholes that appeared to allow individual Maori to continue to alienate their interests in property, in contravention of what he believed were the understandings made in 1900. In the parliamentary debates, Heke was actually most concerned with a loophole that appeared to continue to allow Maori to alienate their property through wills, and a provision in the 1903 Bill was designed to address this.²³²

Heke was also concerned that the Government's failure to include any provision in the Bill to address the present speculation in timber cutting rights on Maori land seemed to be allowing a further 'nibbling away' of the 1900 agreement, in which the Crown had generally accepted that Maori should be protected in their retained lands for their future maintenance.²³³ Heke opposed the present system, as he understood it, because he believed that it was enabling Pakeha sawmillers to acquire cutting rights on Maori land at unfair prices. He explained that sawmillers were travelling around the country and obtaining signatures to deeds covering very large areas of land, such as a recent block of 27,000 acres of timber-bearing land near Palmerston North, and he wanted the Government 'to bring down some legislation this session to meet the trouble'. He believed that the system was leading to generally lower prices for Maori timber than the Crown was obtaining for its timber, while the Crown had the advantage of being able to obtain expert advice on timber prices. Heke criticised the Government's

refusal to consider the matter further, and said he wanted the present practice, with respect to Maori land, to be put a stop to as soon as possible and that 'something should be done'. He also asked that timber on papatupu lands should not be able to be sold until title was ascertained.²³⁴

It is clear to us, from these debates, that Heke was critical of the Government allowing legislative loopholes and refusing to address issues that appeared to be taking Maori back to the old, unmanaged system of purchasing individual interests in land and resources. He wanted the Government to do 'something' to prevent what he saw as an unfair situation for Maori, so that they could utilise their timber resource more effectively and gain better prices for it. His support for restrictions on alienation was to allow time to establish a new and fairer system through the Maori land councils and without legal loopholes. This was not the same as supporting Government restrictions on Maori land as they currently existed. Both Hone Heke and Te Heuheu were in agreement that Maori were currently being disadvantaged in obtaining fair value for their timber. The difference was that, in practical terms, Te Heuheu was obliged to make the best of any opportunities for utilising timber that his people had. Heke, on the other hand, was seeking to have the Government enforce what he hoped would be a much more equitable system for land and timber utilisation overall. His support for restrictions on land and timber dealing was conditional on them being implemented fairly and on a fair means being set up to enable Maori to utilise their land and resources for development opportunities.

We note that, in the same debates, Wi Pere claimed that he had seen the select committee's deliberations and that the European members had objected to the Maori councils being able to ratify timber agreements.²³⁵ The Prime Minister, Richard Seddon, was also critical of the select committee's refusal to allow any legal provision addressing the speculation. Seddon claimed that he had attended some of the committee's deliberations, and he believed it had the 'evident desire' to give away Maori-owned timber to syndicates at unjust prices. He did not believe

that Parliament would have allowed a situation where, if Europeans owned the land, they would not be able to gain fair value for their timber.²³⁶ Seddon observed that it was right that Parliament had stopped the old practice of buying at an unjust price from Maori (at the very least because it would prevent them becoming a burden on the State). It was now time to pass an Act that would prevent such dealing in their timber unless similar safeguards were provided as was now the case with Maori land.²³⁷ Presumably, Seddon was referring to the new land council system.

It is clear to us that Heke was concerned about what he saw as the Government continuing to allow private interests to buy into Maori lands and resources. He was not opposed to Maori utilising their lands, including, presumably, by selling the timber that stood on them, as long as Maori were able to manage this themselves, gain fair value, and retain sufficient lands in the process. What he objected to was the process by which private speculators had apparently been able to rush in and buy up large areas of timber cutting rights on Maori land for a significantly cheaper price than they could on Crown lands, and apparently also on land where title had still not been ascertained. Many were clearly doing this purely for speculative purposes, because they were able to buy up timber rights cheaply, using much the same methods, such as obtaining individual signatures, as had previously taken place with Maori land purchases. Heke wanted 'something' done about this in the way of legislative provision, and as soon as possible, to protect Maori in the utilisation of their timber, and he objected to the Government's decision to defer the matter for the time being. However, this does not mean that he necessarily supported Crown pre-emption policies that prevented Maori from utilising their timber resource except by selling their land (with the timber on it) to the Crown. Rather, he was calling for a fairer process whereby Maori could obtain better prices without being subject to the same kinds of pressures for alienation of cutting rights as had occurred with land sales before 1900.

By 1908, the Stout-Ngata commissioners were reporting on a similar situation: the difficulties iwi and hapu of

the Rotorua district faced in the utilisation of their timber resource as a result of Crown prohibitions on private dealings in land (and associated timber). The commissioners found that, in the Rotorua district, most of the interior lands were subject to the Thermal Springs Districts Act 1881. They found that the restrictions on private land dealings in this Act had contributed to some land subject to the Act being sold to the Crown for low prices.²³⁸ The commissioners noted that the Act also provided that the Crown could act as an agent for Maori owners in helping them to utilise their lands and resources, but they found that the Crown had done little, since passing the Act, to assist Maori owners in this way.²³⁹ As we noted in chapter 14, the commissioners were of the view that, in much of the Rotorua interior, milling timber could well be 'the most valuable crop the land will ever grow'. As we have noted, the commissioners found that some Maori land in the Rotorua interior still contained stands of good-quality timber. They found that the Maori owners of these blocks clearly understood the value of their timber for commercial purposes and wanted to be able to deal with it separately, before the lands were later dealt with by leasing.²⁴⁰ However, the Crown had not invoked the necessary mechanism to allow for this formally in the 1881 Act. Instead, some informal timber agreements had clearly been made between Maori owners and private parties to mill timber on some blocks. Some of these were substantial ventures, in particular on the Okoheriki and Waiteti blocks, where a bush sawmill and tramways had already been built.²⁴¹

The commissioners believed that such ventures with private parties were illegal under the 1881 Act. However, they recommended that, if such ventures involved a fair bargain between the parties, the Government should authorise the relevant Maori land board to validate them. The commissioners also noted that, in some cases (the Tautara and Rotoma blocks), some of the Maori owners were seeking a way of gaining a lease of the land themselves from other owners, in order to erect a timber mill and cut and sell the timber themselves. They intended to mill the timber in such a way that the land could be cleared and developed

for farming as soon as possible. The commissioners were persuaded that those involved had sufficient capital to undertake the milling venture, and all the other owners supported their efforts. However, even in this case, where all owners agreed and the mill venture was to be undertaken from within the owner community, the restrictions of the Act meant that special Government permission was still required to enable the venture to go ahead. The commissioners recommended that such permission should be given.²⁴²

The commissioners noted other blocks retained in Maori ownership with valuable milling timber in the Rotorua district, including parts of the Rotoiti, Te Haumingi, Kaitao, and Rotohokahoka blocks, and Ngati Tarawhai land in the south-east of the district.²⁴³ The commissioners recommended that owners with such lands should be able to commercially utilise their timber if they wished, before the lands were cut up for long-term settlement purposes. This required some method to be devised under the 1881 Act to enable owners to gain the benefit of their valuable timber. In the meantime, the commissioners felt obliged to place a number of specially drawn up timber agreements before the Governor for special permission.²⁴⁴ In the view of the commissioners, a failure to recognise the value of the timber on these lands and have it destroyed just to clear land for settlement would be 'an act of criminal waste'.²⁴⁵ They reminded the Government that timber resources were generally being depleted in the North Island, especially those nearest settlements, and that further settlement would require valuable timber to be conserved and properly utilised. This was particularly important when it was known that the land, once cleared and grassed, would only feed one or two sheep per acre.²⁴⁶ Further, the commissioners found that by this time, even while it was legally possible to seek exemptions from the restrictions for various purposes, the process had proved so time-consuming that relatively little use was made of it.²⁴⁷

The Stout–Ngata commission's report revealed the serious limitations Maori in the Rotorua district faced, by this time, in utilising their timber resource for commercial

purposes and participating in the timber industry at all levels, largely as a result of the way the Crown chose to apply restrictions on dealing in their land. While Maori in the district had retained valuable stands of timber, these were not extensive enough to attract the same challenges to the prohibitions on private dealing in timber as happened in the western Taupo forests. Nevertheless, and as the commissioners recognised, in the marginal interior lands, and with geothermal tourism attractions already targeted, this was often the most commercially valuable resource they had, and it had the potential to provide them with significant benefits. The commissioners recognised, even in the early twentieth century, that a future timber industry might well be one of the best economic opportunities available to Maori in the district, and clearly there were owners willing to participate as entrepreneurs in the industry.

We agree that the restrictions on private land dealings implemented by the Crown at this time were not the only factor in Maori economic success or otherwise in utilising their timber resource. Other relevant factors included market prices, infrastructure, and competition from American timber exports. We agree that restrictions on alienations of Maori land and associated resources, such as timber, had the potential to be protective, especially where a new system to provide a fairer system of utilisation of timber was being established from 1900. However, the Crown was unwilling to participate in any market for timber separate from land. The only market Maori had to sell their commercially valuable timber into, without also having to sell their land, was a private one. In pursuing its long-term objectives, the Crown failed to implement adequate protections to ensure that the way its purchase policies were implemented did not unfairly impact on the rights of Maori to fully utilise their timber resource.

Mr Walzl and Dr Loveridge have both noted that, in Rotorua, and even where valuable timber was involved, most iwi and hapu involvement in the sawmilling industry that developed in the nineteenth and early twentieth centuries appears to have been limited to selling timber royalties or leasing land. Dr Loveridge notes early ‘informal’

agreements, even where land had been proclaimed as restricted under the Thermal Springs Districts Act.²⁴⁸ As we have noted, the Stout–Ngata commission confirmed the existence of these informal agreements and noted the enthusiasm of some owners to participate more actively as millers in their own right. The later evidence we have about milling in the Rotorua district indicates that Maori involvement continued to be limited to selling timber rights, leasing land, and working in the timber mills. Mr Walzl notes a number of more formal arrangements of this kind made over Rotorua blocks, such as Okoheriki, in the decade after the Stout–Ngata commissioners reported. Most of these arrangements took place under land board monitoring.²⁴⁹ In many of the cases outlined by Mr Walzl, Maori owners were also keen to have timber milled to supply essential building materials for their marae and homes, or to pay the costs of basic necessities.²⁵⁰ This provided little spare income for further investment in the sawmilling industry.

Dr Loveridge notes, with respect to the Ngati Pikiao timber lands, that the land councils initially felt themselves limited in the kinds of timber leases they could agree to, unless lands were vested in them.²⁵¹ The thermal springs districts legislation was rescinded in 1910, making such lands subject to ordinary legislative provisions concerning alienation of Maori lands (and resources) and ordinary land board monitoring. Dr Loveridge found that, in general, this administration resulted in much valuable timber being ‘virtually given away’ to European speculators with the blessing of the board. He found that, in the 1920s and 1930s, the Waiariki land board confined its role, generally, to ensuring that only the minimal legislative protections for landowners were met.²⁵²

According to Mr Walzl, some of these early leases had long-term impacts, when timber companies took advantage of them to exercise timber cutting rights over blocks for many years. For example, timber leases in Mangarewa Kaharoa were first arranged in 1912, in the expectation that land would be handed back to owners as the timber was cut. However, by the 1930s, the timber company was

still seeking to exercise its right of renewal of its lease over the whole block, because tawa timber on the block, previously left out of milling, had now become commercially valuable. In the event, the board approved a renewed but shorter-term lease.²⁵³

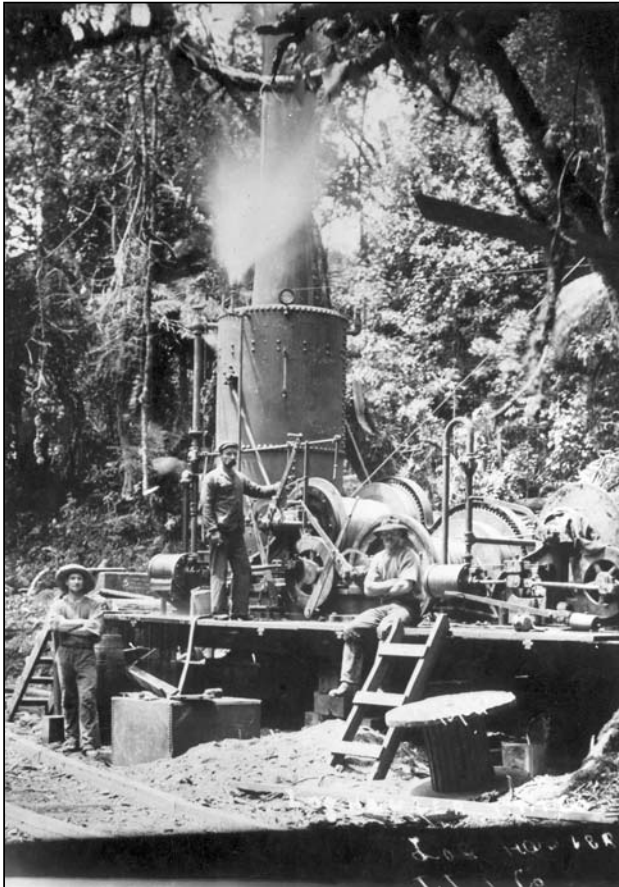
In the Taupo district, Mr Walzl notes that, even with the difficulties Maori owners faced, and probably reflecting the greater extent and therefore interest in the forests there, Maori did manage to form a number of joint-venture arrangements with private companies from the late nineteenth century. The most notable were the Taupo Totara Timber Company, formed in a joint venture to mill largely in the Tuaropaki and Waipapa forests which ended by 1912, and the Tongariro Timber Company venture, which involved a joint-venture agreement to mill a very large area of the western Taupo forests.²⁵⁴ A common feature of these ventures was that the companies involved sought significant Government support (and the removal of restrictions on alienations for the Maori land involved), on the basis that the ventures included more than simply a sale of timber royalties and also involved the provision of rail infrastructure and other benefits for the Maori communities involved and the wider public good. These joint ventures also required significant Government intervention, not just to lift restrictions but also to remove other legal barriers to commercial ventures using Maori lands and resources.

The Tongariro Timber Company venture was presented to us as an illustration of three important generic issues related to Maori participation in the sawmilling industry in this inquiry region. These are: first, the difficulties iwi and hapu of this region faced in using their forest resource to participate in the indigenous timber industry; secondly, the alleged Crown failures to adequately address these difficulties; and lastly, Crown failures to consider iwi and hapu development interests in pursuing national interest objectives.

The Tongariro Timber Company venture covered a large portion of the western Taupo forests. It lasted for a relatively long period of time, from around 1906 until

the venture was abandoned by 1930, although the consequences continued for some time after that. The venture involved a number of initiatives, in addition to the sale of timber rights, including some land alienations and the provision of a railway line. The venture eventually involved a range of parties in addition to the owners and the original company. The venture, as a whole, was extremely complex, and it is beyond what we are able to investigate in detail in this stage one inquiry. We are also aware that litigation arising from the venture involved issues of considerable importance to iwi and hapu of this inquiry region and to New Zealand as a whole, culminating in the landmark case *Hoani Te Heuheu Tukino v The Aotea District Maori Land Board*, which was heard before the Privy Council in 1940. This case became the landmark authority for the proposition that the Treaty of Waitangi is not directly enforceable in the New Zealand courts, except where, and in so far as, Parliament may have enacted to that effect.²⁵⁵ We did not receive submissions on this later court litigation, and therefore we have no comment to make on it. As we agreed with parties, we are only concerned with considering this timber joint venture, with regard to our consideration of our key question concerning Crown obligations of active protection of iwi and hapu in the developing sawmilling industry in the Central North Island and general issues related to this.

In this respect, we note that the Crown agreed that the narrative presented by Mr Walzl about the history of the venture is largely accurate, even while it rejects his interpretation of the Crown's motive and culpability. We feel we can, therefore, rely on this narrative in considering the relevance of the venture to our key question. Although it was very complex, the essential features of the agreement negotiated between the Tongariro Timber Company and the Maori owners of a large area of forest lands in western Taupo involved the sale of timber cutting rights for an agreed price, regular agreed payments over a period of around 50 years, and the building of a 40-mile private railway link between Lake Taupo and the main trunk line at Kakahi to provide access to the timber. The venture lasted,



The Taupo Totara Timber Company's vertical boiler, Lidgerwood log hauler, and workmen, at Mokai circa 1904–1905. The Lidgerwood Manufacturing Company, New York, produced a range of steam-powered equipment for use in the logging industry.

in various guises, from around 1906 until 1929. It involved what was originally estimated at around 135,000 acres of land in some 28 blocks to the west of Lake Taupo. A significant amount of valuable timber existed within this area (estimated at around 976 million log feet of merchantable timber, worth around £3 million at the time). Much of this was not regarded as economically accessible for milling without the proposed railway link.²⁵⁶

The general history of the venture, as outlined by Mr Walzl, was not challenged in our inquiry, and we do not, therefore, need to describe it in detail again. In our view, the main issues appropriate to Treaty development issues, which we are able to comment on, are: first, whether, in fact, the venture can be regarded as part of an iwi development plan; secondly, whether and how the Crown accepted further serious responsibilities and obligations as a result of its involvement in the venture and its aftermath; and lastly, whether, in establishing and implementing policies in the region pursuing what were regarded as the interests of the Crown and the public, the Crown took reasonable steps to ensure the interests and rights of Maori owners in the venture were also adequately considered and protected given the range of obligations the Crown had undertaken.

In general, we have received sufficient evidence to persuade us that iwi and hapu involved in the venture saw it as a development initiative for their communities, and that this view was also prevalent among officials and in advice to Government during the course of the venture. As we have previously noted, the only real option Maori communities had available to them at this time, if they wanted to participate in the industry and utilise it for their development needs, was to seek out and participate in joint-venture arrangements with private companies. The involvement of a private company, therefore, does not signify that the venture was regarded at the time as no more than an ordinary commercial forestry agreement. As Tureiti Te Heuheu had informed a parliamentary select committee in 1905, the Maori communities involved had recognised that simple commercial agreements, such as auctioning their timber rights, were not sufficient if they were to be able to successfully utilise their more inaccessible forests. As a result, they deliberately set out to attract commercial interest in a venture that appeared to have the capability to establish, not just a milling operation, but also the railway line required to extract the timber from the forests. That this was intended as a longer-term development effort was recognised by Government officials of the time. Officials

were, for example, aware that the railway was intended to be able to be used for future development purposes, including carrying goods such as fertiliser and passengers, providing access to the Ngati Tuwharetoa farm lands being developed near Lake Taupo, and transporting produce from those lands once they were cleared and developed for farming.²⁵⁷

The venture gave preference to local communities in mill employment, and a new system of payment of royalties was meant to provide an income for all owners over the life of the venture and make cleared land available in a managed way so that farming could be established. This 'hotch potch' system, as it was known, therefore provided significantly more than royalty payments to individuals as the timber on their land was milled. It was intended to overcome the problems of matching numerous scattered interests in the land with actual timber that was milled. The system was described, at the time, as providing many of the advantages of incorporation for owners, while avoiding what were then the serious difficulties and expense involved with incorporation. As the owners' lawyers noted:

it practically treats all the Native owners as a corporation . . . Payments of royalties will be made proportionately among the shareholders of this company no matter from what particular area the timber is cut and the rights of all are safeguarded. . . .²⁵⁸

We also received evidence that owners agreed to lower royalties than they may have otherwise achieved for their timber, in return for having the railway they required built. Over later years, there is also evidence of significant groups of owners deciding to agree to delays in payments, and to extensions of time for building the railway, in order to encourage what they saw as the long-term benefits to be provided by the venture, including the building of what was intended to be a branch railway from the main trunk line to their forest lands and, in future, their settlements. It is most unlikely that this agreement would have

been forthcoming if a purely commercial timber-cutting agreement had been contemplated.

We received evidence that Government officials and their advisers understood that this agreement was intended to facilitate significant development for communities in the district. We note, for example, Te Heuheu's letter of 1908 to the Government informing it of developments that were expected to result from the agreement, including a railway that would carry goods and passengers, and cutting and payment arrangements designed to fairly meet the needs of all owners.²⁵⁹ We also note evidence from the president of what was then the Maniapoto-Tuwharetoa (later to become the Aotea) District Maori Land Board to the Government, in 1907, that the agreement was expected to benefit the owners, who were described as living in isolation near Lake Taupo and at times in a state of semi-starvation. The proposed railway in connection with the venture would enable them to open their lands to settlement, the timber milling would give them work, and the timber royalties would give them an assured income for some time to come.²⁶⁰ At this time, public works officials also anticipated that the proposed railway would be used for future traffic. They required that permission enabling the venture to go ahead should also require the licensee to agree to carry timber and farm produce on the line at not greater rates than the Government tariff.²⁶¹ In 1908, the Stout-Ngata commissioners also informed the Government of the expected long-term development benefits of the agreement, including the railway that was expected to connect the owners to the North Island main trunk railway and give them easy access to and from their settlements and properties, increasing the value of their lands. The proposed railway construction was expected to provide valuable employment to local Maori, along with work in the timber mills, and assist them to open their lands to settlement. The venture was also expected to assist with the settlement of the district generally.²⁶²

In later years, various officials continued to anticipate the long-term development benefits of the venture, as did

the company, and these anticipated benefits were a major reason for extending the time allowed to the company to undertake its part of the venture agreement. For example, in 1920, in seeking further variations and extensions to the agreement, company representatives confirmed to the Government the anticipated long-term benefits to the owners and the nation in opening up large areas of land to settlement and developing the timber industry in the district.²⁶³ Later petitions from owners to the Government also emphasised that they were willing to suffer delays and extensions in order to get the railway part of the venture built, as they recognised the long-term development benefits this would bring them.²⁶⁴ We also note that Dr Roche describes the proposed railway as intending to facilitate Maori-controlled development of the land, as well as the transport of timber to markets.²⁶⁵

In our view, the evidence supports the claim that this venture was intended to implement a long-term development plan for those iwi and hapu involved. It also had significant elements of a regional development plan for the whole district and for future long-term settlement of it in the national interest. Further, the anticipation of future development was a significant factor in owners and officials refraining from ending the agreement within legal entitlements as company defaults became apparent, and agreeing, instead, to significant extensions and variations.

Given the anticipated value of the scheme for the communities involved, and its wider regional value, especially because of the branch railway, the question must be asked why the Government did not at least assist with the branch railway as part of the regional infrastructure it was facilitating at the time to encourage settlement, either from the beginning of the venture or later, when time extensions were being considered. The provision of a rail link between Lake Taupo and the main trunk line was a central feature of the agreement. It was expected to be in the nature of a branch line to the main Government line, which would be able to carry passengers and goods as well as timber, and therefore provide infrastructure for settling and developing the district. Although smaller feeder lines were also

planned, the main branch line was to be more than just a bush tramline. This much was evident from the start. As the venture evolved, it was still anticipated that the rail link would be important for future regional development purposes. This was a major factor in owners agreeing to delays with agreed payments and extensions to railway building: it was worth suffering some short-term losses, because of the the future economic benefits the rail link would bring. In 1921, the Government required the proposed line to be upgraded from the original 1908 specifications, expecting it to meet a similar standard to the main trunk line. This, too, was in anticipation of its future use carrying goods and people.

This evidence indicates that the branch line was consistently regarded as not only required for transporting timber but also central to the future economic development of the district. The provision of this kind of infrastructure in New Zealand has overwhelmingly been made by the State.²⁶⁶ A number of private ventures did begin building and even operating rail lines in the nineteenth century, but by the early twentieth century the State had taken over these lines in the interests of promoting settlement. The most successful of these private ventures was the Wellington and Manawatu Railway Company, which nevertheless still relied on large grants of land. The company's line between Wellington and Longburn, near Palmerston North, was completed in 1886 and was profitable, but by 1908 it, too, had been taken over by the Government.²⁶⁷ This was about the time that the Tongariro Timber Company venture was being established. There were a number of private lines associated with timber milling around this time, but the western Taupo branch line was consistently regarded as being more than an ordinary bush line.

In providing rail infrastructure at this time, the Crown appears to have been relaxed about the lines' profitability, as long as they promoted regional and national economic development. When the Tongariro venture was struggling, in 1925, the Government *Yearbook* for that year noted, for example, that railways in New Zealand were not considered as 'a profitmaking concern'. Instead, the greater benefits

of assisting national productivity and development and encouraging local industry were regarded as paramount.²⁶⁸ The Government was still building railways at this time. The North Island main trunk railway was only completed in 1908, and new lines continued to be built after both world wars, mainly secondary and branch lines.²⁶⁹ From the later 1920s, the extension of road building into the Central North Island region was rapidly becoming another possible alternative means of access to the western Taupo forests, and we note that this was another form of infrastructure generally provided by the State.

In our view, it was not unreasonable for the Government to welcome efforts by private operators and owners to build rail links in 1908, when this venture was established, and even for some years afterwards, especially if they seemed immediately profitable. However, given that the Tongariro venture clearly began to struggle and, as the Crown has agreed, the major reason for this was the difficulty in gaining capital to build the railway, the development value to local communities and to the region as a whole would seem to have required some Government assistance, especially when it was already considering whether to extend or renegotiate the whole venture and required the branch line to be upgraded to meet main trunk standards. We do not have sufficient evidence before us, at this stage, to determine whether the Government deliberately increased the required standard for the branch line to ensure that the venture collapsed. In our view, the later company allegations presented in evidence are not sufficient to prove this allegation. The company clearly had reason to blame the Government for any failure. However, the Government requirement to upgrade the railway standard was a clear acknowledgement that the branch line was anticipated to be of future regional value, in addition to any purely commercial arrangement between owners and the company to remove timber. It was expected to be useful for the future settlement of the district, and by the Government's own criteria this should have caused it to consider providing some kind of support. The Government was well aware, by this time, that Maori had agreed to lower timber prices

in order to get the railway built. They had suffered long delays, and loss of income and development opportunity, because of the difficulties of completing the railway. The Government's refusal to assist at this stage, while also requiring higher construction standards, meant that it was leaving owners to bear the costs of developing their district themselves.

Assistance with the railway may well have required some agreement with owners over contributions of land and royalties for such purposes. However, it is unlikely that this would have been a major obstacle, given the evident willingness of owners to act in the interests of the long-term development of the district, and their previous willingness to reach such agreements with the timber company. The reluctance of the Government to provide infrastructure to Maori communities for development purposes has been a constant theme of the evidence before us. We note that a desire to keep land values low while it pursued purchasing seems, once again, to have been a reason for the Crown's failure to seriously consider taking over the branch line and assisting with infrastructure in this venture. The Crown's failure to consider the provision of infrastructure for Maori communities for development purposes, on a similar basis as was being provided for settlement generally at this time, was a breach of its obligations of active protection and equity with other sectors of the community.

From Mr Walzl's narrative, we understand the venture took place in three main stages. The first stage, from about 1906 to 1913, was the establishment and early history of the venture, where owner leaderships appeared to participate actively and with reasonable knowledge of, and willing agreement to, proposed variations. As was required by the regulatory environment of the time, the local Maori land board was required to take an oversight and monitoring role, and to act as agent for owners to enable them to overcome difficulties of managing land held in multiple title. At this stage, it appears that the board largely followed the original agreement in carefully considering and obtaining the agreement of parties to any variations to the venture.

We accept, on the evidence available to us, that in the early years of the venture, especially from 1908 to 1913, the Crown accepted responsibility for monitoring and investigating what was a very complex deal through its Maori land board system, and that it appears to have taken reasonable steps to meet its obligations of active protection in doing so. Mr Walzl's evidence indicates that the Crown required the proposed agreement to go through the district land board's monitoring and approval process and established a procedure requiring the consent of the Native Minister and the board to any variations to the agreement. The Crown took the further step of requiring the Stout–Ngata commissioners to investigate and report on the agreement, given the complexity and size of the venture. The agreement also required any variations to be agreed to by the parties, as well as consented to by the Minister.

It was claimed before us that the Stout–Ngata commissioners failed to undertake due diligence investigation of the venture, and in particular whether the company had sufficient capital to undertake the venture. However, we have not received evidence to support this claim. Given the circumstances of the time, including the state of knowledge of the industry, we are not persuaded that the commissioners failed in their investigation. We note that they relied on what expert advice was available. It was understood that the venture was a large one and involved some risk, but the commissioners found that the prices agreed were reasonable, and the negotiated agreement required the company to share risks fairly with owners. We note that Dr Roche, in comparing the venture with others of the time, has found that it appears to compare favourably, with royalty payments anticipated to be equivalent to what was being paid by other millers for Maori-owned cutting rights at the time, exclusive of the extra investment required, in this case, to build the railway.

The company, while paying prices that were reasonably similar to those paid to other Maori timber owners at the time, attracted investors and relied for profits on an expected significant rise in future timber prices, as the rail infrastructure made the timber accessible and alternative

sources of quality timber declined, pushing prices up. These expectations were not unreasonable in the circumstances. While the nominal £25,000 capital with which the company was floated was not large, given the scale of the venture, it was nevertheless on the larger side of the capital investments in timber ventures in the Taupo forests and relied, not unreasonably, on further capital becoming available as timber became accessible. The plan to build a rail line as part of the venture was not unique among timber-milling ventures in the district. Dr Roche cites the example of the Taupo Totara Timber Company, floated in 1901, which planned to build a rail line linking Tihoi forests with the Government railway at Lichfield.²⁷⁰

The evidence available to us indicates that, for some years after 1908, when initial approval was obtained to enable owners to alienate some lands to allow the railway to go ahead, and the overall venture was approved according to the recommendations of the Stout–Ngata commissioners, the land board generally acted as agent in the manner that the owners had anticipated, carefully considering any proposed variations to the venture agreement, seeking a range of evidence to assist decision-making, and including owners in discussions that considered evidence and the implications of any proposals. The board carefully set out its reasons for deciding on proposals and included consideration of the implications for owner interests.²⁷¹ We are persuaded, on the evidence available to us, that this stage of the venture involved a reasonable agreement between parties, and that the Crown fulfilled the obligations of protection required of it, including those operating through the agency of the land board system.

The next stage of the venture began about the time of the First World War, and for a time it was understandably interrupted by wartime conditions. The company's search for further investment capital was held back by the war, and it sought alternative ways of implementing the railway agreement, bringing in another company to build part of the railway link in return for certain rights. The Government introduced a series of legislative measures concerning the venture, especially in the years from 1914 to 1924 and often



View of the railway lines and a 'Climax A' locomotive at the Taupo Totara Timber Company in Mokai, 1905. The Company built its own line to link Mokai, in the Tihoi bush, with the Government line some 60 kilometres away. A stand of native trees can be seen in the distance.

on the recommendation of, and following investigations by, the Native Affairs Committee. These legislative measures were serious interventions to the venture agreement, and they had major impacts on the nature of the scheme and the relationships between the parties to the original agreement. The evidence available to us indicates that these measures introduced new parties, changed the balance of risks between owners and the company, and significantly increased the powers and role of the Maori land board. They entailed greater Crown intervention in deciding such key issues as whether, and on what conditions, time extensions for the company would be allowed or new parties would be able to enter the venture. The participation of owners was limited, and their role was increasingly taken over by the Aotea land board. From being key negotiators in the venture, the owners' role was increasingly limited to indications of overall support. Their ability to pursue their own objectives, and hold the company to account in achieving their objectives and protecting their interests, was increasingly constrained. As a result, we do not accept that the Crown is in any position to claim that the venture was nothing more than a commercial arrangement of the

time, for which the Crown had little active responsibility. The Crown had responsibilities to the owners through the nature of the land board system. In addition, the Crown's active legislative intervention further increased its responsibility with the venture and to the owners.

The developments at this time are complex, and it is not possible to detail them fully. However, the main issues for us are the nature of the Crown's interventions in the agreement and its increasing reliance on the land board standing legally in place of the owners. In 1914, for example, the Government passed legislation validating an agreement made by the company with a third party, the Egmont Box Company, whereby that company agreed to build part of the proposed branch railway over an extended time period in return for rail usage rights for timber from its own concerns. The Government agreed to legislatively validate this agreement, and to clarify and establish resulting legal rights and protections between the companies and the Aotea land board, and between the new company and the owners.²⁷² The Government intervened again in 1915, on the recommendations of a select committee, legislating not only to extend the time allowed for the company to meet

its obligations but also to provide protection for the company against any actions for default without the consent of the Governor in Council.²⁷³ This protection was originally granted for wartime only, but was later extended. The 1915 intervention also suspended the payment of required royalties until 1922, when all back rents had to be paid.²⁷⁴

In 1919, the Tongariro Timber Company entered a further arrangement with the Egmont Box Company, granting that company a 40-year right to cut timber on the Whangaipeke block as well as access to the rail line to transport timber. This arrangement confirmed legal protections against litigation for the company, in return for the Egmont Box Company raising capital to build five miles of railway in the area, contributing to the building of a further four miles of railway, and making a number of agreed payments for timber rights. Further legislation was passed that year, empowering the Governor in Council to approve any arrangement made between the two companies. The Government also imposed conditions requiring back payment of royalties owed and an increased standard for the railway line construction. Further, validating legislation in 1921 provided for arrears to be paid by 1922, which the company then complied with. It was then left to raise sufficient capital to build the promised railway.²⁷⁵

During this time, the evidence indicates that the land board still attempted to seek the views and support of owners through their leaders, although increasingly owner support was sought at a very general level and expressed in terms of overall support for the venture – and especially the proposed railway – as a means of achieving development objectives. There is less evidence of the full detail of legal matters and implications being explained or discussed with owners, and in fact the land board seems to have increasingly taken responsibility for such decisions. Both the board and a significant group of owners appear to have continued to support the venture generally at this time, in the hope that it would lead to economic development in the district, although the details and implications of the commercial and legal transactions appear to have been less well understood.

Following this, and further company defaults on its obligations under the agreement and variations, the Government passed further provisions in 1923, which replaced the original limited time period granting the company protection from actions for default with a general protection against land board action, except with the consent of the Governor-General in Council, and made further modifications to the railway building requirements. In 1924, the Government passed further provisions empowering the land board, subject to the approval of the Governor-General, to vary all or any conditions of any existing agreements between the board and the company in such manner as the board deemed just, as long as any change was not (in the board's view) prejudicial to the Maori landowners.²⁷⁶ According to legal advice obtained by the board, this latest amendment was considered wide enough to cover any proposed variation of the agreement, which could now be approved by the board and Government alone, without the consent of the Governor-General in Council.²⁷⁷ The Government took the view that the 1924 legislation made the board the arbiter of what was just and not prejudicial to the owners. There was, therefore, no longer any requirement to consult with owners over further proposed variations.²⁷⁸ Following this, further variations were made, extending the date for payment of overdue royalties and extending the period for building the railway.

By this time, representatives of various groups of owners were expressing considerable concern, not only over non-payment of further royalties but about the whole venture, and they began to ask the Government for assistance to sort out the matter. By 1927, the board had also decided to begin procedures to cancel the agreement, as a result of continued defaults by the company, and it sought Government permission to do so. At the same time, a number of owner groups petitioned the Government with their concerns with the venture, including the meaning of the various amendments and changes that had been made. Lawyers for some of the owners also began to seek Government permission, as was legally required, to take legal action against

the company. Eventually, in 1929, the Government passed another legislative amendment enabling the land board to cancel its agreement with the company.²⁷⁹

As Mr Walzl describes in some detail, this second stage of the venture took place within a changed Government policy context, which began to have important influences on its decision-making concerning the venture. During this period, and especially from 1918, the utilisation of the valuable timber resource on retained Maori western Taupo lands, and the anticipated later settlement of the district once the forest was cleared, became matters of increasing importance to the Government, and to its policies of land settlement.²⁸⁰ Whereas much of this land had been regarded before the First World War as being of generally poor quality, too inaccessible, and of low immediate priority, the Government's view changed as settlement increased, infrastructure such as the main trunk line was finally completed, and the availability of other lands for settlement declined. This second stage therefore coincided with increased Government interest in acquiring control of the timber lands for eventual settlement needs and of the forest for timber management purposes. These changing perceptions and policy priorities inevitably began to influence Government decision-making when it came to facilitating and intervention in the venture.

From 1918, as we have previously noted, the Government began actively purchasing land in the Taupo district to meet future land settlement and Forest Service objectives, using many of the same practices for extensive purchasing that had been used (and widely criticised by Maori) in the nineteenth century. These practices included the purchase of individual shares without community consent (bypassing, if necessary, the new system of meetings of assembled owners, which the Government gave itself the right to do from 1913), the targeting of individuals and groups known to be suffering poverty (and therefore more likely to sell at low prices), and the imposition of proclamations preventing private dealing in land (and the associated timber resource). Purchase agents recognised, at the time, that potentially valuable timber stands remained 'practically

valueless' until access to them was provided.²⁸¹ Agents also noted the desirability of obtaining extensive areas of land while the added complications of alienations of shares to other interests did not exist, apart from some timber rights. Agents also targeted individuals known to be badly in need of cash for their own immediate requirements, and those who were impatient to obtain cash so they could develop other land.²⁸²

As it had earlier, the Government's use of proclamations preventing private dealings in land also tended to push down land prices. Communities in the district protested to the Government about this.²⁸³ Although, as submitted by the Crown, Government agents were willing to consider separate values of land and timber when it was purchasing, the evidence indicates that this was in order to protect Crown interests where timber cutting rights may have been sold.²⁸⁴ The evidence available to us indicates that, as in the nineteenth century, the primary responsibility required of Government purchase agents was to pursue the Crown's interest in purchasing from Maori as cheaply as possible. The major new protection, by this time, was that agents had to at least offer the Government valuation. However, this took no account of any anticipated increase in values once timber and lands became accessible. Nor were agents required to act on their own beliefs that Government valuations were too low.²⁸⁵ Nor was it made part of their responsibility to consider the known development objectives of Maori communities at this time.

Owners reminded the Government of the wider development nature of the venture at this time, and the original official understanding that it was intended to assist with Maori development. Owners also protested at the likely impacts of land purchasing on their objectives for the venture. The Government was informed of the difficulties likely to be caused by purchasing individual interests, given the 'hotch potch' agreement for paying owners as part of the venture. Nevertheless, the Government decided to continue purchasing individual shares within lands covered by the venture. The evidence available to us indicates that the Government's main concerns, at this time, were whether

this was legal in terms of the venture and whether Crown interests could be protected.²⁸⁶ There is no evidence of parallel concerns about the Crown's responsibility to protect owner interests and development rights in the forest resource. As the Crown submitted to us, the Government took the view that, by purchasing shares, the Crown would simply step into the shoes of those individuals who had sold and be subject to the same rights and liabilities as regarded cutting arrangements. Any difficulty with the hotch potch clause could then be 'solved' by special legislation.²⁸⁷ This was a view entirely based on commercial and legal considerations. It took no account of owners' rights to remain in control of their resource or their wider development objectives for their communities.

It seems that, at this time, the Government seriously considered renegotiating the venture or possibly significantly changing its nature. From about 1919, for example, the Government, through the State Forest Service, made some largely informal approaches to suggest buying out the Tongariro Timber Company to gain control of cutting rights to the valuable timber resource on the western Taupo lands. The company apparently refused an informal offer that would have enabled it to pay off all its creditors and pay out its shareholders around three times the price of their shares. It refused because timber prices had risen so high after the war that, if it could continue with the venture, the timber concession agreed with owners at a much earlier time would now be so valuable that the company stood to make a great deal of profit. The Government had the option of refusing to extend the venture agreement and cancelling it as a result of company defaults, and then either negotiating with owners to undertake a new joint venture or leaving the owners to negotiate new alternative ventures themselves. This might have involved the Government providing reasonable assistance to build the branch rail line, possibly including a transfer of some rights in land for the line as had originally been agreed with the company. This would have been similar to the regional assistance being offered elsewhere at this time and would have helped to make the timber resource even more valuable.

There is some evidence of official scepticism that the venture could ever realistically go ahead. It would, therefore, have seemed appropriate at this stage to consult with owners about whether ending or significantly changing the agreement was warranted, and what future role the Government and company might take. There were some early attempts to hold meetings with owners to discuss these issues. It seems reasonable that the Government and owners could have reconsidered, in partnership, the venture and how it might best be dealt with, to find some agreed way forward to meet their respective wishes.

However, the Government does not appear to have seriously contemplated these possible options. Instead, it remained focused on how best to support and encourage what was seen as the national interest in gaining control of lands and valuable timber. This included extending the venture agreement to restrict the forest resource from any other alternative private use, while enabling purchasing of the lands and the timber resource to be implemented.²⁸⁸ In our view, the Government had a legitimate interest in considering the future utilisation and management of the indigenous forest resource represented by the western Taupo lands. It had a legitimate interest in seeking to gain the most beneficial deal it could with the company in return for legislative measures of benefit to the company. The Government was also obliged, however, to consider owners' rights and development interests, and to infringe these as minimally as possible in pursuit of its policies or consider adequate compensation. Government ministers recognised the Crown's obligation to protect Maori interests. We note evidence, for example, that Attorney-General Sir Francis Bell acknowledged that Maori interests needed to be safeguarded if any further approval to extend the agreement was agreed, as the value of the timber after the war had risen well in excess of the prices originally agreed in 1907 and 1908.²⁸⁹ However, we can find no evidence that this responsibility of protection was carried through into new arrangements for the company. The requirement to pay arrears placed more pressure on the company, but

this still made no allowance for the much higher price of timber after the war.

It can be argued that the owners had the Aotea land board as their agent, to act as protection for their rights and interests. We have already considered the land board system in general terms in part III of this report. The evidence here supports the view that the boards, as state agencies, were required to implement Government policies, and that boards themselves were limited in their ability to adequately act for owners in commercial enterprises for development opportunities. Serious issues are raised by evidence submitted by Mr Walzl as to the ability of the board (which from 1913 was actually the local land court judge) to keep abreast of commercial requirements and protections for owners. Mr Walzl cites, for example, a failure to ensure owners were better protected in the case of delays in making agreed payments to cover due rates and taxes, a failure to ensure interest was charged for delayed or failed payments, and a failure to require payment of penalties or compensation for losses subsequent to delays in agreed payments, such as for the dairy company venture, which depended largely on anticipated progress with the railway and payment of royalties.

There is also evidence that the board had difficulty understanding the full commercial implications of legislative changes and approved variations to the agreement. It had to seek legal advice on this, and the evidence indicates that the board became increasingly uncertain as to the implications of the various amendments and variations to the venture agreement. We note that, in 1922, for example, the president of the board asked for legal assistance so that the rights of the board, the owners, and the two companies now involved might be 'thoroughly investigated, and tabulated and placed on a permanent and satisfactory basis'. The president found the variety of legislative provisions and agreements made in connection with the venture 'exceedingly confusing'.²⁹⁰ This was a clear warning to the Government that more certainty was required to protect owners' rights. Even though advice was promised, in 1929, when the agreement was finally cancelled, the board

still remained uncertain of the exact legal position of the Egmont Box Company as a result of the various agreements and enactments.²⁹¹ In spite of this, the Government continued to pass significant legislative amendments in 1923 and 1924, further changing the terms and conditions of the agreement and the ability of owners and the board to seek remedies.²⁹²

The venture agreement and the subsequent changes to it were very complex. It is hardly surprising that the land board appears to have felt increasingly out of its depth. This does, however, raise general issues of the capacity of the Maori land board system, as developed by the Crown, to adequately assist Maori in commercial opportunities. There is evidence that the board did its best, within its capacity and within Government policies, to protect owners' interests. However, while the boards were originally established to monitor commercial ventures and act as agents for owners to overcome title difficulties in commercially utilising land and resources, the Government increasingly regarded boards as effectively taking the place of owners, and it strengthened legal provisions for this, leaving owners with less and less opportunity for meaningful participation. The boards were also required to focus on the utilisation of Maori lands and resources for the national interest, without sufficient mechanisms to ensure that owners' rights and development interests were recognised and protected. While the evidence indicates that the board acted within its legal powers and the legislative role set for it by the Government in this venture, serious issues remain as to whether the board system was adequately able to actively protect owner development rights in such ventures.

We received no evidence of Government steps to ensure a timely review of the scheme for the development needs of owners. Nor did we receive evidence of any consideration of how extensions to the venture might restore the balance of risks and benefits between the owners and companies involved. There is evidence that some owners had become disenchanted with prospects for the venture ever being able to meet their needs by 1918. A decade had

now passed, and meetings of owners were held to consider whether some blocks might now be removed from the venture and developed by alternative means. In the years after the war, owner concern continued to increase. Owners had not pressed for full payment royalties or opposed extensions to the agreement, because of wartime conditions, but with the war over and timber prices increasing they were much less willing to bear delays. The evidence is also less clear, from this time, about how much direct consultation was occurring with owners and how much owners were being told about what was happening legally with the venture. A number of petitions from owners raised concerns that, while Maori still wanted the venture to succeed, they also wanted full information from the board and for all developments to be fully explained and discussed with them. This evidence raises the issue of how much owners were fully aware of – and understood – the significant legal changes being made to the venture and the implications of these changes for them.²⁹³

The intention, with the various legislative amendments of this period, may have been to ensure that the venture was a success and the owners would benefit from this, but these interventions required the Crown to seriously consider the full range of implications for owners and take reasonable steps to ensure their protection. It also required reasonable consultation with owners, so that they were fully aware of the implications, for their interests, of the legislation and agreed to whatever new risks were held to be involved. We did not receive information on the background of this legislation and what considerations were taken into account when it was passed. On the evidence before us, it seems that there was continued and significant owner support for the venture as a whole and for granting it a further time extension due to the war. It also seems apparent that Maori leaders did not fully appreciate the implications of the changed role and liabilities of the board.²⁹⁴

We are of the view that the series of legislative amendments the Government undertook with regard to this venture, in the years 1914 to 1924, especially, were significant and created correspondingly greater obligations of

protection. The venture was large and complex, and some level of Government intervention and assistance may well have been appropriate and necessary. However, the land board system and the legislative interventions meant that the Government was indeed playing a very active role in the venture, well outside what would normally be the case in any ordinary private joint venture. The Crown had responsibilities to owners through the land board system and as a result of its active interventions. It was, therefore, required to take reasonable steps to actively protect owners' interests, including their development interests. The evidence indicates that the Crown developed the land board system with a primary focus on enabling boards to legally stand in for owners, and with insufficient consideration of trust obligations to owners and inadequate protections for their development interests. The protections requiring the consent of the Native Minister and Governor in Council, for example, were inadequate and ineffective in this venture. The Government also failed to take adequate steps to ensure that its interventions interfered as minimally as possible with owners' Treaty development rights to actively participate to manage their own development, and to set their own development objectives as far as possible. A significant number of owners appear to have continued to support the venture overall for some time, and to have accepted an extension of reasonable time for building the railway as a result of wartime conditions. However, on the evidence available to us, it is not clear that they were fully consulted or informed of the legal implications of the provisions passed, or that they gave their full agreement to these. Further, they were entitled to rely on the Crown protecting their interests through the land board. In taking more and more responsibility for the venture from owners, and placing it with the board and parliamentary select committees, the Crown failed in its duty of allowing Maori reasonable control and input into their own developments.

The third stage of the venture, as described by Mr Walzl, refers to its demise, and to the efforts of the owners, the Crown, and various investors and parties to the venture

to seek to further or protect their interests once the agreement was cancelled. According to Mr Walzl, by 1927 the Aotea District Maori Land Board decided that Maori were suffering considerable disadvantage from continuing delays with the venture, while at the same time having to pay steep land taxes and rates. The resulting hardship and delays in settling the district generally, together with a general realisation that the company was in considerable financial strife, led the board to decide that it was best to begin the process of cancelling the agreement, based on the company defaulting in meeting its obligations.²⁹⁵ The board required Government permission to take this step, which was not obtained until 1929, when a legislative provision confirmed that the Aotea District Maori Land Board could cancel the agreement with the Tongariro Timber Company, to take effect in early 1930. The Government also signalled an intention to negotiate with the owners over the lands and timber involved.²⁹⁶

In the meantime, various parties sought to protect their interests in expectation of the cancellation of the agreement. This is another very complex situation, which we do not intend to try and fully unravel. We need to consider, as far as we can, to what extent the Government took reasonable steps to actively protect the interests of owners, including their development interests, in their remaining forest resource, in this process. We accept the Crown's contention that it cannot be held entirely responsible for the success of commercial ventures Maori entered into. However, given the level of responsibility and intervention the Crown took in this venture and in the way it was wound up, the Crown did have an obligation to actively protect Maori owner interests when it acted and made decisions over this.

The evidence indicates that a number of options were considered when it became clear the venture would be cancelled. By 1929, timber royalty payments owed by the company were in arrears of around £30,000.²⁹⁷ A number of proposals were made to the Government by various parties, including the possibility of establishing new companies to take over the venture, and a state takeover of all company

rights and obligations, to deal equitably with all parties and creditors. It was also suggested that the Government could now gain access to the timber by extending the roads that had now been built, without having to accept the burden of building the proposed railway link.²⁹⁸ The Crown also had to consider owner, regional, and national interests in the management of what was now recognised as a very valuable timber resource. The Crown had already purchased an estimated 25 per cent of individual interests in lands in the venture by this time.²⁹⁹

The Crown finally settled on a number of possible policy options. The first included continuing to purchase the remaining Maori-owned shares in the 135,000 acres involved in the venture, of which 50,000 acres would then be returned to owners for their settlement. In doing so, the Crown would be able to ensure that it obtained sufficient valuable forest, estimated to be worth 'millions' of pounds. Maori owners would be offered £510,000 for their interests in the land and timber. They would be paid in instalments, including sums to be set aside to assist with their land development. Even though expert sawmilling estimates placed the value of the timber alone considerably higher than the purchase proposal, officials insisted that these outside estimates were far too high. They considered that the £500,000 to be offered for the timber and land was 'equitable'.³⁰⁰

A second option was to acquire the timber interests alone, and not the land. However, this was not favoured, as the Crown had already begun purchasing land and it was believed that Maori would insist on a price for the timber that was similar to what the Crown wanted to pay for both land and timber. Most owners, as recorded by the Crown over a number of negotiations at this time, had no desire to sell any more land, but wished to sell timber rights at a price that was similar to what was being offered by other sawmillers. This was considerably higher than the Government offer for both timber and land.³⁰¹

A third option was to seek only to partition out the land the Crown had already bought, but it was noted that this risked the Crown ending up with scattered pieces of land

rather than a compact block for settlement. It was also felt that it would be a pity to allow the rest of the land to fall into the hands of speculators 'as will no doubt happen if handed back to the Natives'.³⁰²

The last option, which was known to have some support from Ngati Tuwharetoa, was to create a new joint venture, with the Crown and owners under some kind of board of control. However, this was not officially favoured either as, although it was practically possible, it was believed that the owners would expect regular royalties regardless of timber cut or sold, and there were anyway 'many objections' to joint control.³⁰³

It is clear from the documented policy considerations of this time that a number of options were open to the Government for consideration, including a joint venture or partnership arrangement between the owners and the Crown. However, the preferred option was to try and acquire the timber lands for a barely 'equitable sum' that would have excluded Maori from further participation as owners in the timber industry. It was also assumed that it was pointless for Maori owners to retain such lands, as they would inevitably fall prey to speculators and lose them anyway. This reflected the long experience of a title system that made it easier to sell individual shares than to develop land, and neglected the long history of owner willingness in this venture to delay short-term gain in favour of long-term development opportunities. We note, with interest, that, while the system of incorporation for Maori land was available at this time and several requests for assistance with incorporation were made by owners, the Government failed to assist with this option. While the Government did consider that assistance might be given for future land development on land that was to be returned under the proposal, this was to be subject to very strict control, and with little opportunity for owners to participate in management decisions such as what land the Government might decide to return, how instalments might be paid, what they were to be used for, and the nature of any future land development. The alternatives of incorporation or joint ventures, where Maori might have more control or

more equal participation as developers, were rejected. The advice to effectively exclude Maori landowners from further forestry opportunities in settling on a policy option for winding up the Tongariro Timber Company venture, and to decline to seriously consider other options that provided for some reasonable form of continuing participation, such as incorporation or a joint venture, was, in our view, a failure to adequately consider Crown obligations of active protection of Maori Treaty development rights.

The proposals eventually put to the owners were: the Crown's purchase proposal; the owners creating a board to administer and control the area; or the land reverting to individual ownership. The Native Minister recommended the first option. According to reports, he discussed the various alternatives and what they would mean, but we do not have a record available to us of this. By the early 1930s, circumstances for purchasing were changing. Economic recession was becoming evident, and we do not have sufficient detailed evidence to be able to determine how the prices proposed and offered might have compared with what was now likely to be a declining market, although we note that much of the anticipated value to the Government was in long-term future use. We note, however, that in 1932 the Prime Minister, George Forbes, explained that when the 1929 legislation was passed it was hoped that the whole matter would have been settled by Maori owners selling 'at such a reasonable price as would justify the Crown in coming to some arrangement with the English creditors of the Tongariro Timber Company'. This was in spite of his comments, in the same letter, that the Crown's legal advice was that the creditors had no claim on either the owners or the Crown, and that any payment would have been in the nature of recognising a moral obligation by the Crown.³⁰⁴ It is difficult for us to read this as anything other than an acknowledgement, by the Crown, that it would only feel justified in offering payments to creditors for any moral (rather than legal) obligations if it could get the assets at such a 'reasonable' price as to not affect its own interests at all. In effect, the Crown intended the Maori owners to accept a price that would subsidise any payment

to creditors. In our view, it is inescapable that this policy reflected a clear failure of protection on the part of the Crown. Forbes went on to claim that, as a result of exaggerated reports of the value of the timber, the owners had asked such high prices that in the financial circumstances of the depression the Crown felt unable to go ahead with purchase negotiations.³⁰⁵

Although the Crown may have believed that the estimated values were now too high, given depression circumstances, it is also clear that the Government was delaying any purchase to see what claims might be made as a result of the failure of the venture and to avoid taking any steps that might mean the Crown would be regarded as taking over any liability.³⁰⁶ In the meantime, early in 1930, Parliament's Native Affairs Committee considered the situation and came to the view that the Egmont Box Company had acquired legal rights in the Whangaipeke block that still needed to be legislatively defined. We did not receive evidence on this in detail, but presumably this was based on the earlier legislative recognition and protection of the company. However, the committee decided to reject all other investor claims. Legislative provisions passed in 1930 confirmed that the Egmont Box Company had a claim, and required the land board to enter negotiations with the company over the extent of this.³⁰⁷ This intervention gave legal recognition to company claims without it having to prove them further, regardless of general Government policy to wait for possible creditors in the venture to legally prove any claims.

Apirana Ngata, one of the commissioners who had approved the venture in 1908 and who had watched it evolve for a large part of his parliamentary career, took the view by late in 1930 that Parliament had favoured the company claims before owner interests and extended the venture well beyond what would have been considered acceptable for Pakeha owners in a similar position.³⁰⁸ Ngata claimed that the owners could also put up claims against the company. They had received only £55,000 out of £85,000 in royalties owed to them. He claimed that they had grounds to take a case against the State for interference

in their rights, but that they just wanted the matter resolved and to be able to exercise the same rights as other New Zealanders to develop their assets as they chose, subject to usual restrictions for Maori land.³⁰⁹

By 1934, the Government was confident that no other creditors had legal claims against either the Maori owners or the Crown as a result of the venture.³¹⁰ It was felt that the company itself was liable for any losses as a result of defaulting on the agreement. Nevertheless, a number of creditors claimed that Parliament should at least give some additional consideration to those creditors who stood to lose everything. They noted that the Maori owners still retained the standing trees, which had never been milled, and they had received significant royalty payments – even if not all that was due. However, as the Government acknowledged, the Maori owners had also lost a considerable amount through having their valuable timber assets tied up for more than 20 years ‘to the detriment of their social and physical welfare.’³¹¹

Meanwhile, the land board and the Egmont company were continuing to negotiate over a payment based on the legislative recognition of rights in 1930. By this time, the company was seeking £23,750, and the board had made a counter offer of £20,000. When the board and company could not agree, the Native Minister intervened and accepted the company proposal. This arrangement was ratified in April 1935, in further legislation. The board made the payment out of its funds in June 1935.³¹² It needs to be recognised that this was not an obligation the Crown decided to honour out of general funds. The board was required to make the payment from funds it held on behalf of owners. There was no cost to the Crown. There was no consultation with owners over this action and it was legislated for in spite of legal advice that creditors generally had no claims. Crown lawyers later acknowledged that the owners may have felt they had good grounds for complaint about this, but their complaint lay with the special legislation passed and the Government which had passed it. They believed that the courts were

unable to look behind any legislation decided on by the Government.³¹³

The iwi and hapu involved had by then begun a lengthy process of litigation, led by Ngati Tuwharetoa paramount chief Hoani Te Heuheu and supported by a number of iwi and hapu of our region, as is now well known. The litigation, seeking to rely on the Treaty of Waitangi against what were claimed to be contrary actions by the Crown, was also supported by other iwi, including some from other parts of our inquiry region.³¹⁴ As we have noted, this litigation was not the subject of claims made before us. We note, however, that in general terms we are required to consider allegations of Crown breaches of the Treaty.

We acknowledge that the Tongariro Timber Company joint venture was particularly large and complex. Care needs to be taken in considering how far it can be used to illustrate issues of relevance to the whole region. However, even taking this into account, we are of the view that, as an important development initiative, and one consistently recognised as such by the Government and other parties at the time, it is illustrative of many general aspects of Government policies with regard to Maori development.

We accept the claimants' proposition that the actions of the Crown in this venture, through the role of the land board system and the series of Government legislative interventions, increased the level of Government responsibility and obligations to protect the owners in their Treaty development rights. The Maori land board system required some involvement from the board, as agent for the owners, in monitoring and approving the venture, overcoming title difficulties, and enabling utilisation of resources for development purposes. The Crown's role, through the board, as 'agent' for the owners was understood at the time to be to monitor and facilitate what was otherwise an apparently reasonable private commercial deal that was also expected to have wider development benefits for the Maori communities involved and the wider settlement of the region. We agree that the Stout-Ōngata commissioners reflected this view in 1908, when recommending the venture. However, we do not accept that their recommendation reflects an

acceptance that Maori should rely on private ventures and not expect any Government assistance. The commissioners did recommend Government assistance for Maori development efforts in their report, equivalent to what Pakeha were receiving, as we have already noted. This comment was made in the context of the Government's failure to offer Maori assistance at this time, and its policies, such as in land purchasing, that further limited Maori options for entering joint development ventures with private enterprise. In this context, it was their view that, if the Government was not willing to assist these landowners in their timber development venture, then it should at least set aside its general restrictions on land dealing with private parties to allow the development venture with the company to go ahead. This was not a statement in favour of one approach over the other, merely a request for the Government to allow development with a private partner to go ahead if it would not do so itself.

Nor can we accept the Crown's submission that this venture was no more than a private deal between the company and the owners, and that the Crown's responsibility ended with a requirement to facilitate it. The Crown had a trust obligation to owners through the agency of the Maori land board. In the middle period of the venture, from about outbreak of the First World War, the Government began a series of interventions in the agreement that were serious and far reaching. The long and extensive history of Government legislative intervention in this venture is a timely illustration of just how difficult it was for iwi and hapu to initiate and participate in commercial joint ventures, as other property owners could, without such constant recourse to legislative intervention. The barriers Maori faced required inevitable Government intervention, regardless of how willing the Government was to actually actively assist Maori development itself. This intervention offered opportunities for the Crown to pursue its interests – opportunities not generally available to it with private property owners. This required very robust and careful protections, and steps to ensure minimal impacts on the rights of property owners. This venture illustrates Crown

failings in this regard. The Crown did have a legitimate role in pursuing national objectives, but this required careful protection for owners to ensure the land board system was able to independently advocate and act for owners. The Crown's failings in this regard breached its obligations of active protection of the Treaty development rights of the owners concerned and their communities.

This had serious economic impacts for owners. We agree that the venture was complex. It is not possible for us to estimate the actual losses or benefits to owners and the Crown. However, in general terms, the evidence is clear that Crown policies meant that iwi and hapu involved had little choice but to participate in this kind of joint venture to have any chance of overcoming the barriers they faced to undertaking timber milling for the development and long-term benefit of their communities. The owners were willing to take lower timber prices, and some delays and failures with agreed payments of royalties, to ensure that the venture succeeded. They were, therefore, agreeable to some losses. However, with Crown intervention, they were increasingly removed from consultation and decision-making over taking continued losses and delays. Although the trees subject to the venture agreement were, in the end, not milled by the company and therefore still left to those owners who had not sold interests to the Crown, the owners were increasingly subject to Crown restrictions on dealings with their land – preventing them from finding alternative uses for their timber and income from it. The owners also lost significantly through the company's failure to provide anticipated employment both on the railway and in the mills. They therefore lost not only anticipated income that could have been put towards other development initiatives, including anticipated farm development, such as their proposed dairy company, but also the opportunity to gain timber working skills close to their settlements.³¹⁵ In addition, they were obliged to take on the additional expense of court actions to try and protect themselves from the claims of other parties in the venture being added to debts on their land.

The Government also intervened to assist companies involved who would otherwise have had to take their chances seeking remedies through the courts. The Government took no responsibility for the impact of its interventions on owner losses, however, and required them to bear this cost. Further, the evidence indicates that the Government did reasonably well out of the venture, in benefiting from low prices for shares in lands as a result of their being tied up in the venture and the land and timber being excluded from other private commercial opportunities, and delays with rail infrastructure development that would have increased land and timber values. We agree that the evidence, in this respect, indicates that owners suffered the larger share of losses from the failure of the venture, including from failed development for their communities. We accept that the extent of this loss was later ameliorated to an extent by high prices received for the timber left standing that was eventually milled by owners in the 1950s and 1960s, through their incorporations. However, this success is unlikely to have fully made up for the earlier losses, including the long period of delayed development for Maori communities.

Crown regulation and conservation of the indigenous timber resource

TO WHAT EXTENT DID THE CROWN FULFIL OBLIGATIONS OF ACTIVE PROTECTION OF IWI AND HAPU IN REGULATING THE INDIGENOUS TIMBER INDUSTRY?

The evidence available to us indicates that the Crown began to recognise the need to consider managing the indigenous timber resource for long-term national economic needs as early as the mid-1870s, although it appears little occurred in the way of policy initiatives until the early twentieth century.³¹⁶ By this time, the Government was also an active participant in timber milling, including in this region.³¹⁷ Before 1918, the main forms of timber regulation had been through charging royalties for timber from Crown lands and using prices to control demand. It was intended that royalties for timber on Crown lands would

set a benchmark for other forest owners and thereby regulate timber use nationally. As we have seen, however, this policy did not work effectively for Maori owners, where prices were routinely lower because of the risks inherent in lands covered by restrictions on private dealing and the difficulties in dealing with land in multiple title.³¹⁸

The Crown began to make more concerted efforts to regulate the production of sawn timber and control alienations of Maori land containing timber from 1918, although, as Mr Walzl has noted, these efforts met with only limited success.³¹⁹ More effective timber management began to be implemented a few years later, through the establishment of the Forestry Department in 1920, which became the State Forest Service in 1923. The Forest Service was given responsibilities for considering long-term plantation forest needs, whether indigenous or exotic, and for advising and implementing policies for regulating the indigenous timber milling industry in the national interest. Conservation, at this time, did not preclude continued milling of the timber resource. It was intended, rather, to denote more effective regulation of milling to reduce waste and to promote a more effective response to the timber requirements of the developing economy. As Dr Roche has explained, the intention was that, with better management, local timber would continue to be able to supply the raw materials for New Zealand's building needs at reasonable prices.³²⁰

In pursuit of better indigenous timber management, the Crown began implementing a dual policy of regulating the sale of indigenous timber and purchasing what were regarded as important timber lands for national interest needs.³²¹ A large part of the land identified as important was in the Central North Island, particularly in the Taupo district. A large proportion was in Maori ownership, although there were also, by the 1920s, significant Crown and other private holdings. As we have seen, this policy contributed to Crown purchasing in the western Taupo forests from 1918 to 1930, including in the forests covered by the Tongariro Timber Company joint venture.

The evidence available to us indicates that the Crown purchase policies implemented in the 1920s to better manage and conserve the indigenous timber resource were based on assumptions that Maori owners were either uninterested or incapable of participating in sustainable long-term management of the sawmilling industry and interested only in short-term gain. They were regarded as not being interested in cooperating over long-term management strategies and treated as a 'risk' to the proper management of the timber resource. These assumptions were used to justify continued Government purchases of Maori-owned forest lands for timber management purposes, and the use of purchase practices found to be harmful to Maori development interests (and which the Stout-Ngata commission had already warned the Government about, as early as 1907).

When court litigation over the Tongariro joint venture was finally over, by the early 1940s, and the Government reassessed national timber requirements, a new decision was made to try and purchase the entire indigenous timber resource on the timber company lands. Ironically, Forest Service officials cited the likelihood that ownership scattered among 'numerous owners', and a timber alienation process, through a system of owner meetings, that had been found to be 'open to grave abuse' while owners had pressing immediate economic needs, meant that Maori-owned timber was at risk of rapidly falling into the hands of a few monopolies.³²² In the meantime, prohibitions on private dealing were retained.³²³

It seems that, by the 1940s, the system of buying up individual shares in these lands was no longer considered viable, presumably due to the likely delays and difficulties dealing with increasing numbers of owners and fragmented interests, in what was regarded as a situation where quick action was necessary. The Forest Service also accepted that it would not be politically acceptable to continue to maintain blanket prohibitions on private dealing in Maori forest lands, without purchasing them within a reasonable period. So when Government officials were authorised to begin

purchasing again in the Tongariro Timber Company's former lands, in 1943, they pursued purchasing through a series of meetings with Ngati Tuwharetoa. According to Mr Walzl, officials at a meeting in late 1943 offered prices higher than Forest Service valuations, and a range of other deals designed to persuade owners. However, after some consideration the offer was turned down. The owners preferred to form their own incorporations to utilise the timber resource themselves.³²⁴ This seems to have ended the Forest Service push for purchasing at this time.

Forest Service officials appear to have turned, instead, to the other main option recognised for regulating the timber resource – finding ways to control milling. The Crown had the opportunity to implement this, in the case of Maori land, through existing mechanisms for monitoring alienations of Maori land and resources. This had the advantage, for the Crown, of enabling the relatively rapid implementation of controls. The Crown had, in fact, begun to implement this system of control when the State Forest Service was established. Section 35 of the Forests Act 1921–22 required that the land court and land boards obtain consents from the Forest Service before granting timber cutting rights on Maori land.³²⁵ As we have noted, these agencies had responsibilities for monitoring alienation agreements to protect Maori owners and enable them to utilise their resources. The Forests Act now required Forest Service advice before timber alienations were approved. This included advice on what merchantable timber existed on the lands in question and what an acceptable price would be.

The Maori land boards at first seemed to be in favour of the new measure, as it offered the potential to assist them in coming to a view on the commercial value of timber on land involved in alienations. Mr Walzl notes, for example, that, shortly after the Forests Act was passed, the president of the Aotea District Maori Land Board welcomed the new provision, noting that, previously, sawmillers had taken advantage of old leases and their rights to renew them under the guise of grazing leases without declaring

the value of timber on the land. He felt that they had been gaining considerable benefit from this practice, without having to pay adequate compensation to Maori owners, even while the timber was the most valuable crop the land would grow. He explained that he had already been seeking assistance from the old Forestry Department, in cases where he believed leases might involve valuable but undeclared timber. He believed that the new provision might be of considerable use and was assured of Forest Service assistance.³²⁶

During the 1930s, Maori owners with remaining forests in the Rotorua and Taupo districts, including those subject to the failed Tongariro Timber Company venture, began to negotiate timber royalty rights with private sawmillers in an effort to gain benefits from their timber. Owners were also mindful that the mills needed a continued supply of timber to provide much-needed employment. It was not long, however, before the way that the Forest Service was implementing appraisals and consents drew strong criticisms from Maori owners, sawmillers, and the land boards. In the 1930s, for example, the president of the Aotea District Maori Land Board expressed concern that Crown and Forest Service 'interference' in implementing consent requirements risked cutting across owners' legal rights to dispose of their timber.³²⁷ He warned the Government that, if the process became too onerous and expensive, Maori would be left with little choice, because of their economic need, but to start dealing with the more unscrupulous sawmillers. This would result in even more waste of the timber resource. In further correspondence, he suggested that if the Forest Service insisted on placing a high value on timber, as it apparently was in many cases, it should then be prepared to pay that price to the owners when sawmillers refused to. He noted that the Forest Service appeared to take no real account of factors such as accessibility and whether mills could realistically keep operating, when it set its prices. He noted that the Crown could wait until prices came up to what it was prepared to agree to; Maori did not have that luxury.³²⁸ He also

suggested that the Forest Service pay the cost of timber appraisals itself, and then recover the money from millers who purchased the timber rights. The system of charging costs to applicants seeking to purchase rights, whether or not they were successful, only served to put some off going through the proper process.³²⁹

There was considerable criticism of the delays in gaining Forest Service appraisals and consents, while officials considered what purposes forest areas might be used for. Timber management for milling was only one such purpose, and others included scenic reserves, soil conservation, and possible national park status.³³⁰ It was noted that, while owners were subject to delays in gaining consents and also as a result of unrealistic valuations undermining deals, they still faced mounting survey debts, rates, and other costs.³³¹ We note that these comments came from the land boards that were required to monitor deals, as well as those, such as sawmillers, who had a vested interest in the deals. The boards had a responsibility to consider the impacts on Maori and their property rights, and their warnings required careful Government consideration. We note similar evidence of concern from the Native Department—again, a less self-interested view than that of sawmillers. Officials involved in the Rotoiti Maori land development scheme in the Rotorua district also complained that the Forest Service was unrealistically and inflexibly insistent on valuations, when agreeing to slightly less would have allowed agreements with millers to go ahead.³³² We agree that the Forest Service had a potentially protective role for iwi and hapu in monitoring timber consents. However, the weight of evidence available to us indicates that officials responsible for monitoring timber alienations from Maori land had become convinced that Forest Service timber management objectives for national interest purposes were effectively taking precedence over iwi and hapu interests in gaining a market benefit from their timber.

According to Mr Walzl, it had become clear, by the 1940s, that warnings that the system would encourage informal black market timber dealing were being proved correct. As had happened in the nineteenth century, the inflexible

application of restrictions on dealing forced Maori land-owners in stressful economic circumstances to engage in informal timber deals. Unscrupulous sawmillers took advantage of under-resourcing and lack of capacity within the land boards to log outside their lease agreements. The boards began to draw attention to this situation, and they warned the Forest Service that its own delays were contributing to the problem.³³³ The Forest Service response to this (and to the country's wartime needs) was to introduce emergency wartime measures designed to provide even more extensive control of the alienation of Maori-owned timber. Effectively, the Timber Controller was to be placed in the position of agent for forest owners. The controller could require owners to sell their timber as directed, and on prices the Forest Service determined.³³⁴ This was a major infringement of Maori property rights, without consultation and without compensation. It was proposed, as evidence supplied to us by Mr Walzl shows, in spite of the fact that iwi and hapu of the Taupo and Rotorua districts made gifts of timber and timber revenue to aid the war effort.³³⁵ It was also knowingly discriminatory as, although the regulations did not specify Maori land, it was expected that they would almost solely affect this form of tenure.

These proposed new powers were greeted with some alarm by judges of the Native Land Court (who were also presidents of the land boards). The Chief Judge raised his concerns, in the early 1940s, that particular care was required to administer the proposed new powers fairly, as they had the potential to impinge significantly on the rights of Maori timber owners. He warned that, while Maori might accept this as necessary in wartime, they were unlikely to agree to such measures simply for the sake of managing the timber industry. He also raised the issue of the extent to which the Forest Service had begun to usurp the functions of the court in deciding whether timber prices on alienation were adequate. This was especially because the Forest Service did so for its own objectives, rather than those of forest owners. He informed the Forest Service that, while Treaty guarantees had been found to have little legal effect unless enacted in legislation, the

present measures provided for a form of ‘confiscation’ of property rights in contravention of article 2 guarantees. His views were supported by other land court judges, including the judge of the Waiariki court (and president of that land board), who raised concerns about what he described as ‘dictatorial’ measures, especially if they were to continue into peacetime.³³⁶

In spite of these warnings, the regulations as proposed were implemented from 1943. Mr Walzl points to a number of cases where these emergency powers were invoked during wartime, requiring Maori owners to sell their timber as directed. The Timber Controller not only had the power to make decisions, but was also the appeal body in being able to hear and dismiss any objections received from Maori owners.³³⁷ The Maori land boards were, in practice, relegated to implementing this Forest Service policy.

Following the war, the Forest Service continued to insist on being able to exercise similarly extensive controls. It sought to have this confirmed in 1949 legislation. Maori Land Court judges (in that role and also as presidents of land boards) again raised concerns. They noted that the Forest Service was intending to exert similar controls over Maori-owned timber agreements as were exercised over state forests, ignoring the private property rights of Maori in their timber. The judges further complained about the poor quality of many Forest Service timber appraisals on Maori land. Some were also of the view that the Forest Service was hiding behind claims of concern for adequate prices for Maori to, in reality, set prices that effectively enabled them to control demand for their timber resource. The judges asked for the powers of the Forest Service over Maori forest lands to be more carefully defined and limited. They noted that, while, in theory, these powers applied to Maori and Pakeha, effectively (because of the mechanisms available) they had come to apply to Maori land only, even though individual Pakeha and private companies still owned large areas of indigenous forest. In spite of these warnings and requests, the proposed measures were passed.³³⁸

Walzl describes new regulations being introduced by Forest Service officials from 1949. There were continued disputes between land boards and Forest Service officials over their implementation. This also brought the Forest Service into conflict with the Ngati Tuwharetoa timber incorporations.³³⁹ Having finally found a way to participate in the timber industry as entrepreneurs, the owners of these incorporations increasingly came up against Forest Service efforts to control milling agreements for their remaining timber resource. According to evidence supplied by Mr Walzl, the timber incorporations do appear to have had significant success in limiting efforts by the Forest Service to implement the same level of control over indigenous timber in the Taupo district.

Having rejected the Crown’s offer, in 1943, to purchase their remaining forest lands, Ngati Tuwharetoa had moved to establish timber incorporations to commercially utilise their remaining timber resource. We received limited evidence on this development.³⁴⁰ It is a remarkable story that requires much more research to be fully told. Ngati Tuwharetoa owners appear to have successfully encouraged the Government to deal through their tribal council, established as a point of contact on all land matters during the war years.³⁴¹ They also worked with a joint Government–iwi advisory committee, established to plan for the large western Taupo area after the war. Owners then began to organise collectively, through the mechanism of block incorporations, to manage the utilisation of their timber as much as possible themselves.

This was led by the establishment of the Puketapu 3A Incorporation, in the mid-1940s. This block of 17,620 acres, held by more than 200 owners of the Ngati Hinemihi and Ngati Turumakina hapu, had not been part of the Tongariro venture. It was, however, estimated to contain very valuable timber by the 1940s, and it was managed by a group of owners who were experienced timber workers and whose innovative approaches to milling and marketing their timber themselves appear to have provided a successful model for other Ngati Tuwharetoa timber incorporations.³⁴² After two years in operation, the incorporation had received

more than £22,000 for its milling arrangements, around half of which was paid out to owners and in a community grant. The remainder was held for investment.³⁴³ The owners then moved on to use their resources to become active in sawmilling and other parts of the timber industry.³⁴⁴

Other timber incorporations followed, from around 1947, and, as parties before us agreed, achieved significant economic success. From the evidence available to us, this success was based on a combination of factors, including the owners' determination and experience in the timber industry and their willingness to push legal boundaries in establishing and operating their timber incorporations. This was a time when the incorporation mechanism had been established with farm development in mind. The participation of incorporations in a variety of timber businesses was not regarded as strictly legal.³⁴⁵ However, the land court and land boards were willing to take a much more flexible approach by this time, especially when there was little competition with farming in the district and the timber was clearly of considerable value. The commercial success of the earlier incorporations also helped to encourage further land board support for the concept. This success was also assisted by the removal of Government restrictions on dealing with private interests, and high prices for quality timber in the post-war period.

Nevertheless, according to evidence presented by Mr Walzl, during the period from the 1940s to the 1960s there were continuing skirmishes between the timber incorporations and the Forest Service over control of milling agreements. The incorporations were able to use their collective authority and resources to limit or end some of the most onerous control mechanisms used by the Forest Service. They were able to end what they saw as expensive and often inaccurate Forest Service appraisals of their forests, for example, by instituting their own means for appraising their timber production. The Forest Service, in return, continued to cast doubt on the ability of incorporation management and questioned whether incorporations properly protected the interests of individual owners. According to Mr Walzl, the Forest Service also began to contemplate

other forms of control over the Maori timber resource. These included the use, ironically, of price controls when it was felt that incorporations were charging 'fantastically' high prices, and the control of sawmill production.³⁴⁶

Even so, the assertive and united efforts of the incorporations, their ability to gain the support of the land boards and land court, their assiduous work to gain political support, and their considerable commercial success meant that they were able to limit the Forest Service in its efforts to exert continued controls over their timber resource. The Taupo timber incorporations appear to have utilised their remaining timber in the years from 1950 until the early 1960s with considerable success. The commercial success of these early timber incorporations also seems to have been significant in convincing the Government to provide more effectively for Maori incorporations and trusts from the 1950s, enabling owners to collectively manage land and resources for commercial purposes, including land returned from development schemes. For our purposes, this relatively brief period of commercial success in utilising indigenous timber contrasts with earlier marginalisation in the years before the 1940s and with the continuing situation in Rotorua.

Maori timber owners in Rotorua do not appear to have been able to exert the same kind of influence in limiting Forest Service controls over the alienation of their timber resource, largely because owners had retained only relatively small and scattered blocks of valuable timber and were not able to organise to the same degree.³⁴⁷ Mr Walzl presented evidence showing that, in Rotorua, the Forest Service continued to implement strict controls into the early 1960s, by which time the commercially valuable indigenous timber resource had been largely milled. This control was accompanied by continuing complaints about the quality of Forest Service appraisals and valuations, and a black market.³⁴⁸ Mr Walzl noted how this very close control over Maori forest alienations in the Rotorua district caused long delays in obtaining consents, often of three to five years, which caused further hardship to owners.³⁴⁹ This close control continued, even though, by the 1950s, Maori

forests contributed in acreage to only around one third of the timber lands in the Rotorua inquiry district.³⁵⁰ The measures allowing the Forest Service direct control were finally repealed in 1963, although the service was still able to appeal to the land court to consider issues of the national interest for the timber resource, when it was considering alienations of Maori land.³⁵¹ The 1963 repeal was met with widespread agreement, even from the Director-General of Forests, that the controls had by this time become a serious anomaly, in only affecting Maori land, leaving the Forest Service open to accusations of discrimination.³⁵²

We agree that the Crown had a legitimate kawanatanga interest in managing the indigenous timber resource for national interest reasons. However, the Government also had Treaty obligations to protect iwi and hapu in utilising their resource for their development needs. As we have previously noted, this required consultation and minimal infringement of Maori property interests, and compensation where infringement was unavoidable. The evidence available to us indicates that it was possible – and well within contemplation – for the Crown to consult with interested parties during this period of regulation. We note evidence of consultation with interested parties in the sawmilling industry as early as through the Timber Conference of 1896, for example, and the 1921 meeting with private sawmillers (who had established the Dominion Federated Sawmillers Association in 1917). We have also noted evidence of Crown ministers meeting with iwi and hapu leaders in the Taupo and Rotorua districts, as well as hearing their concerns about their participation in the timber industry, through official inquiries and representations, from as early as the turn of the century. However, the Crown, in pursuit of its national interest objectives, failed to consult meaningfully with Maori communities over the legislation and regulations that impacted so severely on their dealings with their timber interests for their own benefit. The Crown also had available the views of land court judges, who had clear responsibilities, as judges and presidents of the Maori land boards, to consider Maori interests. The Crown's failure to take meaningful note of

these concerns and act on them was in breach of Treaty principles of active protection and partnership.

The Crown also chose to take advantage of mechanisms for monitoring Maori land alienations generally as a means of implementing management of the timber resource. These mechanisms were established in response to barriers that the Crown itself had created with a form of title that restricted the ability of Maori to reasonably utilise their resources for the benefit of their communities. In using these mechanisms for its own objectives, the Crown increased its obligations of active protection not to take unfair advantage and to ensure Maori interests were carefully protected. Instead, the Crown used this to seriously infringe Maori property rights in their resource, without adequate consultation or compensation. This was a serious breach of the Treaty principles of good faith, active protection, and mutual benefit. It was also effectively discriminatory and therefore breached article 3 guarantees. These breaches of Treaty development rights were compounded when the measures were extended beyond wartime.

In our view, the Crown's willingness to impose such draconian measures was based, in large part, on a failure to recognise the extent to which Crown failings had prevented Maori from participating in the industry at a management level. Instead, it was assumed that Maori were either uninterested or unwilling to consider long-term management of their timber resource, and instead preferred short-term gains. We are of the view that there is significant countervailing evidence, including the efforts of Maori to cooperate over the Tongariro Timber Company venture, to indicate that, when meaningfully consulted, Maori were willing to consider the national interest and were willing to consider long-term management of their resource to extend its life and the benefits their communities might obtain. The Crown's failure to undertake this meaningful consultation over regulation of the industry was in breach of the principles of partnership and good faith. In our view, it is entirely understandable that, when faced with this attitude from the Forest Service, the timber incorporations sought to maximise their profits as much

as possible. We note the contrasting experience of Rotorua iwi and hapu, who were unable to limit continued Forest Service control of their resource.

The Tribunal's findings on indigenous forestry

Iwi and hapu of this inquiry region were specifically guaranteed protection of their forests in the Treaty. The Crown had an obligation to actively protect this property right, which included active protection of the development right of iwi and hapu to be able to utilise their timber resources in new commercial opportunities arising from settlement, and to be protected in a sufficiency of resources to fairly do so. While it was expected that timber lands would eventually be cleared for farming, the commercial value of Maori-owned timber in this inquiry region for various settlement purposes was recognised both by Maori and by the Crown from an early period of settlement and the beginning of Crown purchasing in the region. The Crown, therefore, had an obligation to protect iwi and hapu in this resource when it made land purchases. The Crown's decisions to refuse to purchase timber separately from land and to implement purchase monopolies increased its obligation to ensure Maori were protected in sufficient of their timbered lands and received a fair price for their timber.

In nineteenth-century land purchasing in this region, the Crown targeted land with stands of good-quality, accessible timber. It failed to implement adequate protective mechanisms to ensure that iwi and hapu retained sufficient timber for their present and future needs. As with land purchasing generally, the impacts of these Treaty breaches varied. Some iwi and hapu were able to retain significant timber resources, while others, whose timber was regarded as particularly suitable and accessible for settlement, had lost the opportunity to benefit from their timber resource by the turn of the twentieth century. From early in the twentieth century, the Crown resumed purchasing in the Taupo district and introduced mechanisms to enable private purchasing in the Rotorua district, both of which further impacted on retained forest lands. This resulted, by

the time purchasing declined in the 1930s, in steady attrition of Maori-owned forest in the Taupo district, although significant areas were retained, and the loss of almost half of the remaining timbered Maori land in Rotorua. The losses were also concentrated in the most accessible of the remaining forests.

In both these periods of purchasing, the Crown failed to provide adequate protections for iwi and hapu in their timber resource. This was in breach of Treaty principles of partnership and active protection. The Crown neither adequately monitored nor protected the timber interests of Central North Island Maori when it conducted this purchasing. The Crown was also in breach of the principle of mutual benefit, in foreclosing on an important economic opportunity for some iwi and hapu to utilise their timber resource to gain the benefits from settlement anticipated by the Treaty. This was also in breach of the Treaty right of development for those iwi and hapu who were not protected in sufficient of their timber lands for new economic opportunities.

The Crown failed to actively protect iwi and hapu in participating at all levels of the developing sawmilling industry in the Central North Island. By withholding transport infrastructure and imposing purchase monopolies, without due protections for the ability of Maori to utilise their timber resource, the Crown undermined and limited opportunities for iwi and hapu to participate fully in the industry and gain full benefit from their timber. The Crown's failure to provide positive assistance to overcome barriers to lending and difficulties with governance further limited the ability of iwi and hapu to gain benefit from their timber, even while Maori leaders and the Government's own inquiries warned of the impacts this was having on iwi and hapu utilisation of their timber. These failures breached Crown obligations of active protection of iwi and hapu development rights for their timber resource.

The Crown had a legitimate kawanatanga interest in seeking to regulate the milling of the indigenous timber resource in the national interest, as this became a concern, especially from the early twentieth century. The Crown

also had an obligation to exercise kawanatanga responsibilities with due regard for article 2 guarantees, including Treaty rights to utilise timber resources for development opportunities as appropriate. This required adequate and meaningful consultation, minimal infringement of Treaty rights, and taking adequate account of the development interests of the communities concerned. The Crown's failure to meet these requirements, in regulating the timber resource, breached the Treaty development rights of iwi and hapu.

In using the monitoring mechanisms of the Maori land boards and Maori Land Court, which had been established to better protect Maori interests on alienation, the Crown took on a greater obligation not to use those mechanisms for its own advantage. The Crown breached this obligation in the way that it implemented regulations requiring timber consents and appraisals on Maori land by the Forest Service. The application of controls that effectively only applied to Maori land and not to other forms of tenure was discriminatory and in breach of article 3. This was compounded by the extension of 'confiscatory' controls on Maori timber after the Second World War emergency had ended.

CONCLUSION ON UNDERDEVELOPMENT

As we outlined in chapter 14, the claimants argued that, by the time of the first land development schemes, they had already become entrenched in a cycle of underdevelopment. The Crown denied this allegation. Having considered opportunities in farming, tourism, and indigenous forestry before the Second World War, we are now in a position to reach a general conclusion on this issue. In chapters 14 and 15, we considered the major economic opportunities identified from an early period in the Central North Island for iwi and hapu to utilise their properties and taonga, to benefit from settlement. We found, in chapter 14, that, in spite of the large areas of marginal lands in this region, Government policies assuming the national long-term

value of farming were also influential. In this chapter, we have considered two other major development opportunities for utilising properties and taonga: tourism and indigenous forestry. These were both identified as likely to be important industries in this region, even while they were not subject to the same nationwide policies as occurred with farming.

The evidence available to us reveals that, in this region, in the period from the late nineteenth century to the 1930s, governments were active in promoting and encouraging industries identified as important development opportunities, as well as settler involvement in them. By the early twentieth century, governments were also beginning to recognise and act on responsibilities to manage and conserve significant natural resources in the national interest. Treaty responsibilities required governments to exercise their kawanatanga responsibilities with due regard for Treaty guarantees and the development right of iwi and hapu to utilise their properties and resources in new settlement opportunities. The evidence submitted to us concerning iwi and hapu participation in these opportunities, in this inquiry region, reveals a pattern of Crown failure of active protection and subsequent marginalisation of hapu and iwi during this critical period of economic development in these industries.

We accept the Crown's contention that it is very difficult, if not impossible, to separate the impacts of failure in each of these opportunities. However, we are persuaded that there is strong evidence of the cumulative impact of these breaches by the Second World War. We received evidence from Tahu Kukutai, Ian Pool, and Janet Sceats in their report on population patterns and trends, for example, that the period from 1901 to 1945 was an era of vulnerability and marginalisation for iwi and hapu of this region.³⁵³ Health, housing, and other standards all indicate economic marginalisation at this time. We have a range of evidence, produced at or shortly after this time by welfare and other agencies in the Taupo and Rotorua districts, and collected for this inquiry in the Bayley-Shoebridge document bank, which indicates that many communities in this

inquiry region were suffering extreme poverty by this time and were reliant on a mix of traditional resource gathering, milling, and seasonal rural work.³⁵⁴ Maori welfare officers, appointed from the 1940s, confirmed that poverty and poor-quality housing was rife among Maori communities in their Taupo and Rotorua districts (the latter including a large part of our own Kaingaroa district).³⁵⁵

This made these communities especially vulnerable to economic downturns or loss of work or resources. We have noted the Stout–Ngata commission’s findings, in Rotorua, that the combination of title problems and restrictions on alienations had left lands largely unproductive and communities reliant on resources such as their fisheries. We have noted reports by land board officials, with regard to approval for the Tongariro Timber Company venture for example, of the state of poverty and semi-starvation of communities living near Lake Taupo early in the twentieth century. We note that one of the reasons Ngata was able to extend land development schemes to Maori – and why they began in this region – was the ‘emergency’ economic situation of many Maori communities there. We have also noted the Stout–Ngata inquiry’s mention of the difficulties Maori landowners in Rotorua were still facing, in the early twentieth century, in sorting out land titles and beginning farming.

We note that, from the 1930s, the land development schemes provided significant immediate benefits to Maori communities, especially in housing and health. We also accept the views of all parties before us that the western Taupo timber incorporations achieved significant commercial success, although we lack full details. However, while these initiatives may have mitigated impacts, we are not persuaded that they overcame them. It is evident that the Maori population in this region had begun to grow rapidly by this time. The evidence that we do have, such as the reports of welfare officers and the analysis by Dr Kukutai, Professor Pool, and Dr Sceats, suggests that the ‘under-development’ of the late nineteenth and early twentieth centuries had long-term consequences that were not fully

mitigated by timber industry success or land development schemes.³⁵⁶

From the 1950s, however, the Government began to promote new developments in the region, which offered significant employment opportunities and new opportunities for hapu and iwi to utilise their remaining properties and taonga. These were power generation projects and exotic forestry developments, and it is to these new opportunities we turn in the next chapter.

SUMMARY

Because of the outstanding natural scenery and resources of the Central North Island, and the willingness of hapu and iwi to provide hospitality to travellers wishing to see their taonga, tourism was identified very early as a major potential economic opportunity for the region. Maori took the lead in developing a fledgling tourist industry by guiding visitors to sites of interest and providing associated services, such as transport, accommodation, and entertainment. Thus, when the Crown began purchasing, it had an obligation to actively protect hapu and iwi of the region in their Treaty development right to utilise their properties and taonga in expected tourism opportunities, according to their custom and preferences. This obligation included protecting hapu and iwi in a sufficiency of those properties and resources identified at the time as likely to be important for tourism.

The Crown failed to take reasonable steps to fulfil this obligation, especially when it identified and acquired for itself sites of likely value for tourism, and when it acquired sites for other purposes without taking adequate account of their importance to Maori for tourism-related activities. The impact of this failure varied across the region. By the early twentieth century, hapu and iwi of the Kaingaroa and Taupo districts had lost most of their sites and resources identified at the time as important for tourism, while

those in the Rotorua district had retained some significant taonga.

From the 1880s, hapu and iwi of the Central North Island were becoming increasingly marginalised as tourism entrepreneurs. As well as the loss of suitable sites and resources, major barriers to continued Maori participation in tourism were title problems, and difficulties with obtaining investment finance. These barriers were of the Crown's own making. As part of its duty of active protection, the Crown had an obligation to assist Maori to overcome such barriers. The various township ventures in the region offered some potential for this, and the thermal springs districts legislation allowed for joint Crown–Maori partnerships in developing key tourist sites. However, the Crown failed to take advantage of such opportunities.

By the early twentieth century, the Crown had identified some particularly outstanding sites in the region as having national value, and thus had legitimate kawanatanga responsibilities to ensure that these sites were adequately protected. Such protection did not, however, require Crown ownership of sites of great cultural and spiritual significance to Maori. Nor was it reasonable in Treaty terms for the Crown to acquire such sites because it was convinced that, as a result of its own land title systems, Maori would be unable to prevent the alienation of their taonga to foreign interests or private speculators.

While some modern tourism activities are different from those contemplated in the 1840s, a significant part of the modern tourist industry in the region remains closely linked to its outstanding natural scenery, resources, and other taonga, and the hospitality and culture of the hapu and iwi associated with them. The modern industry is therefore analogous to the tourism trade pioneered by iwi and hapu of the region. In combination, the close link with a long-established tradition of tourism, the close links of modern tourism to taonga and cultural practices in this region, the requirement to redress Treaty breaches, and the need to address economic disparities, require the Crown to provide positive assistance to iwi and hapu of the Central

North Island region who wish to participate in new tourism ventures.

It was expected that lands in the Central North Island would eventually be cleared for farming, but the commercial value of Maori-owned timber in the region was recognised from the beginning of Crown purchasing there. The Crown therefore had an obligation to protect hapu and iwi in this resource when making purchases. The Crown's decisions not to purchase timber separately from land and to implement purchase monopolies increased its obligation to ensure that Maori were protected in sufficient of their timber lands and received a fair price for their timber.

In its nineteenth-century land purchasing in the region, the Crown targeted accessible, good-quality indigenous timber lands and failed to ensure that hapu and iwi were protected sufficiently for their present and future needs. The impact of this failure varied across the region. Some hapu and iwi were able to retain significant timber resources, while others, whose timber was regarded as especially accessible and suitable for settlement purposes, had lost the opportunity to benefit from this resource by the beginning of the twentieth century. The subsequent resumption of Crown land purchasing in the Taupo district, and the introduction of mechanisms to enable private purchasing in the Rotorua district, had a further impact on the amount of timber lands retained. A significant amount remained in Maori hands in the Taupo timber lands, while in Rotorua almost half the remaining Maori timber lands were lost.

The Crown failed to actively protect iwi and hapu in participating at all levels of the indigenous milling industry. Its withholding of transport infrastructure and imposition of purchase monopolies without due protections limited the opportunities for hapu and iwi to utilise their timber resources and gain full value for their timber in the developing sawmilling industry in the Central North Island. The Crown failure to provide adequate positive assistance to overcome lending and governance difficulties to participate in the industry, despite warnings and requests from

Maori leaders and from its own commissions of inquiry, further limited the capacity of iwi and hapu to gain benefit from their timber.

The Crown had a legitimate kawanatanga interest in seeking to regulate the milling of indigenous timber in the national interest. The Maori land council (later land board) system established from 1900 provided a mechanism for the Crown to monitor the utilisation of Maori-owned timber resources. The Crown used this mechanism for its own advantage in implementing regulations that required Forest Service appraisal of, and consent to, the utilisation of Maori-owned timber resources in the region, and in extending controls on Maori-owned timber resources after

the Second World War emergency had ended. In practice, these controls effectively only applied to Maori land.

There was a pattern of Crown marginalisation of hapu and iwi in the Central North Island in the critical period of economic development of the farming, tourism, and forestry industries, from the late nineteenth century to the early 1930s. This economic marginalisation was reflected in the extreme poverty suffered by many Maori communities in the region at this time, who relied on traditional resource-gathering, and mill and seasonal rural work. Welfare agencies reported poor standards of Maori health and housing in the region up to the 1940s.

SUMMARY

- ▶ The Crown's failure to actively protect hapu and iwi in the Central North Island in retaining and developing their sites and resources of value for tourism was a breach of the Treaty principles of partnership, active protection, and mutual benefit from settlement, and a breach of their Treaty development rights in one of the few significant opportunities open to them.
- ▶ In those sites identified as being of national importance for tourism, the Crown had an obligation to exercise its kawanatanga responsibilities with due regard for article 2 guarantees. These required adequate and meaningful consultation, minimal infringement of Treaty rights, and adequate compensation for any losses. The Crown's failure to meet these requirements breached the Treaty development rights of hapu and iwi.
- ▶ The long-established tradition of tourism for some Central North Island hapu and iwi, and the close association between modern tourism and their taonga and cultural practices, together with the need to redress past Treaty breaches and to address economic disparities, require the Crown today as a reasonable Treaty partner to provide positive assistance for those Central North Island hapu and iwi who wish to participate in new tourism ventures.
- ▶ Iwi and hapu of the Central North Island were specifically guaranteed protection of their forests in the Treaty. The Crown therefore had an obligation of active protection of this property right, which included active protection of the development right of hapu and iwi to utilise their timber resources in new commercial opportunities arising from settlement, and to be protected in a sufficiency of timber resources to enable them to do so fairly.

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- ▶ The Crown neither protected nor adequately monitored the interests of Central North Island Maori in their timber lands when making purchases. This failure was in breach of the Treaty principles of partnership, active protection, and mutual benefit from settlement, and a breach of their Treaty development rights.
- ▶ The Crown's failure to actively protect iwi and hapu in participating in the developing sawmilling industry in the Central North Island was in breach of the Treaty principle of active protection.
- ▶ In regulating the milling of indigenous timber in the national interest, the Crown had an obligation to exercise its kawanatanga responsibilities with due regard for article 2 guarantees. These required adequate and meaningful consultation, minimal infringement of Treaty rights, and taking adequate account of the development interests of the communities involved. The Crown's failure to meet these requirements breached the Treaty development rights of hapu and iwi.
- ▶ In using the monitoring mechanism provided by the Maori land council (later land board) system, the Crown established controls that, in effect, applied only to Maori-owned lands. This was discriminatory and in breach of article 3.

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POWER GENERATION AND EXOTIC FORESTRY

This chapter is concerned with development opportunities that gained significance for the iwi and hapu of the Central North Island inquiry region after the Second World War. The abundant natural resources of the central North Island were identified as having the potential to make a significant contribution to national post-war development needs. In this chapter, we will look at two development opportunities in particular. The region's waterways and geothermal resources had the potential to help meet New Zealand's growing need for power generation. Also, early experiments with exotic forestry plantations on land unsuitable for farming combined with accessible and cheap power, the necessary infrastructure, and an available workforce to open a second major development opportunity.

Although the Government still supported land development schemes, where possible, it had begun to recognise that the properties retained by Maori were unlikely to support their growing population. Post-war pressures of urbanisation were obviously going to intensify. In response, the Government began to focus less on addressing the title problems Maori faced in utilising and managing their remaining tribal estate, and more on article 3 guarantees in the context of promoting equality of treatment and equal employment opportunities. By doing so, the Government aimed to achieve individual prosperity and assimilation, rather than to attempt to provide for tribally based development.

Development policies for Maori communities in the post-war period tended to be geared towards overall goals

of assimilation, equality of living and health standards, full employment, and economic growth. This took place within the context of a high level of consensus (at least until the 1980s) that a significant degree of intervention and facilitation of economic development by the State was both necessary and desirable. Governments accepted responsibilities to provide for expected national energy needs, encourage industries that utilised natural resources and contributed to the national economy, and promote regional development. This consensus was undermined in the 1970s and was gone by the mid-1980s, with rapid withdrawal from direct state involvement in economic enterprises and a significant restructuring of government.

In many cases, these new post-war development opportunities were based on resources in which Maori claimed a property right that the Government did not recognise. Maori also claimed strong customary and spiritual associations with their taonga, which included their waterways and geothermal resources as well as the highly-prized land on which exotic state forests were being planted.

The new industries had their beginnings in earlier experimentation: exotic tree species had been trialled from the 1890s, and hydro power developments had begun earlier in the twentieth century. Nonetheless, new technologies in wood processing and hydroelectric and geothermal power generation combined with greater investment capacity to substantially increase the impact of these industries – both on the environment and on local communities.

AN OVERVIEW OF THE ISSUES

The claimants' case

Claimants submitted to us that many of the waterways and geothermal resources in this region that have been utilised for power generation are in fact properties and taonga of iwi and hapu. As such, they are included within Treaty guarantees to iwi and hapu, and the Crown has an obligation of active protection towards them. In the claimants' view, this guarantee includes the Treaty rights of iwi and hapu to utilise these properties and taonga for development opportunities. They submitted that well-established Treaty principles provide for iwi and hapu to apply new technologies and knowledge for such purposes. The Crown, on the other hand, cannot use compelling national interest objectives either to ignore or to override their tino rangatiratanga and development rights in their properties and taonga. The claimants argued that the Crown took control of waterways and geothermal resources in this inquiry region and undertook major power generation projects, without taking reasonable steps to meet its obligations to actively protect the interests of iwi and hapu. The Crown's failures included: not ensuring that its impacts on resources were minimal; excluding iwi and hapu from a fair share of benefits arising from its developments; and failing to adequately compensate the tribes for the loss or infringement of their development rights in these industries.

The claimants also put it to us that the Crown had an obligation of active protection towards those iwi and hapu who were encouraged to use their lands for exotic forestry plantations. Further, a number of factors combined to make exotic forestry particularly important in this inquiry region, even where iwi and hapu no longer 'owned' the land that was used. These factors included:

- ▶ Government promises of development assistance;
- ▶ the recognised importance of the industry in helping Maori social and economic development and addressing the widespread poverty of Maori communities by the 1940s;
- ▶ the strong impact of the industry on Maori communities of this region, on their lifestyles, settlements,

and environment, and on their ability to protect their cultural preferences and live according to them; and

- ▶ the important contribution of the Maori workforce to the development of the industry.

While claimants acknowledged that they had gained significant employment benefits from the exotic forestry industry, they argued that the Crown failed to consider their development needs as communities. It failed, for example, to provide reasonable opportunities for them to gain experience, expertise, and jobs in forest management and business, which in turn restricted their ability to influence or control the way in which the industry impacted on their environment and taonga. Claimants submitted that they had paid a high price for the benefits brought by the forestry industry, and that the Crown's restructuring of the industry in the 1980s failed the test of its Treaty obligations to consult and to actively protect their social and economic interests, to their significant prejudice.

The Crown's case

The Crown acknowledges the importance of Lake Taupo as a taonga of Ngati Tuwharetoa. It accepts that geothermal resources were traditionally of importance to Maori in this inquiry region, for purposes such as cooking, bathing, and medicinal uses. The Crown also accepts that, in general, the Treaty does not require a static notion of the expression of Maori property rights. But, in its view, any Treaty right of development must co-exist with other Treaty rights and principles, and must be informed by standards of reasonableness and the balancing of interests that is required for good government. The Crown submitted that we should look for practical guidance to the Court of Appeal judgment in *Te Runanganui o Te Ika Whenua Inc v Attorney-General*, which found that there is no customary or Treaty right providing for electricity power generation.

The Crown also submitted that Treaty development rights cannot trump the Government's right to regulate resource use and management in the public interest. This is a well-established element of kawanatanga. Projects such

as the Lake Taupo control gates were clearly regarded as being in the national interest when they were constructed. The capital-intensive nature of the hydro schemes and the need for coordinated management and control also meant that hydro development on this scale could only conceivably have been undertaken by the Crown.

The Treaty and the exercise of tino rangatiratanga, the Crown stated, do not give Maori a right to generate electricity from geothermal resources. Maori do not have preferential development rights in relation to the geothermal resource, nor do they have veto rights over its use and development by non-Maori third-party users. The technology for geothermal power generation did not exist until after the Second World War. The Crown also rejected the 'expansive' right to development advocated by a number of claimants. The Crown rejected any claims that it had, or has, a positive obligation to foster Central North Island Maori in commercial development of the geothermal resource. The Crown also submitted that, as with water power, it has a legitimate role in conserving and managing the geothermal resource.

With regard to the exotic forestry industry, the Crown put it to us that development did not start until well after it had purchased the Kaingaroa lands. The Crown could not have foreseen this industry or development opportunity at the time it was making purchases. Although the available statistics are not clear, it seems that the amount of Maori land acquired specifically for exotic forestry during the twentieth century was relatively low in comparison with the area already planted in state forests. The scale of acquisition of Maori land for forestry by using compulsory powers was also very limited, although it did have significance for those involved.

The Crown submitted that it did not have a Treaty obligation to consult iwi and hapu over developing the exotic forestry industry in their rohe. Nor was there a Treaty obligation to provide guaranteed employment in the industry or the region. The Crown submitted that it did take Maori interests into account in establishing the forestry industry in the region, and provided significant benefits for Maori

communities through jobs and housing. It also assisted Maori to develop some of their remaining land for exotic forestry. The Tuwharetoa timber trusts, for example, have been successful and are a credit both to Maori and to the Crown.

The Crown acknowledged, however, that its restructuring of the industry in the 1980s had a significant impact on Maori communities in our inquiry region, and resulted in extensive dislocation and unemployment amongst those reliant on the industry. While some consultation was undertaken with Maori communities affected by the changes, it was not extensive. The Crown submitted that the restructuring has been the subject of a greater amount of evidence in the Urewera inquiry, and that the findings of that Tribunal are likely to assist understandings in this region. Research on the restructuring undertaken for this inquiry has significant limitations, the Crown submitted, and the consequences for Maori were not always negative.

Key questions

We have limited evidence for some aspects of the claims submitted to us concerning development opportunities in this Central North Island region in respect of the power generation and exotic forestry industries. However, as agreed, we are concerned with generic issues in our stage one inquiry. Having considered the evidence and submissions, we feel that we can assess a number of generic issues concerning the Crown's obligations of active protection towards iwi and hapu with regard to these opportunities, and the extent to which any such obligations were fulfilled. We agree that further detailed research is required to determine the extent of any prejudice for particular iwi and hapu.

We have identified the following key questions for consideration in this chapter:

- What Treaty obligations, if any, did the Crown have to iwi and hapu of this region in respect of development opportunities in the power generation industry, and did the Crown fulfil any such obligations?

- What Treaty obligations, if any, did the Crown have to iwi and hapu of this region in respect of development opportunities in the exotic forestry industry, and did the Crown fulfil any such obligations?

POWER GENERATION

KEY QUESTION: WHAT TREATY OBLIGATIONS, IF ANY, DID THE CROWN HAVE TO IWI AND HAPU OF THIS REGION IN RESPECT OF DEVELOPMENT OPPORTUNITIES IN THE POWER GENERATION INDUSTRY, AND DID THE CROWN FULFIL ANY SUCH OBLIGATIONS?

The claimants' case

The claimants submitted to us that the natural waterways and geothermal resources of this region are properties, and in many cases taonga of considerable value. They are among the properties and taonga guaranteed by the Treaty. As such, the Crown's obligation of active protection extends to protecting a development right in them. Claimants submitted that their Treaty interest is not limited to 'traditional' or customary uses. Taking advantage of technological developments that enable effective utilisation of the waterways and geothermal resource for power generation is simply part of the right to develop property.¹ Even where the Crown has passed legislation appropriating legal control and regulation of these resources, customary interests still remain that have not been extinguished.²

Similarly, while the sale of nearby land and other consequences of settlement may have reduced the exclusive interest of Maori in these resources, a significant Maori interest remains. In development terms, it was, therefore, a breach of the Crown's responsibility of active protection and of its fiduciary duty if it failed to take reasonable steps to consider and provide for Maori development rights in these resources. It was also a breach of Treaty protections

to usurp the right to undertake development, and to gain the benefits from such development, via controls that denied Maori the same or an exclusive right to benefit from the development of their resource.³ Where the Crown has been obliged to infringe on Maori development interests in the national interest, the impacts are required to be as minimal as possible. The Crown also had to pay compensation in such instances, as outlined in the Tribunal's *Te Ika Whenua Rivers Report*.⁴

The Crown could not, it was argued, use the national interest to justify disregarding or overriding Maori development interests in their taonga and properties. To do so would be to ignore the essential nature of the Treaty partnership, which is the undertaking of a common endeavour for the benefit of both parties.⁵ The national interest does not give the Crown unfettered rights to exercise its kawanatanga powers. Instead, as has been found in previous Tribunal reports, the exercise of kawanatanga is qualified by the Crown's obligation to guarantee tino rangatiratanga. In the claimants' view, the Crown cannot claim that it has a duty of governance under article 1 of the Treaty to control and manage natural resources that overrides the rights of rangatiratanga guaranteed by article 2. Maori rangatiratanga is not to be qualified by a balancing of interests; rather, the Crown's governance is qualified by the promise to protect and guarantee Maori rangatiratanga over their taonga for so long as Maori wish to retain it.⁶

Hydro power generation development opportunities

With regard to the use of waterways for development purposes, a number of claimants adopted the general arguments submitted by Karen Feint for Ngati Tuwharetoa. Ms Feint submitted that Ngati Tuwharetoa claim possession of the lakes and rivers of their region as taonga protected by article 2 guarantees. This possession includes the water resource under Maori tikanga, not merely the beds of lakes and rivers. The Treaty rights in this resource extend to a right to the use of water and to control access to the water. These rights of use and control also apply to any development that makes use of the water resource, including

hydroelectric power.⁷ This is not a claim of a customary right to generate hydroelectricity per se, but is based on the principle that proprietary rights in a water resource must include the right to develop that resource. As was noted in the *Te Ika Whenua Rivers Report*, the Treaty right includes not merely a ‘customary use right’ but full proprietary rights that take into account the rangatiratanga or authority exercised by hapu over their territory.⁸

Claimants referred to previous Tribunal reports, in particular the *Whanganui River Report* and *Te Ika Whenua Rivers Report*, in support of their claim of development rights for taonga that are waterways. For example, Ms Feint noted that the *Whanganui River Report* found that Maori rights to water were a ‘valuable tradable commodity’. She asked this Tribunal to adopt the finding of that report that:

just rights and property in the river must include the right to licence others to use the river water. The right to develop and exploit a water resource is conceptually no different from a right to develop and exploit the resources on dry land.

If one owns a resource, it is only natural to assume that one can profit from that ownership. That is the way with property.⁹

Counsel therefore sought confirmation that Treaty rights with respect to water include the right to license others to use the waters, and that negotiations are required to put such licensing into effect.¹⁰

Ms Feint and other counsel before us also referred to the Ika Whenua Rivers Tribunal’s finding that there was a very limited scope in the Court of Appeal’s *Te Runanganui o Te Ika Whenua Inc v Attorney-General* decision. The court was assessing whether electricity generation assets (dams) could be sold, and not the nature or extent of Te Ika Whenua’s rights in their rivers or water. In the Tribunal’s finding, the Ika Whenua people did have Treaty interests in their rivers as taonga, including a development right to generate electricity.¹¹

Ms Feint also noted evidence from Chris Winitana that Ngati Tuwharetoa regard their rights in water as coming

from the creation of the taonga for their benefit and by their tupuna. This benefit includes a right to develop the resource. Mr Winitana gave evidence that any ‘straight-jacketing’ of such rights to what were perceived as traditional usages would be hotly contested, as the tribe’s traditional knowledge base had always been adjusted and tested over time, incorporating new knowledge.¹²

A number of claimants supported the claim presented by Ngati Tuwharetoa over the use of Lake Taupo in the Waikato River hydro scheme, as an example of the Crown’s failure to recognise and give practical effect to Maori development rights in their waterways. Counsel for Ngati Tuwharetoa submitted that the Crown’s actions and legislation, including the acquisition of the lake bed and the enactment of legislative powers to control use of the water resource for electricity, all failed to take account of Ngati Tuwharetoa’s interests in their taonga, including their development interest.

It was submitted that the Waikato River hydro scheme is the most intensive use of water power in New Zealand, and that it uses Lake Taupo as a massive reservoir. The control gates across the outlet of Lake Taupo act as a tap, which controls the water flowing through the seven power stations situated down river.¹³ The Crown had already begun legislating for control of hydroelectric power development from the late nineteenth century, with a range of laws that enabled it to investigate waterways for hydro power potential and granted the State the sole right to use water for hydro power generation. The Crown then began a series of investigations, during which it was recognised that Lake Taupo was a valuable potential resource for hydro power generation.¹⁴

The claimants submitted that the Crown had a duty to take reasonable steps to protect Treaty interests in the hydro development involving the lake. These steps included obtaining Ngati Tuwharetoa’s agreement to the use of their taonga for such a major infrastructural development, and exploring ways in which their Treaty development interests could be provided for. Evidence indicates that Ngati Tuwharetoa were willing to negotiate. Innovative solutions, such as some

kind of joint-venture arrangement, could have been found that would have both protected Ngati Tuwharetoa interests as far as possible, and fairly compensated them for the use of their taonga and for any harm suffered.¹⁵ However, Ngati Tuwharetoa do not receive any benefit from the profits of the Waikato River hydro scheme.¹⁶ When the lake bed was eventually returned, this issue was not addressed. The continuing operation of the hydro schemes even after the lake and river beds were returned indicates that the acquisition of the beds was never essential for hydro power generation.¹⁷

The claimants asked this Tribunal to consider that Treaty rights with respect to water include the right to license others to use the waters, and that negotiations are required to put such licensing into effect.¹⁸ It was noted that the Crown has received significant profits from the Waikato River hydro scheme from the outset, and that the commercialisation of the electricity market has resulted in third parties generating significant profits from the use of tribal taonga.¹⁹

Geothermal power generation development opportunities

The claimants submitted to us that both geothermal surface manifestations and the whole subterranean geothermal resource were taonga protected by the Treaty. A right to development of this resource is therefore inherent in the Treaty right to exercise rangatiratanga over the geothermal resource. The claimants agree that the technology to generate electricity from geothermal resources did not exist until after the Second World War. However, they claim that iwi and hapu of the region had retained a significant development right in the geothermal resource and that this required active Crown protection. This included a share in the control of and proceeds from the use of the geothermal resources of this inquiry region for power generation.²⁰

Treaty rights in the geothermal taonga of this region, they argued, were not limited to 'traditional' uses or surface manifestations. Counsel for Ngati Whakaue referred to what are considered to be serious limitations in a recent 1990 agreement with the Crown over the remission of rental payments for the use of geothermal energy in the

Ohinemutu area, as part of the Crown's regulation of the resource under the Geothermal Energy Act 1953. This agreement was described as reflecting some important concessions in recognising the relationship between Ngati Whakaue and their geothermal resource at Ohinemutu, but it was also limited in a number of important respects. It failed to extend recognition of Ngati Whakaue interests in their geothermal resource beyond Ohinemutu and, in terms of development opportunities, it was limited to use of the resource for traditional purposes. The agreement failed to recognise any possible development interest in the use of the resource for purposes such as geothermal power.²¹

Claimants put it to us that, in practice, the Crown has failed to actively protect iwi and hapu of this region in opportunities to develop their geothermal resource for power generation purposes. This includes a failure of active protection in ensuring that the tribes retained adequate geothermal lands for their present and future needs. As a result, some Maori communities no longer have the chance to participate in more recent development opportunities in the power generation industry. Examples include the alienation of the Wairakei field and the loss of the Tokaanu geothermal area as a result of Crown actions or omissions.²²

Claimants also submitted that the Crown has legislated to control and regulate the geothermal resource, including the use of the resource for power generation purposes, without taking reasonable steps to recognise and protect Maori interests in it. Such interests include a right to develop it, or to profit from its development. As a result, the resource has been used without sufficient safeguards for Maori future development opportunities. Instead, development has been encouraged and delegated to outside parties without adequate regard for iwi and hapu interests in the resource.

Claimants submitted that, by the time technology was developed to enable power generation from geothermal resources in the 1940s, the Crown was, in fact, amenable to considering joint-enterprise and private ventures that used the resource, especially for industrial development.

The Government, for example, encouraged companies such as the Tasman Pulp and Paper Company to develop the geothermal resource for power generation, for use in the exotic forestry industry. However, the Crown failed to consider Maori interests in the resource when it promoted such private development opportunities. For example, the Ngati Rangitihi claimants allege that the right to extract steam from the Onepu geothermal area was given over by the Crown to Tasman Pulp and Paper in 1952 without regard for their interests.²³ A number of submissions also allege that the Crown conducted explorations and investigations of potential sites for geothermal power generation without adequately consulting Maori or considering their development interests, for example the Ohaaki geothermal system and the field later developed by the Tuaropaki Trust.

In more recent times, the Crown has taken more note of Maori interests in developing geothermal stations. The Ngati Tahu submissions acknowledged that the Crown undertook to lease, rather than take, the Maori land required for the Ohaaki power station, as a result of general Maori opposition to continued takings of Maori land for public purposes in the 1970s. However, the Crown failed to adequately protect Maori development interests when it entered into leases for this land. The Maori Trustee had responsibility for leasing the land, as a result of rates pressures. The Maori Land Court later criticised the trustee for its leases at this time, saying they lacked adequate safeguards to protect the owners' interests. The Maori Trustee leased the land to the Crown and enabled the Crown to conduct tests to assess the geothermal field under the land for its suitability for power generation. A trust, representing owners, then entered into a lease with the Crown to enable rental of the land for a power station, which was built in the 1980s. Ngati Tahu claim that they entered negotiations over the lease in order to keep ownership of the land, and for the opportunity to participate in the development of the thermal resource beneath it. However, they were placed in a difficult position in the negotiations, because, if they refused to lease, the Crown

still had the power to take the land and could also insist on its legal rights to take and use the geothermal energy of the field whether the land was alienated or not. In 1999, the Crown sold its interest in the lease to Contact Energy without adequate consultation with the owners.²⁴

The claimants submitted that, in the case of the Tuaropaki Trust, the Crown failed in its obligations of active protection of their development right to participate in using the geothermal resource for power generation. They submitted that the trust acted on behalf of owners and their hapu to exercise their rights to develop their geothermal resource under their land as they saw fit. However, they claim that, instead of actively protecting the trust's efforts to develop the Mokai geothermal power station, the Crown obstructed those efforts. They claim that the Crown assumed that the trust was not capable of developing the geothermal resource, and acted instead to have the field developed by outside interests. They allege that, in 1982, the Crown trespassed on their land and drilled exploratory wells to investigate the resource under their land. The Crown then considered ways to best utilise the resource, including calling for tenders, without securing agreement from the trust, on behalf of the owners of the land, or taking account of their development wishes.²⁵

They claim the Crown then continued to actively obstruct the trust's own efforts to develop the field, by obstructing its application for water rights, opposing its resource consent application, and threatening to take land surrounding the geothermal wells. The trust was obliged to purchase, at considerable cost, the information the Crown had gathered on the resource beneath its lands. The Crown, through the Electricity Corporation of New Zealand Limited (ECNZ), also acquired some land above the field in order to gain a legal interest in the area. When ECNZ was restructured, and even although the trust was in negotiations to acquire that land, the Crown allowed the land to go to Contact Energy. The claimants submitted that the entire history of geothermal power development, up until and including the restructuring of the industry in the 1990s, reflects the Crown's failures to recognise the

rights of tangata whenua as owners of the resource and to actively protect their development rights in it.²⁶

The claimants acknowledge that their Mokai geothermal power station is now successful, but they feel that they have achieved this in spite of the Crown's lack of active protection and obstructive attitude. They also feel that the Government has not adapted trust entities sufficiently to reflect the owners' preference that hapu should control and develop important resources and benefit from them, rather than whoever are now regarded as individual legal owners. There are many more hapu members with rights in the geothermal resource than are now represented by the Tuaropaki Trust. The trust tries to deal with this issue, but it is constrained in what it can do by law.²⁷

It was submitted that the Mokai power station illustrates the potential Maori can achieve in developing their geothermal resource. However, this stands in contrast to the difficulties Maori of this inquiry region continue to face in participating in the development of that resource. These difficulties are, in the claimants' view, a result of the Crown's failures of active protection. The Crown has usurped their property rights and failed to respect its Treaty obligation to enable them to use their resource for development opportunities.²⁸ This failure includes prior development, for example of the Wairakei field, that has hindered the ability of Maori to develop geothermal fields. In addition, while the Tokaanu field has not been developed, the Tokaanu power station might now hinder any future development possibility because of the risk caused by subsidence.²⁹

With the development of the Mokai field, the hapu had not only retained lands that enabled them to develop the field, but were also in a position to be able to develop it as they chose and for their own interests. This enabled them to exert a significant level of control over that development to meet wider community objectives, including social, cultural, and environmental objectives as well as economic ones. They were able to implement strict environmental controls that protect the taonga and preserve surface manifestations and sites of community importance. Claimants contrasted this with what they described as the more

destructive 'mining' of geothermal fields, at Wairakei for example, and the current resource management regime, which may undermine their control of the development of their field and their ability to protect it.³⁰

The Crown's case

The Crown acknowledges the importance of Lake Taupo as a taonga of Ngati Tuwharetoa.³¹ It accepts that geothermal resources were traditionally of importance to Maori in this inquiry region for cooking, bathing, and medicinal purposes.³² However, the Crown does not accept that the Ngatoroirangi tradition reflecting the interlinking of the geothermal resource as a whole is sufficient ground for a valid Treaty claim to Maori ownership of the subterranean resource.³³ The Crown submitted that the nature of the geothermal resource is similar to water, and fundamentally different from a river resource. Therefore, the extensive claimant reference to the findings of the *Whanganui River Report* does not apply in the case of the geothermal resource.³⁴ The Crown accepts that it has some Treaty responsibilities to protect customary use of geothermal resources by Maori in the Central North Island.³⁵

In terms of any Treaty development rights, the Crown accepts that, in general, the Treaty does not require a static notion of the expression of Maori property rights.³⁶ However, any right of development must co-exist with other rights and other principles of the Treaty. As such, it must also be compatible with basic criteria such as standards of reasonableness and the need for the Crown to balance interests.³⁷ In seeking some delineation of the extent of the Treaty right of development, for its practical guidance, the Crown submitted that the view of the Court of Appeal in *Te Runanganui o Te Ika Whenua Inc v Attorney-General* is correct. That is:

However liberally Maori customary title and Treaty rights might be construed, they were never conceived as including the right to generate electricity by harnessing water power . . . The Treaty of Waitangi is to be construed as a living document,

but even so it could not sensibly be regarded today as meant to safeguard rights to generate electricity.³⁸

The Crown, therefore, does not accept that any Treaty right in waterways and geothermal resources confers a development right to generate electricity from them. The Crown also submitted that development rights do not trump the Government's right to regulate resource use and management in the public interest. The ability to regulate property rights and other interests is a well-established element of *kawanatanga*.³⁹

Hydro power generation

Regarding the use of the water resource of this inquiry region for hydroelectricity generation purposes, the Crown submitted that the provision of a stable supply of electricity is a vital component of the economic and social life of all New Zealanders, including Maori. The capital-intensive nature of the schemes, and the need for coordinated management and control, meant that hydro development on this scale could only conceivably be undertaken by the Crown. The balancing of the various interests involved in the construction of the hydro power stations included consideration not only of Maori interests but also of the interests of the country as a whole in the development of national infrastructure.⁴⁰

The Crown submitted that the Lake Taupo control gates, and indeed the Waikato River hydro scheme as a whole, are a large and complex infrastructure development which is of considerable national importance. This was accepted by counsel for Ngati Tuwharetoa. This infrastructure was planned and built to meet pressing demands in the 1940s and 1950s, first for electricity for the war effort and later for national development in the post-war years. This was a significant and compelling national objective which justified, in Treaty terms, the infringement of Ngati Tuwharetoa's interests in the water resources of the region. The development was undertaken to meet wider national needs and concerns and, as such, was a proper use of the Crown's *kawanatanga* power. The Crown referred to

Canadian jurisprudence, which has found that the development of hydroelectric power is a 'substantial and compelling objective which justifies infringing constitutional entrenched original rights in the Canadian context'.⁴¹ The Crown submitted that it had clear *kawanatanga* rights to develop the hydroelectric infrastructure in the Lake Taupo and Waikato River catchments as a matter of compelling national interest. The more critical issue, in its view, is how the Crown dealt with Ngati Tuwharetoa in relation to the development of this infrastructure.⁴²

In practical terms, the Crown submitted that it reserved to itself, in the national interest, the general *kawanatanga* right to generate electricity from water in 1903. It also began surveying waterways for possible hydroelectric power generation purposes from this time. However, it is not possible to be sure, from the evidence available, whether those surveys included Lake Taupo. The Crown rejects any claims that it acted in bad faith in not raising the issue of hydro generation during the 1926 Lake Taupo negotiations. The Crown had already, in 1903, reserved generation rights to itself, so there was no need to discuss any legal rights. The Crown had the sole statutory right to generate electricity from water resources, and the legal situation was and is that water is not capable of legal ownership.

The Crown submitted that there are no records of the detail of what was discussed at the negotiations in 1926, and that it is not known what Ngati Tuwharetoa's understandings were of the Crown's legal rights to generate electricity. However, it cannot be certain that Ngati Tuwharetoa were unaware of the Crown's rights or did not accept them at the time these negotiations took place. The Waikato River was already being used for electricity generation: the first dam on the river, the Horahora dam, was built in 1913, and another, the Arapuni dam, was under construction. The Taupo control gates, which were intended to manage the lake waters for more efficient power generation, were built in 1940 and 1941. It is not clear why Ngati Tuwharetoa did not raise their apparent concerns about the use of the lake for hydro purposes until 1944, with the letter of Hoani Te Heuheu referred to by claimant counsel. Te Heuheu's

statement in that letter, that using the lake's waters for electricity generation opened new questions and required fresh negotiations with Ngati Tuwharetoa, is not the case at law and was not the case at the time of the 1926 agreement.⁴³

The Crown submitted that its intentions for hydro generation concerning the lake were unclear, in any case, in 1926. The necessary technology did not exist at this time to contemplate building control gates on Lake Taupo. This was a significant engineering feat, not undertaken until the 1940s. The Crown also referred to the findings of the Court of Appeal in *Te Runanganui o Te Ika Whenua Inc v Attorney-General*, in rejecting the contention that the Crown knew it should have spoken to Ngati Tuwharetoa about hydroelectricity generation but deliberately chose not to do so.⁴⁴

The Crown also denied the claim that the last thing on the Government's mind, as it rapidly built and implemented the Taupo control gates, was discussing the project with Ngati Tuwharetoa. Counsel submitted that the evidence indicates there was dialogue with Ngati Tuwharetoa before the installation of the gates. Tony Walzl, for example, acknowledged in cross-examination that, at a meeting in 1939 and in surrounding correspondence, Ngati Tuwharetoa 'were clearly advised of a proposal to regulate water levels on the Lake'.⁴⁵ With regard to minimal infringement, the Crown submitted that it is only required to make a decision that is reasonable in all the circumstances, taking into account the impact and taking reasonable steps to limit adverse impact.⁴⁶

Geothermal power generation

The Crown rejects claims that the Treaty, including the guarantee of tino rangatiratanga, confers a right on Maori to generate power from geothermal resources.⁴⁷ The Crown noted that it has rejected the findings of the Tribunal's *Petroleum Report*, which found that there was an ongoing Treaty interest in the petroleum resource after it was nationalised. The Crown also rejects the notions of Maori having preferential development rights in relation to the geothermal resource or having veto rights over the

use and development of the resource by non-Maori third-party users.⁴⁸ The Crown submitted that technology did not exist until after the Second World War to generate electricity from geothermal resources. The Crown rejects the 'expansive' right to development advocated by a number of claimants. The Treaty does not, in its view, give Maori a right to generate electricity from geothermal resources, and it cited *Te Runanganui o Te Ika Whenua Inc v Attorney-General* in support of this.⁴⁹

The Crown submitted that little evidence has been presented to this Tribunal on the issue of whether it has provided development assistance to iwi and hapu of this region in relation to geothermal resources. The Crown does not accept that it has a positive obligation to foster Maori commercial development of the geothermal resource. The Crown hopes that settlement redress, following a negotiated settlement, will provide greater opportunity for iwi and hapu to commercially develop geothermal resources, should they consider that appropriate.⁵⁰

The Tribunal's analysis

We agree that we have limited evidence on the detail of many issues submitted before us concerning power generation. Some of these matters, such as the claimants' rights in waterways, the water resource, and the geothermal resource, are considered in more detail in part v of our report. In particular, in chapter 18 we consider the detail of the 1926 negotiations over Lake Taupo, whether the Crown was under an obligation to negotiate over hydroelectricity, and the Treaty-compliance of the resultant agreement and its enacting legislation. The issue of whether Maori have a proprietary interest in their geothermal taonga, and other pertinent issues with regard to Maori Treaty rights in respect of geothermal resources, are addressed in detail in chapter 20. We also received extensive claims regarding the impacts (environmental and otherwise) of the Crown's development of these resources for power generation purposes. These issues are also considered further in part v of this report. In this chapter, we focus on issues

of development rights in these resources and any Crown obligations of active protection of Maori in the exercise of those rights.

Background

It is clear, from the evidence available to us, that the abundant natural resources of this region made it particularly suitable for the massive development of power generation projects following the Second World War. It was recognised that national economic development and a growing population required the development and provision of reasonably priced electricity in reliable and sufficient quantities. This included power for development opportunities in our inquiry region, such as the exotic forestry industry, and for national requirements. New forms of regional development were also a priority. It will be recalled, from chapter 13, that governments of this era wanted to foster the development of Maori as a people, in particular through farm development but also through equality of opportunities and job creation. Hydro development contributed to all these aims and built on development experience from the late nineteenth and early twentieth centuries. Geothermal power generation opportunities, however, were only able to be realised with the arrival of new technologies and knowledge after the war. Central North Island Maori participated as workers constructing these power projects.

There was nothing in the common law to prevent the involvement of Maori or other private interests in the entrepreneurial development of power generation that utilised these natural resources, especially where they were associated with land ownership. In fact, some early gas and hydro power schemes in New Zealand were developed by private interests. However, given the perceived national importance of power generation, especially for national infrastructure purposes, and the high cost of development, the Crown tended increasingly to take the lead in power generation development. The Crown reserved to itself legal powers of control and regulation of resources for that purpose. The central control and general benefit of power generation was also reflected, at a regional level, by increasing

local body and supply authority control of regional power generation. The Crown delegated significant powers of control and regulation to these authorities, and the profits they made were regarded as being of general benefit to local communities.

Hydro power generation already had a long history by the 1940s. Electricity historian Neil Rennie has explained how, from the mid-nineteenth century, technological developments enabled the centuries-old concept of the water wheel to be transformed into the water turbine, a more efficient source of power that opened the way for the establishment of hydro power as an efficient, affordable, and practical source of power for industrial and commercial purposes in competition with steam, gas, and coal.⁵¹ The natural waterways of New Zealand were identified as a resource with significant potential to be developed for hydro power generation. Private enterprise was prominent in the early development of the resource. One of the earliest ventures in commercial use of hydro power generation in New Zealand was undertaken on the South Island's West Coast by the Power and Lighting Company, which built and operated a hydroelectric power station on the banks of the Inangahua River to provide electricity to paying subscribers. In 1888, Reefton famously became the first town in the southern hemisphere to have a public electricity supply.⁵²

The potential for hydro development was quickly recognised by the Crown. It also saw the need to ensure that such power generation was readily and equitably available to assist development and economic growth. It was recognised that the effective provision of such power would require effective planning and investment, and this was seen as part of the Crown's responsibility for a young and developing economy. The Crown, therefore, began to assert powers to control both the industry and the natural resources it was likely to require. It then commenced the development of the power generation infrastructure it had identified as necessary for national economic development.

Based on common law assumptions that the water resource was not capable of being owned (until it had been

captured) but could be regulated, a variety of legislative provisions were passed in the late nineteenth and early twentieth centuries that concerned electricity supply in general and hydro power generation in particular. These included the Electrical Motive Power Act 1896 and the Water-Power Act 1903, which strengthened Government control of the developing industry and vested in the Crown the sole right to use waters for electrical purposes. This was followed by provisions such as the Public Works Act 1928, which also reserved to the Crown the exclusive right to generate electricity from water, and the Water and Soil Conservation Act 1967, which reserved to the Crown the sole rights to dam any river or stream, and to divert, discharge, or use any natural water.

In terms of a Maori property right, however, matters were not as clear-cut as this legislative history appears to suggest. The key parliamentary enactment was the Water-Power Act of 1903, in section 2(1) of which the Crown vested in itself the 'sole right to use water in lakes, falls, rivers, or streams for the purpose of generating or storing electricity or other power'. In his report on inland waterways, Ben White quotes the member of Parliament for Northern Maori, Hone Heke, who objected to this nationalisation of the right to use water for generating power. He told the House:

It would not be proper for a Bill like this to take away from Maori owners the use of water-power on their lands. There is no telling what use even the Maoris may desire to put such water-power for themselves . . . the sweeping provision of subsection (1) is going too far. . . It is an attempt to take away active [*sic*: Native] rights.⁵³

The Tribunal, in its *Te Ika Whenua Rivers Report*, noted that the Minister for Public Works replied to Heke, assuring him that any 'vested interests held by the Natives or others would be preserved, and if required under subsection (2) would have to be paid for'.⁵⁴ This was apparently a reference to the qualifying clause in the Act, that the Crown's right would be 'subject to any rights lawfully held'.⁵⁵

Section 2(2) of the Act also provided that the Government had to 'acquire . . . any [such] existing rights . . . for utilising water for the generation or storage of electrical power'. The Water-Power Act was repealed in 1905, but these particular provisions were reproduced in section 267 of the Public Works Act of that year. When this Act was in turn repealed in 1908, its successor continued to state, in section 267, that the Crown's right to use water for electricity was subject to any rights lawfully held, and that such rights had to be acquired by the Crown. The Public Works Act 1928 repealed the 1908 Act but, again, replicated these provisions in section 306.

By the 1903 Act and its immediate successors, therefore, the Crown vested a qualified right in itself. Where other parties had a pre-existing right to use water for either generation or storage, it had to be acquired (and paid for). The Government did not necessarily accept Heke's position that Maori had such rights, but it acknowledged that, if they did, then the Crown would have to acquire and pay for them before it could put waterways to such a use. This was not an academic issue. The Maori community at Parihaka, for example, was generating its own electricity by 1902, from 'icy cold mountain water pumped half a mile by hydraulic ram'.⁵⁶ But the question, in Treaty terms, is whether the right preserved by the Act applied only to Maori who, like the Parihaka community, had already developed their use of water for that purpose. In our view, the exchange between the member for Northern Maori and the Minister for Public Works cannot be interpreted so narrowly. Heke spoke of a potential right – the possibility of using water to generate electricity in the future – and it was that which the Minister appeared to promise was preserved to Maori under the Act, whether or not the legislation in fact did so. What had been preserved in law, and whether Maori had a right that could be proven to the satisfaction of the Crown, remained to be tested in 1903.

In our inquiry region, the issue became caught up with the ownership of lakes, as we will explore in chapter 18. Here, we note that, in terms of the intersection between Maori customary rights and British law, the matter was not

sufficiently settled for the Government to be sure of itself. In brief, the Attorney-General, Sir Francis Bell, advised the Government in 1922 that, if the Native Land Court vested ownership of the Rotorua lakebeds in Te Arawa, then this would raise a 'very serious difficulty in the matter of fishing and possibly the user of water for electric light and other purposes.'⁵⁷ This was an important doubt concerning the Crown's 'sole' right to generate electricity under the 1903 Act and its successors. To put the matter beyond doubt, therefore, the Government felt it necessary to pass legislation which, in giving effect to a negotiated agreement with Te Arawa, declared that 'the right to use the waters of the said lakes' was 'the property of the Crown, freed and discharged from the Native customary title, if any.'⁵⁸ The basis of this agreement, in the view of the Attorney-General, was that 'we [the Government] did not admit you [Te Arawa] had anything to sell and therefore we had nothing to buy.'⁵⁹

We did not hear evidence on the Rotorua lakes negotiations of 1922. We note, however, that the Crown felt it necessary, in 1926, to make the same legislative enactment with regard to Lake Taupo, its tributary rivers, and the Waikato River. Here, too, the Crown declared the right to use these waters 'to be the property of the Crown, freed and discharged from the Native customary title (if any)', adding, 'or any other Native freehold title.'⁶⁰ The Native Land Amendment and Native Land Claims Adjustment Act 1926 stated that it gave effect to an agreement between Maori and the Crown. As we will see in chapter 18, however, the right to use the Taupo waters for electricity generation or storage (or for any purpose other than fishing) was not in fact negotiated or agreed between the parties. Instead, it appears to have been inserted in the Act without the tribe's consent. We discuss the detailed evidence for that conclusion in chapter 18. The Crown began to actively control Lake Taupo for hydroelectricity purposes in 1941, and from 1944 to 1946 Ngati Tuwharetoa objected that such use of their taonga for hydroelectricity required fresh negotiations, agreement, and payment. The Government promised to look into their claim that this matter had not

been settled in 1926, but, as far as we are aware, never did so. It certainly never resolved the matter with the tribe.⁶¹

From 1903 to 1928, therefore, the Government passed four statutes that stated that the Crown's 'sole' right was subject to any other rights lawfully held, and that the Government had to acquire such rights before it could exercise its own. Further, it recognised that Maori property rights might have included the right to use the water of their lakes and rivers to generate electricity or to store it for that purpose. It did so on the advice of the Attorney-General. Such rights – if they could be shown to have existed – were preserved at law by the 1903 Act and its successors. And, without compromising the possibility that Maori might not in fact own such rights, the Government negotiated with them and then enacted legislation specifically to vest those rights in itself for the Rotorua and Taupo waters in the 1920s.⁶² In both pieces of legislation, it claimed that it was giving effect to negotiated agreements. We have not examined this question for Rotorua, but (as we will see in chapter 18) the right to use the Taupo waters for hydroelectric purposes was not, in fact, agreed to by Maori right-holders in 1926. Nor was it paid for. Thus, the Government acquired this right, as it was authorised to do under the 1903 Act, but without consent or payment.

In terms of Maori views, therefore, both Hone Heke (in Parliament in 1903) and Ngati Tuwharetoa (to the Government from 1944 to 1946) argued that their rights in lands and waters included the right to control, develop, or profit from them for hydroelectricity. This was indeed, in our view, based on a developable property right guaranteed by the Treaty of Waitangi. From 1903 to 1928, governments were ambivalent as to whether they accepted the existence of such a right. Their actions, on the other hand, sent a clear signal that Central North Island Maori had such a right and that it had to be transferred to the Crown by agreement, given effect by legislation.

In practical terms, the Crown increasingly exercised control over the distribution and supply of electricity, as well as over its generation. This did not entirely remove, but did constrain, private participation in the developing hydro



Power station at Okere Falls on the Kaituna River, photographed by William Archer Price about 1908. This station was an early hydroelectric power development, driven by tourist pressure on facilities at Rotorua township. It was superseded by the Arapuni station on the Waikato River in the 1930s.

generation industry, as participation required approval and delegation of powers from the Crown. Another important constraint to private participation was the significant capital investment required to develop hydro power infrastructure. This, in turn, tended to leave the Crown as the major investor in the industry.

Within this context, there was some early development of hydro power generation in our inquiry region before the 1940s. This was undertaken by the Crown, and also by local authorities with delegated powers to generate and supply hydro power for local purposes. Initially, development was led by local authorities responding to local power supply requirements, as settlement increased and economic opportunities were recognised and developed. For example, power supplies to Rotorua township, utilising Okere Falls from 1901, were linked to pressure from tourism, because the town's water and sewage systems could not cope with the sudden expansion in domestic tourism following the opening of the railway to Rotorua in 1894. The benefits were seen not only in immediate improvements to the town's sanitation and water supplies, but also in the early provision of electric lighting to some of the main tourist amenities, including the railway station, the Government baths, and the sanatorium grounds, while electric lighting was still a novelty.⁶³ As well as adding to the tourist attractions and facilities of Rotorua township, the Okere Falls hydroelectric system proved profitable from the beginning, and it continued to generate profits even as rapid increases in demand required extra capacity.⁶⁴

We also received evidence concerning the Taupo borough authority's construction and operation of the Hinemaiaia hydro station (1952), and the later stations Hinemaiaia B (1966) and C (1981), to provide the capacity to meet increasing power demand. The increase in power capacity for the Taupo district helped to further stimulate economic growth. For example, a good supply of reasonably-priced electricity enabled farmers to finally overcome a remaining barrier to farm development on the pumice lands in the north of the district, because they were able to make up for a scarcity of surface water for stock with electrically-powered deep well bores. The extension of electricity supply to areas around Lake Taupo from the 1950s enabled further tourism development at lakeside areas such as Kinloch Bay, where resorts and summer holiday homes with power reticulation were built.⁶⁵

The success of local hydroelectric power generation systems such as Okere Falls helped to encourage the Government to embark on investigations and planning for building a national hydro power generation infrastructure. This required active Government participation because of the need for centralised planning and substantial capital. The Government began investigating natural waterways for their hydro generation potential, including those in the central North Island. Construction activity began in 1914, with the experimental Lake Coleridge hydro station in Canterbury. Its immediate success encouraged the Government to press ahead with its plans, accepting that the State was the only agency with the resources necessary to invest in the hydro dams required.⁶⁶ This work began in earnest following the First World War, although it was interrupted by economic recession in the 1930s and by shortages of materials and funds during the Second World War.⁶⁷

In the post-war period, it was recognised that a national hydro power generation infrastructure had become even more necessary to meet expected demand.⁶⁸ Demand for electricity outstripped supply for nearly two decades following the Second World War, as the Government embarked on an extensive plan to expand the national electricity supply infrastructure. The substantial water resources of this inquiry region were a key part of this national plan. New technological and industrial advances enabled more extensive and effective hydro power generation, and thus facilitated major hydro development and the production of cheap and reliable electricity. This, in turn, supported what were perceived as nationally important industries in the Central North Island, including the exotic wood processing industry and farm production.⁶⁹ We accept that these advances were important both for the nation and for our inquiry region.

The post-war expansion of hydro power generation in this region required effective and extensive utilisation and manipulation of the largest lakes and rivers in the North Island. Developments included the Tongariro



The newly created Kinloch Marina, Western Bay, Lake Taupo, 1962. Such tourism developments were facilitated by the extension of hydroelectric power supply in the 1950s

power project with its diversions of the headwaters of major rivers, the Lake Taupo control gates, and a series of hydro dams along the Waikato River. The work involved the utilisation of other natural resources, such as gravel for associated construction projects. From the 1940s until the late 1960s, the development and construction of hydro dams and associated infrastructure, including roads, created considerable employment opportunities in the region. Between 1947 and 1964, for example, seven hydro dams were commissioned along the Waikato River.⁷⁰ Of these, the Ohakuri and Aratiatia dams are located within the Central North Island inquiry region. The large gravity dam at Ohakuri created Lake Ohakuri, the largest artificial lake in the North Island.⁷¹ It also flooded much of the geothermal field at Orakei Korako.

As noted previously, the geothermal resources of this inquiry region had long been recognised for their role in development opportunities such as tourism. It was now recognised that geothermal water or steam might also be harnessed for power generation, as pressure was released when the water or steam reached the surface. The



Ohakuri dam and powerhouse

technology to use geothermal energy to generate electric power had been developed by Italian engineers and scientists from the 1890s onwards. New Zealand engineers visited Italy to observe these facilities in the 1920s and 1930s, but they were initially cautious and directed their attention towards hydroelectric power. Public interest, and a series of droughts that resulted in power shortages in 1946 and 1947, persuaded the Government to consider the potential for geothermal electricity as part of its plan to expand power generation. New Zealand engineers went to Italy again, and followed up their visit by surveying potential geothermal resources in New Zealand and beginning test drilling at the Wairakei field.⁷²

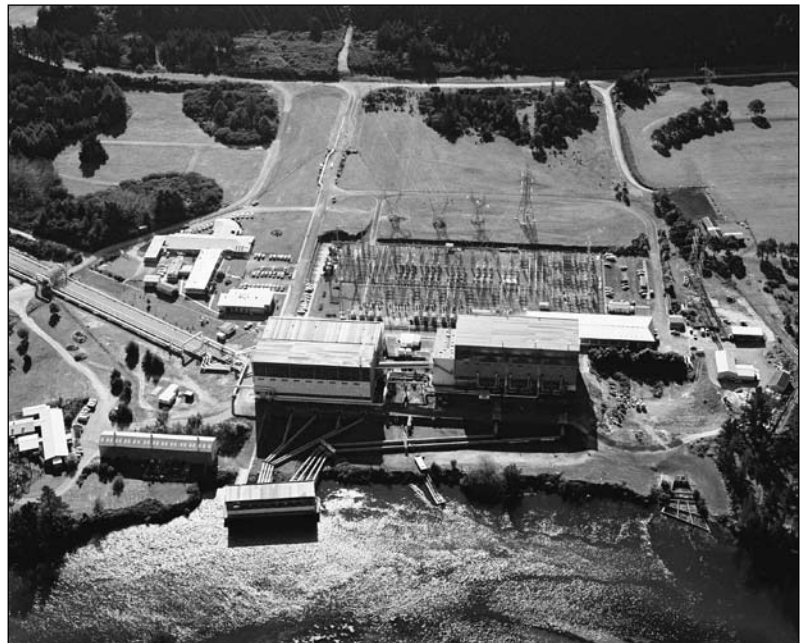
The potential of Wairakei was confirmed in the 1950s, when testing revealed superheated water, in good quantities, with temperatures around 480°C. At the time, the generation of geothermal electric power was regarded as not only contributing to national power supplies, but also possibly supplying heavy water production to meet the needs of the United Kingdom's atomic energy programme.

Reports confirmed that the Wairakei field could supply both of these requirements, and the Government authorised the construction of a power station. A joint venture, involving the New Zealand Government and the British Atomic Energy Authority, was formed, and New Zealand's first geothermal station was commissioned in 1958. The British withdrew from the heavy water part of the scheme when costs were reassessed, so the Government refocused the scheme entirely on electricity production.⁷³ The Wairakei power station is located on the banks of the Waikato River, and water for cooling is taken from and returned back to the river. At the time, it was considered a significant engineering achievement. A second geothermal power station, with additional generating units, was completed in 1963. The combined capacity of the two adjacent power stations is 190MW. It has been described as 'a remarkably reliable performer' and has 'the highest load factor of any station' in New Zealand.⁷⁴

Two other important geothermal developments took place at about the time the Wairakei power station was



◀ Geothermal drilling at Wairakei, 2 May 1951



Power generation facilities at Wairakei ▶



Ohaaki Marae, with the cooling tower of the Ohaaki power station visible in the distance, 2004.

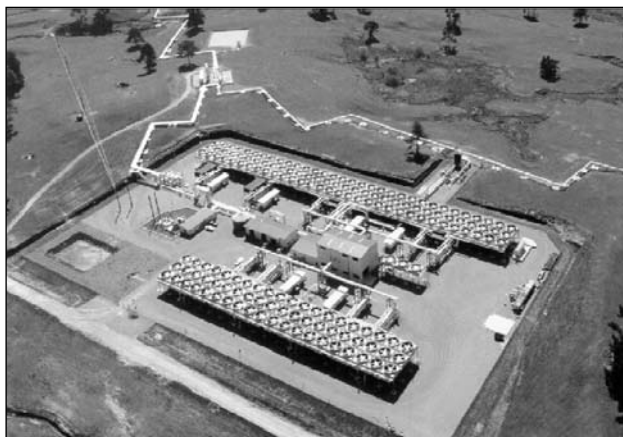
under construction. The first of these was on the Kawerau geothermal field. The geothermal energy capacity of this field was investigated and assessed in 1951 and 1952.⁷⁵ The results confirmed the potential of the field for commercial development and were reported to the Geothermal Energy Committee. This was not considered to be the time to build a second geothermal power station, but other potential commercial options were identified. The Kaingaroa pine forests, planted by the State during the previous three decades, had reached maturity and were ready to cut. The Government was about to join forces with private enterprise to create the wood-processing facilities needed. The Tasman Pulp and Paper Company was formed to build and operate a large-scale integrated mill, which would process logs and produce pulp, paper, timber, cardboard, and fibreboard.⁷⁶ Geothermal energy could be used to operate the mill, dry the products, and generate power for the new forestry town to be built. The Tasman mill was therefore located at Kawerau, on the geothermal field and between the forests at Kaingaroa and the port at Mount Maunganui. The Government provided its share of the venture capital and facilitated the process by designing and building the

new town, constructing roads and a railway, and passing legislation to ensure that production could commence with a minimum of delay.⁷⁷

The discovery of natural gas fields in the late 1950s and 1960s diverted the Government's attention towards harnessing natural gas for power supply purposes, especially after the oil shocks of the 1970s.⁷⁸ New geothermal power projects were not contemplated until the 1980s. The next geothermal station, Ohaaki, posed very different technological and public policy challenges for the Ministry of Works and Development and the New Zealand Electricity Department than had the previous station at Wairakei. The field differed greatly in its hydrology and geology and, as noted by claimants, public policy circumstances had also altered. The Government agreed to lease, rather than take, the land required from Ngati Tahu, marking the first time Maori of this region had become involved in the power industry. Ngati Tahu obtained a rental income from the land used for the power station, although not from the resource itself. However, Ngati Tahu participation was limited, extending only to leasing and not to participation in the development of the geothermal field.

Construction of the Ohaaki station began in 1982, with production wells being drilled in Broadlands as well as Ohaaki. Buildings, including a 105-metre-high cooling tower, were built on the Ohaaki site and the generating equipment was installed. Re-injection of water back into the aquifers was an important part of the scheme. It was seen as a way to prolong the operating life of the field and avoid the discharge of water containing arsenic, boron, and mercury into the Waikato River. The Ohaaki power station was commissioned in 1989 with a smaller capacity than Wairakei.⁷⁹

In the mid-1980s, the Crown instituted major policy changes with regard to its participation in the power generation industry and the possibility of private participation. The Government rapidly withdrew from active involvement in operating power stations. Through a series of steps, it provided for the corporatisation and privatisation of the local and central government agencies involved in power



Tuaropaki Power Station 1, Mokai

generation and supply. The Government also relaxed controls, thus enabling private enterprise, including Maori communities and commercial entities, to become more involved in the power generation industry either on their own account or in joint-venture projects.

The Mokai geothermal field had been investigated by the mid-1980s, as part of the Crown's exploratory programme, with six exploratory wells drilled and a report completed in 1986. This field was regarded as one of the most promising energy sources within the Taupo Volcanic Zone (TVZ).⁸⁰ It was regarded as suitable for commercial development, as it was remote from tourist sites and the subsurface configurations made the reinjection of geothermal fluids a practical option that would both minimise discharge and sustain the life of the field. The report of 1986 described Mokai as possibly being a 'somewhat larger energy resource than Wairakei'.⁸¹

In the new, privatised environment for power generation development, the local Maori owners, who were already farming extensive areas of land over the Mokai field through the Tuaropaki Trust, decided to investigate developing the resource themselves.⁸² Representatives of the owners reviewed the scientific research, visited projects and

operating equipment in Japan, the USA, Italy, and Israel, and took commercial advice.⁸³ They joined and participated actively in the World Geothermal Association. They also sought and obtained a resource consent from Environment Waikato in 1994. Detailed planning was done, in conjunction with ECNZ, and proposals for a 50MW power station were announced in 1998.⁸⁴ The Mokai 1 power station was commissioned in 2000. A second power station, known as Mokai 2, was built in a joint venture with Mighty River Power. It was designed and built by Ormat of Israel and commissioned in 2005.⁸⁵ The Mokai field, with a capacity similar to or greater than Wairakei, is being operated on a more conservative basis, drawing on less geothermal energy and allowing more time for aquifers to recharge.

The Crown also pointed out to us the Ngati Tahu involvement in what appears to be a successful joint-venture geothermal generation project at Rotokawa, although the trustees involved in that project were not participants in this inquiry.

The Government's privatisation and restructuring policies of the 1980s resulted in a number of the state-owned and local authority-owned power generation projects in this region being taken over by private enterprises or state-run companies. For example, the Crown sold the Ohaaki power station and lease. The Crown also sold its interests in the joint-venture Tasman mill at Kawerau in the mid-1980s, with the current owners being Norske Skög. As future demand for power generation is expected to exceed supply, the demand for new power generation developments in our inquiry region is expected to continue to grow. This has been reflected, for example, in the 2006 announcement by the State-owned enterprise, Mighty River Power, that it plans to build a large new geothermal power station at Kawerau.

A Treaty development right for power generation

As we will see in part v of this report, we accept that the water and geothermal resources of this region were included in the properties and taonga guaranteed to Maori in the Treaty. As with the Ika Whenua Tribunal, we do not

disagree with the Court of Appeal in finding that customary or aboriginal and Treaty rights did not include a right to generate electricity per se. As we have already discussed in chapter 13, we are not required to consider aboriginal rights alone. We are required to consider the changes brought about by the Treaty and the guarantees within it, in light of the benefits that settlement was expected to bring both for Maori and for settlers. We also have to consider the well-established principles identified by the courts and the Tribunal to assist in applying the two texts of the Treaty. We have already found (in chapter 13) that Treaty principles require the Crown to actively protect the properties and taonga guaranteed in the Treaty. In part v, we will explain in more detail our finding that waterways, and the water and geothermal resource in this region, are among the properties and taonga protected in the Treaty. In development terms, the Crown's duty of active protection of these properties and taonga extends to protection of the development right inherent in all ownership of property.

For the same reason that we cannot consider aboriginal rights without also considering the Treaty, we cannot accept the Crown's submission referring us to Canadian judgements allowing for infringement of aboriginal rights for essential development purposes. The Canadian situation, involving constitutional rights at issue in the courts, is different from our own. In taking account of the Treaty of Waitangi, we have found that it is well established that kawanatanga rights and national interest imperatives cannot automatically override guarantees to Maori for their properties and taonga. As has been well established by the courts and the Tribunal, the Treaty guarantees require the application of overarching principles of good faith and partnership. The needs and obligations of both parties must be taken into account, and any infringement of the Treaty's guarantees to Maori requires careful consideration, consultation, minimal impact, and compensation for losses. In development terms, this also requires the Crown to consider new development opportunities when redressing past infringements.

As we explained in chapter 13, the development interest in taonga and properties such as water has been recognised in previous Tribunal reports. The Whanganui River Tribunal found, for example, that Atihaunui rights in their river included a development right. This development right included a right to control access and rights to water within the river as a 'valuable, tradeable commodity'. That Tribunal also found that the 'just rights and property' in the river must have included a right to license others to use the river water. In the words of that Tribunal: 'The right to develop and exploit a water resource is conceptually no different from a right to develop and exploit the resources on dry land.'⁸⁶

The *Te Ika Whenua Rivers Report* also found that, under the Treaty, Te Ika Whenua peoples were entitled to full, exclusive, and undisturbed possession of their properties and taonga, which included their rivers. As part of this, they were entitled to the full use of those assets and had the right to develop them to their full extent.⁸⁷ We also follow the Whanganui River Tribunal in finding that the Crown could not delegate its responsibility for active protection of Treaty development interests in waterways to other agencies such as local or supply authorities.

The Te Ika Whenua Rivers Tribunal found that it was legitimate for the Crown to restrict the use of water for electricity to itself, so that the resource could be protected and used for the benefit of all. But, in doing so, the Crown failed to recognise that it was interfering with Maori proprietary rights in their rivers and with the development right inherent in such property rights. The Tribunal found that if kawanatanga rights were to be exercised, then such exercise should be fair and with proper consultation. If property rights were affected, 'then full compensation should be paid.'⁸⁸ Long-delayed compensation negotiations would now have to consider, in that Tribunal's view:

- (a) compensation for past use;
- (b) compensation for loss of rights or the ability to share as a partner in power production; and

- (c) payment for the future use of the proprietary interest of Te Ika Whenua in the rivers.⁸⁹

As has been well established, the Treaty guarantees and principles require the Treaty to be considered as a living document and not restricted to the situation at 1840. It has to be applied to changing and at times unforeseen circumstances. This means that Maori development rights for properties and taonga are not limited to such knowledge and technology as was known at 1840. Instead, Maori are entitled to apply new knowledge and technologies in utilising their properties for development purposes as part of the expected benefits of settlement. The Crown accepted both of these points in our proceedings: 'that the Treaty does not require a static notion of the expression of Maori property rights'; and that Maori have a right, along with others, 'to develop their property rights and express them in modern terms'.⁹⁰

We have also acknowledged that Treaty principles and the relationship created by the Treaty, alongside the expectation of colonisation, meant likely changes to the full and exclusive nature of customary rights in some taonga. In the view of the Ika Whenua Tribunal, for example, there was a valid expectation that settlers would be accommodated by the sharing of rivers. However, this sharing did not mean that property rights could be appropriated without consent or compensation, or that all development rights were lost if the Crown did make such an appropriation. The Crown had (and still has) to have regard to residual rights, including development rights, when considering present and future development opportunities. The *Te Ika Whenua Rivers Report* found, therefore, that the ability of tangata whenua to exercise their Treaty development right today depends on present-day circumstances, not on the position as at 1840. That report found that the tangata whenua had shared the use of their rivers, in reasonable fulfilment of their Treaty obligations, and that this had resulted in the loss of their exclusive development right in the rivers. Nevertheless, this agreement to share and their residual

interests in the rivers still had to be taken account of by the Crown in considering any development options.⁹¹

There is a second step to this process to consider, which arises from the Crown's decision to remove itself from the core role of owner and operator of the national power generation infrastructure in the late twentieth century. We agree with the Ika Whenua Tribunal that the Crown acted reasonably when it appointed itself the developer of the national power generation infrastructure, given the scale of investment required and the need to care responsibly for the nation's interest. (This exercise of kawanatanga, as we will discuss below, nonetheless required a full, free, and informed cession of Maori property rights, and a fair payment for them.) When the Government reviewed the appropriate role and bounds of the State in the 1980s, and decided to open up the power generation industry to private operators, its Treaty obligation remained the active protection of the residual Maori interest in their waters, including their rights to develop and profit from that interest and to develop as a people. New opportunities were created for private citizens in what was still, in many ways, a Maori resource. Giving this opportunity (or, rather, selling it) to private concerns required the Crown to consider Maori development needs and their ability to participate in the new opportunities being created. In fact, this was an opportunity for the Crown to do so. As is clear from the claims before us, this opportunity was not taken up.

We follow the view of the Ika Whenua Rivers Tribunal that 'it seems quite unacceptable that commercial profit can be made' from the Treaty interest in the taonga 'without any form of compensation or payment'. We also follow that Tribunal in finding that any compensation involved should 'at least' take into account such factors as past profit from use of the taonga, compensation for loss of rights to share in the benefits from utilisation of the taonga, and payment for the future use of the Treaty interest in the taonga.⁹²

Hydro power generation opportunities

We agree that the Crown had a legitimate kawanatanga right to decide to control and regulate the provision of hydro power generation in New Zealand from an early period in the twentieth century, given the needs and limitations of a growing economy. We also agree that some of the major power generation projects in our region, including the Lake Taupo control gates and the Waikato River hydro scheme, were planned, built, and operated in the national interest for the benefit of all. We agree that, legally, the Crown reserved to itself the right to use waters and, later, geothermal resources for power generation purposes.

However, we have found that while these actions may have constrained what private parties could do with their taonga, they did not remove the Treaty property right in them or the development right that was a part of this. When the Crown came to consider power generation needs, and these needs impacted on iwi and hapu, it was still required to consider its Treaty guarantees to them in respect of their taonga, as well as the impacts that the construction of infrastructure would have on them.

In considering what was reasonable in the circumstances of the time, we agree that it was generally felt necessary to exclude private interests from planning and constructing power generation facilities before the Second World War. The development opportunity of private parties (save existing rights) was foreclosed by legislation from 1903. However, where it was clear that requirements for power generation were likely to impact on iwi and hapu, the Treaty required consultation with them, minimal infringement of their rights, and, if infringement was unavoidable, adequate compensation. These same Crown responsibilities of active protection were also required if power generation was delegated to local supply authorities.

On the evidence available to us, we are of the view that, in general, the Crown failed to fulfil these obligations of active protection in developing the hydro power generation industry. With regard to Lake Taupo, its tributary riv-

ers, and the Waikato River (see chapter 18), the Crown failed to adequately undertake these responsibilities:

- ▶ in 1926, in negotiations over the lake, the rivers, and their fisheries;
- ▶ in 1939, when the lake control gates were being proposed;
- ▶ and again from 1944 to 1946, when Taupo Maori demanded that the Crown negotiate agreement and payment with them.

On the evidence available to us, the Crown's negotiations with Ngati Tuwharetoa in 1926 did not include the right to use and modify these waterways for hydroelectric purposes. The claimants did not agree to it, and they were not paid for it. Our full discussion and findings on this matter are contained in chapter 18. Nonetheless, the Crown gave itself this right, free and clear of the Maori customary right ('if any'), by a statute which purported to give effect to an agreement with tribal leaders. We find that this was an expropriation of the claimants' property right, and of the right to develop and profit from their property, without consent or compensation. As such, it was a breach of the plain meaning of article 2 of the Treaty, of the principles of the Treaty, and of the right of development.

We pause a moment to consider the alternatives that were available to the Crown at the time.

First, it had, from 1903, foreclosed the general right of its citizens to develop their properties for hydroelectricity, except in so far as there were pre-existing rights 'lawfully held'. By legislation in 1903, 1905, 1908, and again in 1928, the Crown was required to acquire such lawful rights before proceeding. It had to pay for them. One option, which was debated in the 1930s for petroleum, was to pay property owners a royalty.⁹³ Another was to purchase the right freely and fairly from its owners. A third, endorsed by the Water-Power Act 1903, was to acquire any property rights as for a public work and pay compensation. As we discussed above, the Attorney-General contributed to the Government's decision in the 1920s to put the question of whether there were Maori rights beyond doubt. For key waterways in our

inquiry region, this was done by supposed negotiation and agreement, and given effect by legislation: in Rotorua, in 1922, and in Taupo, in 1926, although not for the Kaingaroa rivers, as the Te Ika Whenua Tribunal found. But, as we will demonstrate in chapter 18, the Crown did not actually negotiate agreement or pay to acquire the right to use the Taupo waters.

Secondly, although the Crown felt the need to exclude private citizens and develop and control the infrastructure itself, its Maori Treaty partners were exercising authority and self-government guaranteed to them by the Treaty. As we have seen in part II, the tribes constantly sought legal powers of self-government from the Crown. In the 1920s, as part of settling the fishing question, the Crown was willing to provide legal corporate capacity and powers to tribal trust boards. At the same time, it was willing to give licensing powers to acclimatisation societies. While it agreed to give tribal boards a share of the fishing licences and some powers over Maori fishing, the Government did not establish the boards as local authorities or give them the licensing powers that it delegated to other authorities.⁹⁴

Yet the opportunity for this kind of delegation existed with hydroelectricity. In 1928, the Public Works Act, which still preserved existing rights to use waters for electricity, provided for the Government to delegate development of hydro power to 'any local authority'. It could also be granted to 'any person or company'. A licence to use water for hydroelectricity could be granted by the Government to any person or body corporate. The licence could be a perpetual one. Similarly, local authorities could grant such powers with the permission of the Government.⁹⁵ The newly created tribal trust boards of the Central North Island were bodies corporate that could have been licensed to generate electricity, or could have become licensing authorities themselves. This would, of course, have required assistance from the Crown to overcome barriers such as lack of finance, and for it to have treated the boards as genuine local authorities.

From the 1940s, when the Government began actively controlling Lake Taupo as a reservoir for generating

power, the profits accruing to the Government from electricity were enormous. This was stated both by officials and by parliamentarians.⁹⁶ The Government could certainly have afforded to pay compensation for its ongoing use of the tribes' taonga for electricity. It paid an annuity for the right of access to lakes and rivers for angling and other purposes. It would have been a simple matter to have added a share of electricity revenue to that annuity. Was this unthinkable at the time? In our view, it was not. As we have found, the Crown provided in legislation from the 1900s to the 1920s that it had to pay for pre-existing rights to use water for electricity. Its failure to do so for Central North Island Maori in the 1920s was a breach of the Treaty. It had an opportunity to correct and redress that breach in the 1940s, when Ngati Tuwharetoa leaders asserted the Crown's obligations to obtain their agreement to the use of their taonga for electricity, and pay them for it. The Crown's failure to do so in the 1940s or thereafter compounded the earlier breach rather than redressing it.

The failure to pay for an expropriated property right is only part of the story. As we have noted in chapters 14 and 15, the Central North Island region's poor farming land was balanced by the richness of its natural resources. In tourism, in forestry, and – in this case – in the powering of the nation, there were opportunities for the tribes to develop and experience the mutual benefits promised by the Treaty, if they retained a sufficient base for doing so. In terms of hydroelectricity, perhaps the most important wealth-generator in terms of using Maori taonga, they were permitted to retain no base at all. We note that a possible exception is Lake Rotoaira, but that lake is outside our inquiry region.

The Crown relied on the legal situation it had created, without giving sufficient consideration to the need to also consider Treaty interests. This caused it to miss the opportunity to create more of a partnership with Ngati Tuwharetoa in using their waterways for power generation purposes. Taupo Maori were denied any development benefits from the utilisation of their resource for electricity. On the face of it, actual development losses were minimal,

Aratiatia Dam. This dam was built between 1959 and 1964. Not only was it an important hydroelectric development but also, as is often the case in the Central North Island, it provided a significant tourism opportunity. According to *Te Ara Encyclopedia of New Zealand*, the spillways alongside the dam are opened daily and the spectacle is viewed by 60,000 visitors a year.



because private participation in the power generation industry had been restricted since 1903. But, in our view, there are two other factors to consider.

First, Maori interests need not have been 'private' in that respect. Had the Crown honoured its Treaty obligations to give effect to Maori self-government, and had it conceded proper powers and roles to the Maori Councils and Maori land councils of 1900, then Maori local authorities would have existed that were capable of managing, developing, and profiting from power generation alongside other local authorities. With the creation of tribal trust boards, in association with the Rotorua and Taupo lakes, the opportunity for delegation and partnership was even greater.

Secondly, there was never a proper inquiry into exactly what 'lawfully held' rights were preserved by the 1903 Act and its successors. This was largely because the Government was determined to rule out private ownership of large, significant bodies of water.⁹⁷ When it looked, however, as if the Native Land Court might award ownership of Central

North Island lakebeds to Maori, their legal ownership of such beds (from time immemorial, under Maori custom) would carry with it rights that predated and may therefore have been reserved by the 1903 Act and its successors. Hence, in our view, Attorney-General Bell was worried in 1922 that a court award of a lakebed to Rotorua Maori might include the right to use those waters for electricity.⁹⁸ This was one reason for the negotiations discussed in chapter 18, which resulted in legislation in 1922 vesting the sole right to use these waters in the Crown.

The situation with regard to 'private' interests in electricity generation was fundamentally altered in the 1980s. When the Crown changed its policies in that decade, it created a significant opportunity for non-State bodies to participate in the industry. In our view, this required the Crown to return to Ngati Tuwharetoa and other iwi and hapu and discuss the potential options for them to participate more actively in power generation infrastructure that utilised their taonga. It cannot have escaped the

Government's notice that Maori in this region wanted change. In 1984, J T Asher wrote to the Minister of Energy:

This trust [the Lake Rotoaira Trust] as the owner of Lake Rotoaira does not receive one cent of income for the use of its property [Lake Rotoaira] for the generation of electricity and a massive income return to the N.Z. Electricity Department of which you are Government Head. Legally, it is unclear or unresolved as to whether this Trust has a legal claim against the N.Z. Electricity Department for the use of its lake for the generation of electricity. It may not have a legal claim however, it has a moral claim as here is Maori owned land being used to generate massive sums of income for the State in particular and the taxpayer in general.⁹⁹

When the Government restructured later in the 1980s, it needed to address what were by now long-term barriers to Maori participation in development. It also needed to consider positive assistance for Maori participation, given past Treaty breaches involving failure to acknowledge the taonga, failure to protect them, and failure of active protection to participate in other development opportunities in the region. Assistance to participate in joint ventures could, for example, have been considered when the hydroelectric infrastructure affecting such taonga as lakes and rivers was sold or partially privatised. That would have enabled iwi and hapu to share in the economic benefits that the Crown now allows private interests to obtain from the use of their water resource for power generation.

We did not receive sufficient evidence to be able to determine whether, or how, the Crown fulfilled its obligations of active protection to iwi and hapu in conducting the privatisation of hydroelectricity in this region. We note the finding of the Ika Whenua Rivers Tribunal that the Crown failed to implement general policies to recognise and protect the development interests of the Ika Whenua peoples when it privatised the dams on Kaingaroa rivers. In the evidence of claimants and the Crown, neither the Government nor private concerns are paying Central North Island Maori for the use of their property right in their waterways.

The Tribunal's findings

We find that:

- ▶ It was reasonable for the Crown to undertake the development of hydro power resources in New Zealand, as the only body with sufficient capital and resources to do so effectively, while maintaining responsibility for the fair use and distribution of electricity.
- ▶ In exercising its kawanatanga rights, the Crown was required to consult with Maori, to acquire their property rights with their free, full, and informed consent, to infringe their tino rangatiratanga as little as possible, and to compensate for all such infringements.
- ▶ There is a Maori property right in water resources, capable of development for profit, which is guaranteed and protected by the Treaty of Waitangi.
- ▶ This development right included the right to develop the resource for hydroelectricity or to profit from that development.
- ▶ When the Crown vested in itself the sole right to use water for hydroelectricity, in 1903, it preserved all existing rights 'lawfully held', which it then had to acquire before proceeding with hydro development.
- ▶ Parliament was explicitly assured in 1903 that such rights included any Maori rights to develop water power, in response to queries and objections from Hone Heke. Such rights, in so far as the Crown could be brought to admit their lawfulness, were preserved in the Public Works Acts of 1905, 1908, and 1928.
- ▶ In the Central North Island, the question became bound up with the ownership of lake and river beds, with the Attorney-General concerned that the award of these beds to Maori by the Native Land Court might carry with it the right to use the waters for electricity.
- ▶ The Crown, therefore, took steps to resolve the matter in the 1920s, legislating for the Rotorua lakes and for the 'Taupo waters' that the right to use water was the property of the Crown, freed and discharged from Maori customary or freehold rights, if any. In doing

so, the Crown claimed to be giving effect to negotiated agreements. We have not considered the case of Rotorua, but, with regard to Taupo, there was no negotiated agreement, no consent, and no payment. The Crown, therefore, expropriated this property right in breach of the plain meaning of article 2 of the Treaty, without the full, free, and informed consent of its Maori owners, and without compensation. This also breached the Treaty principles of partnership and active protection. Further, it foreclosed a known development right without consent or compensation. That, also, was in breach of the Treaty.

- ▶ From 1944 to 1946, Taupo leaders requested that the Crown negotiate with them and pay them for the use of their lake and waters for hydroelectric purposes, as this had not been done in 1926. The Government promised to look into this matter but, as far as we are aware, did not do so. The tribe's request went unsatisfied. The Crown thereby lost an opportunity to redress the 1926 Treaty breach, and instead made a fresh breach of Treaty principles.
- ▶ The Crown could have honoured its Treaty guarantee of self-government by providing greater legal powers and real local authority to Maori Councils and tribal trust boards, which would then have become bodies to whom licensing powers for electricity could have been delegated, and to whom profits from electricity generation could have been due, just as they were to other local bodies.
- ▶ In the 1980s, when the Crown gave up its own conceptual framework for state ownership and control of the electricity industry, it failed to meet the claimants' reasonable request for a share in the proceeds of electricity. The Crown's policy changes provided it with a major opportunity to redress past breaches and provide assistance for Maori to become meaningful players in the newly privatised electricity industry. Without full evidence on how far, if at all, it met that opportunity, we leave the question to negotiations.
- ▶ There is still a Treaty obligation today for the Crown to compensate Maori for the ongoing use by others – after transfer from the Crown – of their proprietary interests in their waters. If that interest has been extinguished at law without consent or compensation, the obligation is even stronger.
- ▶ The Crown has acknowledged the appropriateness of returning the ownership of the beds of Taupo waters to Maori, which had been acquired in breach of the Treaty. There is no bar, in our view, to paying compensation for past and present use of the waters, acquired without consent and in breach of the Treaty.
- ▶ In 1840, Ngati Tuwharetoa and their whanaunga possessed a lake, whole and indivisible, inclusive of the bed, the banks, the gravel, the waters, the fish, and the mauri thereof (see chapter 18). It is that whole lake, that taonga, which is used to drive the power stations on the Waikato River. In particular, it is the use of the lake as a vessel for storage, and the manipulation of the level of the lake, that has been key to using it as a reservoir for the generation of electricity, and not just the use of the water component of the resource. Ngati Tuwharetoa and their whanaunga have never relinquished their taonga; nor has the Crown ever claimed ownership of it in that sense. To that extent, the property right in the taonga possessed at 1840, as guaranteed by the Treaty, survives today. As a property right, it is no longer exclusive. The tribes have shared the use of their taonga with Pakeha, as is appropriate under the Treaty. But the right survives, and the tribes should be compensated for the use of their taonga for electricity.
- ▶ In terms of a development opportunity in the modern hydroelectricity industry, it will be clear from our foregoing discussion (and from chapter 18) that Central North Island Maori meet many of the criteria outlined in chapter 13:
 - the development or activity is a legitimate outgrowth or development of a customary property right;

- the development or activity is in their rohe;
- the development or activity involves their taonga (whether still in their legal ownership or not);
- they have had a long association or history of involvement in the development or activity (in terms of their requests for payment for the use of their lake, the short-term and long-term effects on them of the Tongariro Power Development and the manipulation of lake levels since 1941, and their involvement in working on the power projects);
- a tribal initiative is involved or contemplated;
- the development or activity may contribute to the redress of past Treaty breaches; and
- the development or activity may assist their cultural, social, or economic development.

We turn next to the question of geothermal power, and the opportunity it represented to Central North Island Maori and the Crown in the second half of the twentieth century.

Geothermal power generation opportunities

Geothermal power generation was not considered as a possible development opportunity until after the Second World War. We agree that the Crown was not able to foresee this opportunity at the time it made many of its land purchases. And it was these purchases that provided the Crown with legal access to the geothermal resource. Nevertheless, the Crown's failure to ensure that iwi and hapu in this region retained sufficient geothermal lands was a Treaty breach, as we have found in chapters 10 and 15. It was a breach of the Treaty right of development because it foreclosed future development opportunities. Examples of this failure include the geothermal taonga alienated as a result of the native townships initiative, and the thermal areas the Crown targeted and acquired in the Thermal Springs District. Yet these were not the only ways that the Crown reduced the resource base available for Central North Island Maori to take advantage of new

and unforeseen opportunities such as geothermal power generation. We heard evidence of how the Government's actions damaged certain sites, such as its flooding of much of the Orakei Korako geothermal field. These actions also reduced the resource base and foreclosed on future development opportunities.

We agree that the Wairakei and Ohaaki stations were built as part of the national power generation infrastructure, and that at the time this was considered to be in the national interest. Private sector involvement was not generally considered possible when the first Wairakei station was built, although it was a definite possibility with the Kawerau project in the 1950s, the second Wairakei station in the 1960s, and the decision to construct Ohaaki in the 1970s. This exploitation of geothermal power in the national interest, however, was carried out without regard for Maori interests in the geothermal resource.

There are two issues for the Tribunal to consider with respect to the impairment of the developable geothermal property right held by Maori: the Crown's failure to pay royalties; and its failure to enter joint ventures.

Impairment of the developable property right and the failure to pay royalties

The geothermal taonga was possessed by Central North Island Maori in 1840, and was therefore protected and guaranteed by the Treaty. The detail of our decision on this point is contained in chapter 20, so we refer to it only briefly here. In our view, particular hapu and iwi possessed land and the surface geothermal features, and had tino rangatiratanga (full authority) over them. That rangatiratanga had been significantly impaired by the mid-twentieth century. Ownership of surface features had passed into private hands, whether in individualised titles under the native land laws, or in non-Maori ownership as a result of Crown or private purchases. Where the geothermal lands were still in Maori ownership, there was sometimes a trust or other mechanism that recognised multiple interests, while in other cases individual owners continued to permit community use. In Tokaanu, for example, the

Native Department noted such surviving communal rights in the 1940s, despite the theoretical change that ‘virtual’ individual titles had wrought.¹⁰⁰ At the same time, Central North Island Maori still possessed the underlying geothermal fields as a taonga known to them, valued, and used as at 1840. Their rights in respect of the fields and the Taupo Volcanic Zone (TVZ) had not been affected by the introduction of the British common law and the native land laws, neither of which claimed to confer or grant ownership of this water, heat, and energy resource. Thus, customary rights persisted in three layers: rights in the surface features; rights in the fields; and rights in the subterranean heat and energy system (the TVZ).

These three levels of rights changed with the passage of the Geothermal Energy Act in 1953, as we explain in chapter 20. Here, we note that Maori control and access – two sticks in the bundle of property rights – were reduced by this Act. The Crown was fully aware of the Maori interest in the resource. There had been some Maori opposition to the Crown’s plans to develop the Kawerau resource, and the Act preserved some of the known forms of customary use. Otherwise, the Crown did not recognise Central North Island Maori as having a property right in the resource, which – in its view – was akin to groundwater, unowned until someone captured it. What was being taken away, in the Government’s view, was the right of landowners to capture the resource in order to generate power. It adopted this view without consulting Central North Island Maori or inquiring into the nature of their claims to the resource, although it was aware of such claims. In our view, this action – which impaired property rights and the Maori relationship with their taonga – was in breach of the Treaty.

The significance to Maori development is obvious. Maori lost part of their property rights in the resource as a surface feature. That part of their property rights was the developable part, and it was guaranteed under the Treaty and British laws of property. It was now being taken away by statute and vested in the Crown, in the national interest. In our view, this situation was analogous to that of petroleum

in the 1930s, to the extent that, even if nationalisation was required in the national interest, there was nothing that required the fiscal profits to also go to the Crown. In other words, it was the generation of power rather than the making of a profit that was essential to the national interest. As Ngata and others proposed for petroleum in 1937, profit (in the form of royalties) ought to have gone to Maori and not the State. Given that the surface features for development at Wairakei had passed out of Maori ownership in breach of the Treaty (see chapter 9), there was an added obligation on the Crown to redress that breach by whatever means available – in this case, by the development possibilities of generating power from the Wairakei geothermal field and the profits to be gained thereby.

Further, the Crown should have recognised a Maori customary right and Treaty interest in the fields and the TVZ. That right was a developable one. The entire subsurface resource was a taonga of Maori of this region, possessed by those who followed in the footsteps of Ngatoroirangi, told the stories, said the karakia, and had whakapapa to the taonga. The Crown ought to have paid a royalty to the owners of that resource each time it used it. As we find in chapter 20, the iwi and hapu of the Central North Island have never knowingly or deliberately relinquished their rights in the resource, and those rights persist today. For each of the geothermal stations, therefore, the Crown ought to have paid a royalty or rental: to those Maori who owned the land containing the geothermal feature – or who had lost ownership in breach of the Treaty – and to the hapu or iwi who exercise tino rangatiratanga over the field. We leave our recommendations about how royalties should be allocated to chapter 20. Here, we find that in failing to share or pay royalties, the Crown acted in breach of the plain meaning of article 2 of the Treaty, and in breach of the Treaty development rights of Maori of this region.

Impairment of the developable property right and the failure to enter joint ventures

From the 1950s, the Crown began to enter into joint ventures with private capital – at Kawerau, for example, with

the Tasman Pulp and Paper Company. From this time, it was also possible for governments to give effect to the Treaty right of development by entering into joint ventures with Central North Island Maori to develop geothermal power, as it had done with Tasman at Kawerau. Again, the Geothermal Energy Act was the key factor preventing such opportunities for Maori.

During the mid-to-late twentieth century, the Crown entered into joint ventures with Central North Island Maori to develop their lands for exotic forestry. In the main, these ventures took two forms: the formation of joint companies, as for Tarawera Forest, for example; or the leasing of Maori land for the Forest Service to plant and develop. In each case, Maori brought property – their land – as their contribution to setting up the joint venture. They would also contribute labour and skills, but that was for the future. The Crown wanted regional development in the Central North Island. In addition, as we saw in chapter 13, mid-century governments wanted to see Maori develop in terms of their land, their access to opportunities, and employment. The Crown's forestry joint ventures were a way of developing the resource in the national interest, while at the same time helping regional and Maori development.¹⁰¹

The difference, when it came to the development of geothermal power, was that Maori had no property (of a kind recognised by the Crown) to contribute to the setting up of joint ventures. Had the Crown recognised the Maori property right in the resource, it would have had to enter into joint ventures with Maori, as it did for forestry on Maori land. By failing to consult Central North Island iwi and hapu, by failing to inquire into the nature and veracity of their claims to rights in the resource, and by passing the Geothermal Energy Act 1953, the Crown foreclosed on Maori opportunities to participate in joint ventures to develop geothermal power.

We will discuss the situations at Ohaaki and Mokai in more detail in chapter 20. Here, we note that, at Ohaaki, Maori did at least have land to contribute to the venture, and that Maori have been able to develop their own station at Mokai in the new circumstances of the 1990s, with

full authority (tino rangatiratanga) over how the resource would best be developed in accord with their cultural values. But, in both instances, a royalty or rental is paid by Maori for the right to use the resource. We did not receive detailed submissions from counsel on current royalty or resource rental arrangements.¹⁰² In our view, as a matter of principle, such a royalty or rental should be paid to the only people who can assert a proprietary interest in the subsurface taonga – the Maori people of the Central North Island. It should not be paid to the Crown, which does not, after all, claim an ownership interest in the resource. We distinguish this payment from fees necessary for the Crown's monitoring and regulation. We note the finding of the Te Arawa Geothermal Preliminary Tribunal that the Crown is charging a true rental rather than just recouping its costs.¹⁰³ Even if the Crown were not charging a rental itself, Central North Island Maori are entitled to payment for the use of their proprietary interest in the geothermal subsurface taonga.

Circumstances changed significantly in the mid-1980s. The Government decided to withdraw from active participation in the power generation industry and privatise aspects of it, and allow private parties to participate in geothermal power generation. This had a major impact for iwi and hapu development opportunities in the region. In these significantly changed circumstances, the Crown still had an obligation to actively consider and protect the interests of iwi and hapu of the Central North Island region.

In practical terms, we follow the *Te Ika Whenua Rivers Report*, in that privatisation required consideration of the impacts on, and possible opportunities for, iwi and hapu with Treaty interests in the resource.¹⁰⁴ As new opportunities were opened to participate in the industry, the Crown's obligation of active protection required it to address any unfair barriers that iwi and hapu faced – and continue to face – in participating in the power generation industry.

We note the relative success of the Tuaropaki Trust and other iwi and hapu joint ventures in the geothermal industry in recent years. These tend to underline the willingness of some Maori communities to participate in new

development opportunities and manage participation in ways that meet community preferences, including the protection of cultural sites of importance and the resource itself, in addition to economic gains. As with other groups in this region, they were quite adamant that they did not need the Crown to foster their success in this industry. What they required from the Crown, instead, was recognition of their rights to participate in conservation and management of their taonga in meaningful partnership, and assistance to overcome unfair barriers that have been, at least in part, of the Crown's making.¹⁰⁵

The Tribunal's findings

We find that:

- ▶ In 1840, Maori of the Central North Island region possessed the geothermal taonga in three ways: as surface features and as fields, under the rangatiranga of particular communities; and as a subterranean resource (the Taupo Volcanic Zone), known to, valued by, and used by Ngatoroirangi's people as a taonga under their rangatiranga and kaitiakitanga (see chapter 20 for details).
- ▶ It was reasonable for the Crown to undertake the development of geothermal power resources in New Zealand, as the only body with sufficient capital and resources to do so effectively, while maintaining responsibility for the fair use and distribution of electricity.
- ▶ In exercising its kawanatanga rights, the Crown was required to consult with Maori, to acquire their property rights with their free, full, and informed consent, to infringe their tino rangatiranga as little as possible, and to compensate for all such infringements.
- ▶ There were Maori customary rights and Treaty interests in the geothermal lands (which contained the surface features) that Maori had retained, held under the native land laws but still exercised in many instances as a community right.
- ▶ Maori possessed a customary right and a Treaty interest in the fields and the TVZ as taonga in 1840, which they have never voluntarily or knowingly relinquished.
- ▶ The Geothermal Energy Act 1953 affected these property rights, foreclosing the right of Maori to develop or profit from the development of their taonga. The Government passed this legislation without consulting Maori or informing itself of the nature of their interest and rights, although it was aware of Maori assertions of authority (in opposition to one of its plans) and of customary uses (some of which were preserved in the Act). In doing so, the Crown breached the Treaty principles of partnership and active protection, and the Treaty right of development. It foreclosed the ability of Maori to develop or profit from their property rights, and it took away one of the few opportunities for economic development of Central North Island resources still in Maori possession.
- ▶ As had been proposed in 1937 for petroleum, geothermal power had to be developed in the national interest, but there was no compelling reason why the royalties (payment for the right to use the resource) had to go to the Crown rather than to its Maori owners. The failure to pay Maori for the use of their taonga was in breach of the Treaty.
- ▶ The Geothermal Energy Act 1953 operated to prevent the Crown from entering into joint development ventures with Central North Island Maori. In other such ventures, it was Maori possession of property that required the Crown to act in joint ventures with them (in the interests of the nation and the region, and for the development of Maori as a people). The Crown, however, gave itself the sole right to access and use the geothermal resource for power generation, and did not recognise that it was using Maori property. If Maori did not have such property to bring to the table, then the Crown would not enter into joint

ventures with them. By foreclosing this opportunity, the Crown acted in breach of the Treaty.

- ▶ There is still a Treaty obligation today for the Crown to compensate Maori for the use of their proprietary interests in the geothermal subsurface resource.
- ▶ In terms of a development opportunity in the modern geothermal power industry, it will be clear from our foregoing discussion (and from chapter 20) that Central North Island Maori meet many of the criteria outlined in chapter 13:
 - the development or activity is in their rohe;
 - the development or activity involves their taonga and the use of a resource in which, in our view, they have a proprietary interest;
 - they have a long association or history of involvement in the development or activity;
 - tribal initiatives are involved or contemplated;
 - the development or activity may contribute to the redress of past Treaty breaches; and
 - the development or activity may assist their cultural, social, or economic development.

EXOTIC FORESTRY

KEY QUESTION: WHAT TREATY OBLIGATIONS, IF ANY, DID THE CROWN HAVE TO IWI AND HAPU OF THIS REGION IN RESPECT OF DEVELOPMENT OPPORTUNITIES IN THE EXOTIC FORESTRY INDUSTRY, AND DID THE CROWN FULFIL ANY SUCH OBLIGATIONS?

The exotic forestry industry was a significant development opportunity in this inquiry region. This was especially true of the post-war period, when abundant power generated from water and geothermal resources, improved infrastructure, and significant Government investment enabled new wood-processing technologies to utilise existing large exotic forest plantings in the region, mainly on Crown lands. The industry, and the significant Government

involvement in it, had a major impact on Maori communities in our inquiry region. Some communities were able to utilise their retained lands in the new industry and participate at a range of levels, from leasing land to forestry companies through to more active involvement via timber incorporations or joint ventures. The Crown continued to acquire some Maori land for the industry, mainly by purchasing or leasing, but also, in some cases, by compulsory acquisition. However, the vast majority of the industry involved plantations on land the Crown had already acquired from Maori in the nineteenth century.

The major Maori involvement in the industry was through employment. This began as early as the mid-1890s, working in the experimental state plantings at Kaingaroa and Whakarewarewa. Maori had significant involvement in later periods of planting in the region, including during the depression years of the 1930s. As plantations matured and the industry was further developed for milling and processing from the 1940s, Maori communities were encouraged to take up employment opportunities for their rapidly growing populations – even with the introduction of land development schemes, their surviving lands seemed unlikely to provide for their full support. Also, the exotic forestry industry offered more long-term, settled employment opportunities than did the construction of power projects. At the same time, it offered a transition from indigenous forestry for those with skills in that industry. The industry often combined housing with employment opportunities, and it enabled communities to remain close to traditional rohe and contacts with their land. Maori also found that participation in the industry enabled them to retain community-based cultural practices and lifestyles, while gaining economic benefits and new skills and expertise. To that extent, much of the tangata whenua evidence about exotic forestry was positive.

The industry also had major impacts on the relationships between Maori communities of this region, their natural environment and taonga, and their traditional settlements. The industry transformed settlement patterns, turned

small villages into forestry towns, encouraged an influx of outsiders into the region and into local communities, and impacted significantly on the natural environment. Maori of this region were also among those most affected when the industry was rapidly restructured in the mid-1980s.

While Maori communities contributed significantly to the industry through labour and skills (and while the industry, in turn, had a significant impact on their lives and their rohe), only relatively small areas of their retained lands in Rotorua and Kaingaroa were involved. Even the two large Taupo trusts that entered the industry were dwarfed by the area of exotic forestry that was developed on land already acquired by the Crown, where iwi and hapu no longer retained legal interests. Much of that Crown land, such as on the Kaingaroa Plains, had no previous history of indigenous forestry. The exotic forestry industry was, therefore, not significantly based on properties or indigenous forests (or, in some areas, on traditional practices using indigenous forests) for which there could be a development right as part of the Treaty's property guarantee. It will be recalled from chapter 13 that one dimension of the Treaty right of development is the right of property-owners to develop their property, on the basis of equal access to opportunities to do so. Much of the land used in the exotic forestry industry, however, was no longer in Maori ownership when it was developed. We will explore the significance of this point in our substantive discussion.

A large number of claimant allegations concerning the exotic forestry industry in this inquiry region actually relate to the impacts of the industry on the environment. The focus of this chapter, however, is on claims of Treaty development rights in terms of the opportunities offered by the exotic forestry industry in the Central North Island.

The claimants' case

Claimants submitted that the Crown was heavily involved in developing and promoting the exotic forestry industry in this region. Crown activities included planting trees, acquiring land, investigating and promoting new

technologies, providing infrastructure such as railways and sources of power, and participating in and encouraging private sector involvement in the milling and processing industries. In planning for this, the Crown expected the industry to be a major economic opportunity that would heavily utilise the region's natural resources and labour force. It also knew that the industry would have massive impacts on the lands, employment, and social and cultural well-being of Maori of this inquiry region. The Crown, therefore, had obligations to protect and foster the development interests of Maori in this industry. It was also required to consult with iwi and hapu of the region over this development opportunity and their participation in it.

Instead, it was alleged that the Crown's actions fell far short of this requirement to consult.¹⁰⁶ Crown consultation with iwi and hapu leaders over the initial planning for the exotic forestry industry in the region was 'virtually non-existent'.¹⁰⁷ The Crown did conduct some limited consultation when it needed Maori land: planning for the Murupara scheme, for example, included meetings between Crown officials, private industry representatives, and local Maori. But the claimants argued that these meetings only took place because Maori land was required for the scheme, and that discussions were limited to this.¹⁰⁸

In the claimants' view, the Crown assumed that national benefits, together with the benefits it expected would accrue for Maori generally, would outweigh any negative impacts for iwi and hapu of the region. It made its assumption without adequately consulting or considering Maori views and preferences, or asking how these benefits might practically be achieved and what the costs – including environmental impacts – might be. The pulp and paper processing industry, for example, produced significant national benefits in the areas of export earnings, the balance of payments, and employment generally, but the Crown failed to consider the actual cost to local people, including their relationship with their environment.¹⁰⁹ Some claimants argued that these costs of development, including the costs of restoring or mitigating continued environmental damage, require adequate compensation in

return for the national benefit received.¹¹⁰ (Although we do not deal with the issue in this chapter, we include this point so that the claimants' case may be seen in its full context. It is an important dimension to recall when considering the economic benefits of forestry development for Maori of the Central North Island region.)

Further, the claimants argued that much of the Crown's involvement in the industry exploited and profited from large areas of land, especially in the Kaingaroa district, that had been acquired from Maori in breach of the Treaty through purchases, the Native Land Court process, and the Crown's failure to protect iwi and hapu in the retention of sufficient lands.¹¹¹ In their view, this is an important point to consider in evaluating the Crown's Treaty responsibilities to them in the development of exotic forestry. Also, the Crown continued to acquire further Maori land in this inquiry region for exotic forestry and its supporting infrastructure, sometimes by purchase but also by compulsory acquisition. The threat of compulsion was used to pressure sales.¹¹² The extent of such acquisitions, however, is not easily determined from the statistical evidence available.

It was alleged that those Maori who were able to utilise some of their retained lands in the industry were not actively protected by the Crown. In the claimants' view, the Crown was more interested in ensuring that their lands were used for forestry than it was in ensuring that Maori were able to benefit and meet their particular needs from such land use. In a number of cases, the Crown placed Maori owners under considerable pressure to use their lands in the exotic forestry industry, but failed to ensure that they were able to participate in the industry as business people or to benefit from it at that level. Significant areas of retained Maori land in the region were eventually tied up in exotic forestry ventures, including some 73,000 hectares of land under lease. Some of these leases were private arrangements, but it was the Crown that encouraged private interests into the industry in the region, especially the Tasman Pulp and Paper Company. In doing so, it had a responsibility to protect hapu and iwi interests when it struck deals with these companies. In the claimants' view,

the Crown failed to protect those Maori landowners who used their retained lands to participate in leasing and joint-venture forestry agreements. Pressure was placed on owners and their communities to participate, without any provision of mechanisms or advice to enable them to do so in ways that protected and provided for their own development objectives. This is reflected in the Tarawera forestry venture, for example, already reported on by the Tarawera Forest Tribunal.¹¹³

Ngati Tuwharetoa submitted that they were an exception, in that they were able to participate on a business level in their own right, but that this was in spite of – rather than because of – Crown assistance. They submitted that their commercial success in exotic forestry relied heavily on the experience and expertise in both forestry and business that they had managed to build up with their indigenous forest resource, especially when they were better able to utilise it after the Second World War. They had a healthy scepticism of the Crown's commercial ability and advice, and they could pay for advice, where necessary, from outside experts and professionals. This enabled them to deal more successfully with later Crown joint-venture proposals, including the Lake Taupo and Lake Rotoaira forest trusts.

They were able to negotiate a number of features with these trusts that better served the economic needs and development interests of their communities. This included their 'remarkable success', as George Asher described it in his evidence, in overcoming the difficulties of multiple land ownership and fragmented title. Tribal leaders persuaded the owners of 63 blocks on the eastern side of Lake Taupo and 73 blocks near Lake Rotoaira to agree to develop two forest estates. This involved negotiating a special arrangement to enable whanau and hapu relationships with the land to be retained, while still allowing the blocks to be used for commercial forestry purposes. On a commercial level, they negotiated:

- ▶ a payment on stumpage instead of an annual rental, which maximised later returns;
- ▶ a commercial and quality performance condition in leases to ensure high-quality wood fibre;

- ▶ a reduced lease time period; and
- ▶ the inclusion of an environmental management plan, based on Ngati Tuwharetoa tikanga, whakapapa, and custom, that included leaving significant reserves unplanted in recognition of the need to be sensitive to the environment and to protect valued sites.

The eastern Lake Taupo forest was planted between 1969 and 1985, and the Rotoaira forest between 1973 and 1989. The forests have been successful and are now generating income, although the decisions on stumpage meant a 30-year wait for returns on the investment. Logging began in 1995 and the first dividends were paid in 1996.¹¹⁴

Although these trusts are commercially successful and have a significant income, the claimants noted that the capital generated is nowhere near providing a high income for most owners, nor supporting all of Ngati Tuwharetoa's development needs. The situation at present is that, of the capital generated, one-third of the owners still receive less than \$10 per year, just under two-thirds receive less than \$100 per year, and only 7 per cent receive \$1000 or more. The trusts incur significant costs keeping track of continuing changes in owners and beneficiaries. The profits from these trusts are not sufficient to address the existing needs of Ngati Tuwharetoa; nor do they make up for the results of past Crown Treaty breaches.¹¹⁵ Ngati Tuwharetoa warned us that we should not hold their commercial success with exotic forestry against them and assume that, because they are 'well off' in comparison to other iwi, their claims should be dismissed. Counsel reminded us of the observation of Chris Winitana, that to be denied a hearing on Treaty breaches because they were relatively 'well off' (largely through their own efforts) was to penalise Ngati Tuwharetoa a second time and to ignore what they might have achieved if they had been allowed to develop according to their full potential.¹¹⁶

Ngati Tuwharetoa submitted that being able to participate more actively at a business level enabled them to maintain significant forms of community control, so that overall community development objectives could be achieved. Commercial success was just one component

of this, along with protections for the environment and important cultural sites. In their view, this stands in contrast to the relative disadvantage of other iwi and hapu in joint-venture exotic forestry opportunities. On the whole, others lacked Tuwharetoa's post-war experience in indigenous forestry, and had not had the chance to gain the same kind of confidence and expertise in managing forest lands and assets. They were therefore required to rely more heavily on the Crown's advice and assistance. As a result, they were largely marginalised from the business and entrepreneurial levels of exotic forestry development and over-represented in the wage worker segment. They were also less able to gain the skills needed for management positions, or to participate in decision-making over ventures which might have enabled them to meet a wider range of community objectives. Maurice Toe Toe, for example, in evidence for Ngati Manawa, noted the difficulties his people faced when they were told that, as workers, they would have to plant over their sacred sites and see them destroyed by forestry operations.¹¹⁷

It was also alleged that, in promoting and facilitating the exotic forestry industry, the Crown identified the advantage of the rapidly growing Maori labour force to the industry. The Crown encouraged Maori to regard the industry as a major development opportunity in the changing post-war economic environment. This included encouraging Maori from outside the region to gain employment in the industry, as well as Maori communities from within the region to move to forestry towns. The Crown also encouraged Maori to believe that the exotic forestry industry was a long-term development option for their communities. Ngati Tutemohuta, for example, submitted that forestry was regarded as a long-term development option when more temporary opportunities such as construction work on power stations and transport infrastructure came to an end.¹¹⁸ The exotic forests, they believed, could continue to be managed and utilised for future generations, providing necessary employment opportunities for growing populations.

The claimants alleged that, in encouraging Maori to cooperate so fully in the industry and to tie their lives and

settlements so closely to it, the Crown promoted a belief that they were getting 'a job for life'. The industry was seen as a means of enabling communities to take up a long-term development option in the region, when the properties they had been able to retain could no longer be expected to support all the needs of their communities. Maori had recognised this opportunity and participated in the industry from the time it was first established; they supplied much of the labour for the early Whakarewarewa tree nursery, for example. As the industry developed, Maori communities in the region cooperated by ending old settlement patterns and willingly establishing themselves in areas conducive to the exotic forestry industry, including the expanded forestry towns. In doing so, they were encouraged to become dependent on the industry for their employment and, in many cases, their housing.¹¹⁹

The claimants acknowledge that employment opportunities in exotic forestry were a major benefit for their communities. Ngati Tahu, for example, noted that 'everyone from Ngati Tahu at one stage or another, had a job in the forestry'.¹²⁰ However, in becoming such a major source of employment, the industry also had a major impact on their lives and communities over a number of generations. They paid a significant price in social disruption, pressure from outside workers, hard working conditions, lack of environmental protections, and a measure of racial discrimination from co-workers and management. Ngati Tutemohuta, for example, described their view of the impact of Maori and Pakeha forestry workers who came from outside the district to work in the Waimihia State Forest.¹²¹

Claimants submitted that, in return for cooperating in the exotic forestry industry to such a large extent, contributing both labour and land, and with the industry becoming such a major development opportunity with so many impacts for Maori of the region, the Crown had an obligation as a Treaty partner actively to protect their development rights and other Treaty rights. In the claimants' view, the industry was important in providing the employment opportunities and skills necessary for development and for Maori communities to escape from poverty

and marginalisation. The Crown had a responsibility to ensure that they were encouraged and able to participate at all levels of employment in the industry, which included obtaining managerial and skilled professional expertise. However, it was alleged that the Crown's vision for Maori employment was limited to the forestry worker level. It was assumed that this was where Maori were of most benefit to the industry and the national economy, because they were unable or uninterested in being more than a waged workforce. The Crown failed to offer adequate assistance and encouragement for Maori workers to develop professional and management skills that would enable them to better support and develop their communities for the future. This left them vulnerable, and less able to move into other opportunities should the industry suffer a decline or (as actually did happen) major restructuring occurred.

In terms of that restructuring, the exotic forestry industry was so important to Maori, and the impact on them so immense, that when the Crown decided to review its active involvement in the industry and its commitment to Maori participation, it was required to take their Treaty rights (including their development rights) into account. This was particularly so when the Government decided to privatise state forest assets within a very short period of time in the 1980s.¹²² It was claimed that the Crown's obligation of active protection required it to consult with Maori communities affected by these decisions and to take active steps to protect their interests. The Crown, as a reasonable Treaty partner, had to satisfy itself that Maori of this region were in a position to adjust to the disruption and economic loss about to be suffered, and it had to actively assist with alternative development opportunities.

It was claimed, however, that while the Crown appeared to accept some degree of responsibility in this respect, including an awareness of the need to take Treaty obligations into account, it did so in a very limited way. Rather, it pursued the perceived national interest while reducing protections for Maori to little more than procedure. The claimants agreed, for example, that the Crown took some steps to consult them, but argued that this consultation



Protest march against forestry restructuring, in the 1980s

was minimal and inadequate. Further, it only took place after the Crown had already made major decisions. It was more in the nature of informing Maori about what was going to happen, including how their claims to forest land would be dealt with, than seeking genuine dialogue. It was alleged that the Crown only began to consider its possible Treaty obligations after it had decided and announced the sale of its forestry assets, and that it placed considerations of sale price and buyers' interests above meeting such obligations.¹²³

In the claimants' submission, there was only one national hui (in Rotorua) to discuss the Crown's restructuring of its exotic forestry assets. The terms of consultation were very limited, and the Crown showed little interest in undertaking additional, regional hui. There was little explanation of how the restructuring would take place or how job losses and economic impacts would be addressed. Officials were aware of Maori dissatisfaction with the level of consultation, but the Government remained focused on disseminating information rather than engaging in consultation. The same pattern of inadequate consultation was evident

when it came to the important issue of how Maori leased forests would be treated.¹²⁴

Regardless of the adequacy of consultation with Maori leaderships, whether at a national or a regional level, it was alleged that there was also 'woefully insufficient' consultation with the communities most affected, and very little practical assistance for them. The Government's restructuring and privatisation decisions were made very quickly, within just a few years, which left little time for those most affected (among whom Maori were highly represented) to adjust and make alternative arrangements, including finding alternative employment. This had major social and economic impacts.

A regional coordinating committee was established to manage the impacts for Maori in the Minginui–Murupara–Kaingaroa and Taupo–Turangi areas. This acknowledged the special relationship that had been established between local communities of the region, which were predominantly Maori, and the exotic forestry industry. Their employment, housing, and community life had come to revolve around the industry. There would be severe consequences for those made redundant, especially when there were few alternative sources of employment at the time. The regional committee informed the Government of the expected 'severe and long term' impacts on Maori communities and the hidden costs of the restructuring programme. In addition to increased poverty and job losses, there would be stress, dislocation of communities, impacts on wider families, and loss of key community members. The Government did make available a \$5 million contingency fund, but this was for ameliorating immediate impacts rather than for alternative development purposes. The Crown failed to adequately consider and address the disproportionate impact of the forestry restructuring on Maori communities of the Central North Island.¹²⁵

Ngati Tutemohuta suggested that a number of Maori communities had already suffered dislocation, as work on geothermal projects and power stations had come to an end. But they had been encouraged to expect longer-term development opportunities in forestry. Yet, when the

Crown decided to change its involvement in the industry, in spite of its previous encouragement of Maori, it did so at a pace and with a lack of care in the planning and implementing of privatisation that left communities without adequate protection. This included the Crown's failure to ensure that private companies would continue to honour agreements and practices of cultural importance that had been worked out between Maori of this inquiry region and the New Zealand Forest Service. Although the Resource Management Act 1991 provided some partial protection for Maori interests at about the same time, this was not sufficient with regard to the forestry sector. Ngati Tutemohuta referred to the evidence of Bibi Simon, regarding his work at Fletcher Challenge during the restructuring and his concern that private companies were unlikely to continue arrangements that had gone some way to meet their cultural and environmental concerns in forests in their rohe. He also noted the wish of the hapu to continue to actively participate in development opportunities in the forestry industry in their rohe.¹²⁶

The Crown's case

The Crown submitted that exotic forestry plantations were the result of technological developments at the beginning of the twentieth century.¹²⁷ The exotic forestry industry and its potential as an export earner were not contemplated by the Crown when a significant area of land in the Kaingaroa district was purchased that later became the basis of the Kaingaroa State Forest.¹²⁸ The Crown submitted that very little Maori land was purchased in the nineteenth century with exotic plantation forestry in mind.¹²⁹ Although the available statistics do not provide a clear picture of land acquisitions for exotic forestry, it does seem that the amount of Maori land in this region the Crown acquired in the twentieth century specifically for exotic forestry was relatively low, in comparison with the area already in state forests.¹³⁰ The scale of acquisition of Maori land for forestry by using compulsory powers was also very limited overall, even while it had significance for those involved.¹³¹

The Crown asked us to be careful about applying modern concepts of Treaty consultation backwards in time to the 1920s and 1930s, when its exotic forestry policy emerged. The Crown submitted that it has been well settled that consultation is not a Treaty principle per se, but an expected characteristic of the good faith nature of the Treaty relationship. The available evidence does not demonstrate systematic consultation prior to the implementation of forestry policy in the 1920s and 1930s, but this does not necessarily indicate or constitute a breach of the principles of the Treaty.¹³²

The Crown submitted that the evidence is clear that Maori interests in forestry in the inquiry region were always an important feature of Government policy. While some of this policy can be criticised for being paternalistic, it was not a case of the Crown acting in a state of avoidable ignorance as to the nature and extent of Maori interests. In many instances, Crown regulation and policy acted to check exploitation of Maori resources by private interests. Maori participated extensively in the exotic forestry industry, particularly through employment opportunities.¹³³ There is little systematic evidence that the Forest Service was a reluctant employer of Maori labour. Rather, the records indicate a high rate of Maori employment in the industry, and an official expectation that rapid growth in the Maori population in the Bay of Plenty would occur as a result of the expansion of the industry.¹³⁴ The Crown does not have a Treaty obligation to provide guaranteed employment.¹³⁵

The Crown does not accept allegations that the Ngati Tuwharetoa timber trusts succeeded in spite of, rather than because of, Crown policy. The Crown submitted that this is not a balanced assessment. The commercial success of the timber trusts is a credit to the business skills of Tuwharetoa. Direct Crown involvement was, however, pivotal in assisting Tuwharetoa to develop these assets. The Crown accepts that there are environmental limitations on wealth creation opportunities for the Lake Taupo Forest Trust (with limits on land use near the lake). But within those limitations the trust has been successful, and it is a

venture of which both Ngati Tuwharetoa and the Crown can be rightly proud.¹³⁶

The Crown acknowledges that the restructuring of the Crown forestry agencies in the 1980s had a significant impact on Maori communities of this inquiry region. It resulted in extensive dislocation and unemployment among both Maori and Pakeha communities reliant on the industry. The Crown also acknowledges that while some consultation prior to restructuring did take place it was not extensive.¹³⁷ The Crown noted that this issue has been argued extensively in the Urewera inquiry and that the findings of that Tribunal are likely to assist understandings in this region. The Crown proposed that this be taken into account in planning future stages of this inquiry.¹³⁸

In the Crown's view, while the research reports submitted on forestry contain helpful data, they have significant limitations which should prevent the Tribunal from drawing any reliable conclusions as to cause and effect and as to prejudice resulting from Crown acts or omissions with regard to the restructuring. Important matters of context were not covered adequately, including domestic and international changes and pressures on the export timber industry that pre-dated privatisation. These included: the shift from indigenous to exotic forests for export; the growth of export timber markets and exposure to international cycles in timber prices; the role of major private companies in the industry, which took commercial decisions that had their own adverse impacts on Maori of the region; the lack of any comparison with other industries; and the limitations of not covering the whole restructuring period.¹³⁹ Restructuring and its resultant disruption were a result of private and public, and international and domestic influences. Insufficient data is available to the Tribunal to reach firm conclusions about cause and effect in terms of the Crown's policies of restructuring and corporatisation in the 1980s.

The Crown submitted that it cannot be assumed that restructuring always had negative consequences for Maori of this region. It pointed to claimant evidence of culturally sensitive programmes that were implemented by

companies which purchased state forestry assets. In addition, some Maori individuals and communities were able to participate in developing small contract businesses following the restructuring.¹⁴⁰

The Tribunal's analysis

From the evidence and submissions of parties, it appears that there are four main questions for us to consider:

- ▶ Did the Crown meet its obligations to assist Maori to develop their properties to the fullest extent and assist them to overcome unfair barriers to such development, in exotic forestry on Maori land?
- ▶ Did the Crown give effect to the right of Maori to develop as a people, and fulfil the Treaty promise of mutual benefit, by its active fostering of exotic forestry in the Central North Island?
- ▶ Did the Crown meet its Treaty obligations to Central North Island Maori during its restructuring of the exotic forestry industry in the 1980s and 1990s?
- ▶ Does the Treaty right of development apply to exotic forestry today?

Before addressing these questions, we provide a brief discussion of the development opportunity as it emerged in the twentieth century. The following historical narrative is drawn largely from the helpful reports of the claimants' historian, Tony Walzl.¹⁴¹

Exotic forestry became a major development opportunity in this region in the twentieth century, particularly after the 1940s. It also had major impacts on Maori communities of this region. The natural character of the Central North Island was an important factor in the growth of the industry, as was active Government involvement in promoting and encouraging it as a development opportunity. Governments from the 1940s to the 1970s showed a concern for national economic development, regional development, and the economic development of Maori people living in this region. Much of the interior was marginal for farming, which opened the way from an early period for consideration of alternative land uses. This included



Maori workers planting
Whakarewarewa Forest, circa 1899

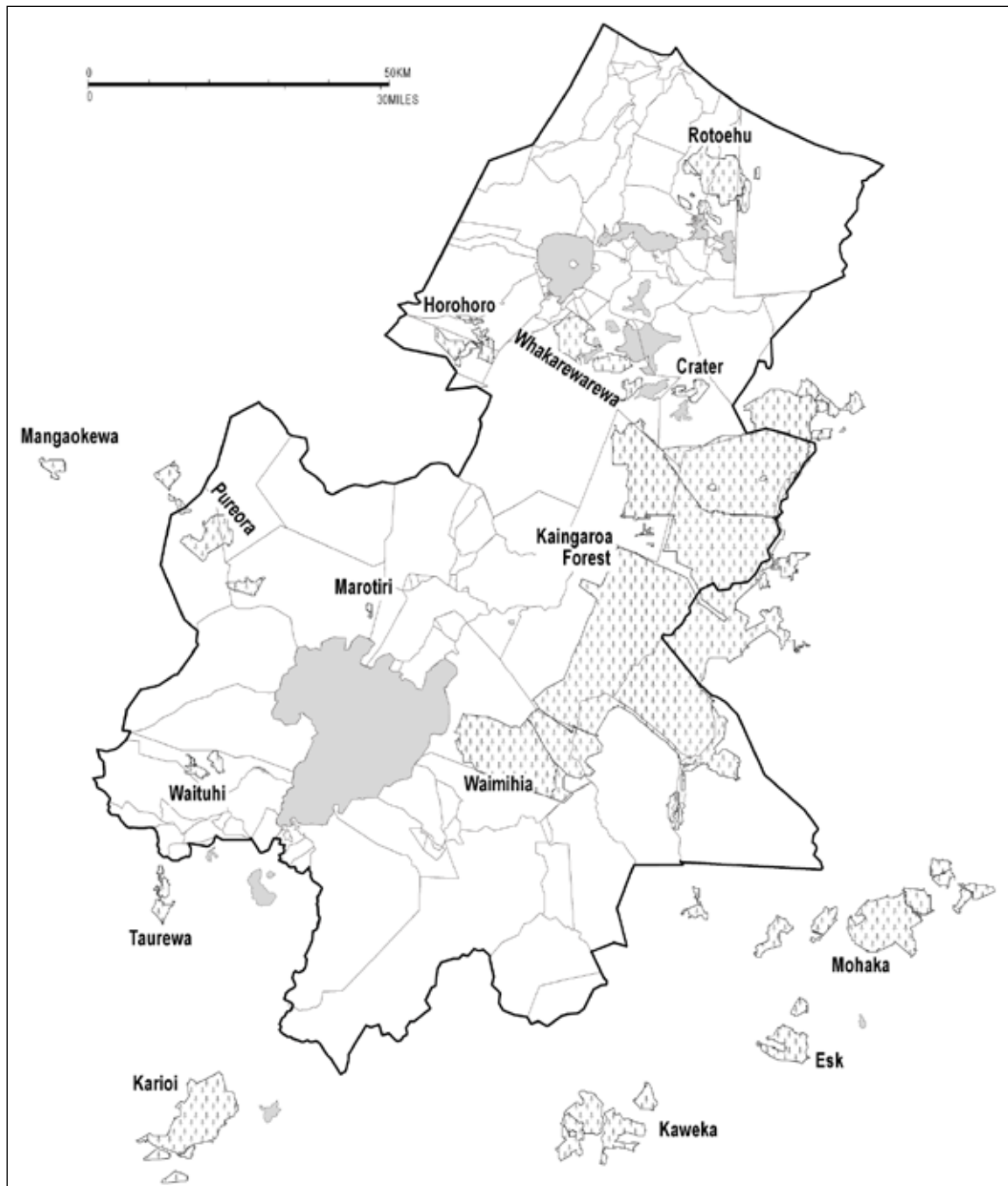
experimentation with tree crops. A number of exotic tree plantations were trialled on Crown and private land in this inquiry region, from as early as the mid-1890s. Major trials began on Crown land in the Kaingaroa district and at Whakarewarewa in Rotorua.

A State Forest Service was established from 1919 amid growing concerns about a possible timber famine. It undertook further exotic tree planting on Crown land from 1921 until 1935. Significant areas of the Central North Island region were planted, mostly in Kaingaroa and to a lesser extent in the Rotorua and Taupo districts. Exotic tree crops were unaffected by the cobalt-deficient soils, and it was found that they did well even on the pumice land where it was so difficult to establish farming. This enabled the growth of the forestry industry in this region without the same competition from farming interests as occurred in other parts of New Zealand. Most of the early experimentation took place on land the Crown had already purchased from Maori, although Maori were heavily involved

from the earliest period of planting as workers in the Government nurseries.

Exotic tree planting increased in the 1930s, in an effort to provide work for the unemployed. The expansion of planting resulted in state forest acreages increasing from around 77,000 hectares in 1921 to 317,000 hectares by 1939, a planting rate that was not exceeded until the 1970s. State plantings continued after this peak time. For example, the Waimihia State Forest in the Taupo district was established in the 1950s. As a result of this expansion in tree planting, the State became the dominant owner of exotic forests, with more than a 54 per cent share by 1940. Kaingaroa became host to one of the largest plantation forests in the world.

By the mid-1930s, as the first large plantings of exotic trees were completed, the older parts of the Whakarewarewa and Kaingaroa forests, planted from the 1890s, were beginning to produce trees suitable for milling. Private sawmillers, however, were reluctant to take the financial risk of



Map 16.1: Crown forestry licence land in and around the Central North Island inquiry region

changing over from the machinery required for indigenous timber milling to that required for efficient milling of the generally lower-grade exotic timber. The Government set about finding a way to use its plantation forest resource commercially for national and regional economic development. In particular, an exotic timber industry had the potential to provide for the domestic timber needs of a growing population as indigenous forestry declined. It also had the potential to offset the need for future timber imports and even create significant income from exports. Further, it had the potential to provide employment, especially for the many rapidly-growing Maori communities of the region. Lastly, it offered a means of utilising not just the marginal lands of the region, but other natural resources such as waterways and geothermal fields, which would generate the power required by the new industry.

The Government became actively involved in investigating and encouraging new technologies for using exotic timber for domestic and export purposes, both as sawn timber and for the pulp and paper industry. In 1939, the State Forest Service commissioned the Waipa Mill in Rotorua as a pioneer plant to utilise timber from exotic forests. In the mid-1940s, the Government embarked on a joint state and private venture for a large-scale state-led industrial sawmill and pulp mill – the Tasman Pulp and Paper Company.¹⁴² At the same time, the Government took responsibility for substantial investment in supporting infrastructure for the exotic timber industry – not only road and rail construction, but also power generation using the natural waterways and geothermal resources of the region. The Tasman plant, for example, was connected by rail to the forest resource and to the port at Mount Maunganui, to enable timber and processed wood products to be exported. The Government also passed supportive legislation that included dispensation from normal water pollution controls, such as the Tasman Pulp and Paper Mill Enabling Act 1954, to assist the industry.

The Government encouraged Maori communities both from within and from outside this inquiry region to form a labour force for the new industry, as a significant means



Making cheese crates at the Waipa sawmill, 1941. The New Zealand Forest Service commissioned this mill in 1939 as a pioneer plant to use timber products from exotic forestry.

of escaping poverty and acquiring new skills when populations were growing beyond what their surviving lands could be expected to support. A number of small settlements in (or just on the edges of) our inquiry region were significantly expanded to meet the needs of the exotic forestry industry, and previous settlement patterns in the region were significantly altered. Pulp and paper towns such as Tokoroa and Kawerau, and small forestry settlements such as Murupara, became dependent on the exotic forestry industry. Tokoroa, Murupara, and Kawerau all experienced higher growth rates than the national average in the years from 1951 to 1981. Other smaller forestry towns in this inquiry region included Waiotapu, Waimahia/Waitahanui, and Waipukao. Each of the townships came to represent specialised occupations in the industry. For example, Kawerau predominantly housed skilled technicians for the pulp and paper plant, sawmill, and rail yards. Kaingaroa village was enlarged to accommodate forestry workers engaged mainly in silviculture and forest maintenance, and the small village of Murupara was expanded to accommodate mainly logging workers. Local iwi and hapu

moved to take advantage of opportunities in aspects of the industry, but they also faced pressures from the migration of many outside workers, Maori and Pakeha, into the region.

Although the Crown owned the largest areas of land in exotic plantation forestry, Maori of this region were also encouraged to contribute areas of their retained lands to the industry. This mainly took the form of joint ventures or leases, but some Maori land was also acquired through purchases or compulsory acquisition. The amounts of Maori land involved in the industry were relatively small but were often strategically useful in enabling the Crown and companies to make up economically viable blocks of forest. In some cases, Maori utilisation of land for forestry also contributed to the Crown's other goals, such as protecting hydro projects and helping to limit the pollution of Lake Taupo. The involvement of Maori owners in utilising their lands for exotic forestry purposes varied, from little more than leasing lands to forestry companies, through to more active involvement in the industry by means of timber trusts or joint ventures.

During the 1960s, the exotic forestry industry continued to grow rapidly and began to overtake indigenous forest milling as the dominant sector of the forestry industry in New Zealand. A number of small mills for exotic timber were established in this region, but the industry was dominated by the Government, through the New Zealand Forest Service and two large companies: New Zealand Forest Products (which operated the Kinleith Mill and the Whakatane Board Mills Limited subsidiary), and Tasman Pulp and Paper (which operated the Tasman Mill at Kawerau). The large mills relied on abundant and relatively inexpensive power, generated in the region from both hydro and geothermal sources. All the mills expanded their capacity in the 1970s. First came a large expansion at the New Zealand Forest Products Kinleith Mill in the early 1970s, followed a few years later by the subsidiary Whakatane Board Mills. The Tasman Mill at Kawerau also expanded in the mid-1970s. By the end of the decade, expansion slowed with the full exploitation of the then-

mature exotic timber, with another crop of mature timber (from the 1960s plantings) due to mature in the 1990s.

The Government's role in the exotic forestry industry changed dramatically in the mid-1980s, when it decided to withdraw from direct involvement. This happened rapidly. The Forest Service was restructured and dismantled, and state-owned forestry assets were privatised. Some of this privatisation involved forests on land leased from Maori owners. The rapid restructuring had significant impacts on the forestry workforce in this region, many of whom were Maori, and introduced a variety of new private sector interests into ownership, management, and employment opportunities in the region's forests.

Having outlined the general nature of the development opportunity from the 1940s to the 1980s, we now turn to consider whether the Crown met its Treaty obligations in terms of exotic forestry on Maori land.

Obligations to assist development and overcome barriers

DID THE CROWN MEET ITS OBLIGATIONS TO ASSIST MAORI TO DEVELOP THEIR PROPERTIES TO THE FULLEST EXTENT AND ASSIST THEM TO OVERCOME UNFAIR BARRIERS TO SUCH DEVELOPMENT, IN EXOTIC FORESTRY ON MAORI LAND?

In chapter 13, we found that the Maori Treaty right of development includes:

- equal access to development opportunities for their properties and taonga, on a level playing field with other citizens; and
- positive assistance from the Crown, where appropriate in the circumstances, which may include assistance to overcome unfair barriers to development, some of them of the Crown's making.

In the first half of the twentieth century, the Crown's acquisition of land for exotic forestry focused on the purchase (or taking) of sites useful for particular state forests. This is a significant grievance for the Maori people involved. The non-seller owners of Rotomahana–Parekarangi, for example, who wanted to retain their ancestral land and indeed were dependent on it for horticulture, were targeted

for individual purchasing in order to supplement the state forest.¹⁴³ Most exotic afforestation, however, was on Crown land until the 1960s. Major planting initiatives had ended with the Second World War but resumed in force in the 1960s. New land was required, so the Crown turned to the large areas of undeveloped Maori land in the Central North Island (mainly in the Taupo district).¹⁴⁴ The Maori Affairs Department cooperated with the Forest Service, seeing no need at this time to raise the ‘farms versus trees’ debate again in this region.¹⁴⁵ Rather than purchasing land, however, the Government sought to lease it from its Maori owners and to supply the capital for forest development. A variety of arrangements were entered into, including joint ventures such as the Tarawera Forest, leases with rental payments, and leases with peppercorn rentals until the forests were ready to be logged (at which point the partners would share the stumpage).¹⁴⁶

In the claimants’ submission, the Crown managed 957,000 hectares of forests by the 1980s, 73,000 hectares of which were planted on land leased from Maori. By far the largest forest leases in this region were the Lake Taupo Forest Trust (30,237 hectares, located east of the lake) and the Lake Rotoaira Forest Trust (16,447 hectares, located partly in our inquiry region and partly in the National Park inquiry district).¹⁴⁷ We received evidence on these leases from George Asher, the manager of the two forest trusts, and from the claimants’ historian, Mr Walzl.¹⁴⁸

The background to the leases was that, by the mid-1960s, the Government noted that Maori were reluctant to sell land for forestry, but that leasing was an alternative which enabled their land to be planted (something that was beyond their financial capacity) while they retained control and would share in the returns. At the same time, an officials committee considered possible forms of land use in the Taupo district.¹⁴⁹ This included ‘unused’ Maori land. Mr Asher noted that one of the Government’s primary concerns was the protection of waterways for hydro-electricity, and this is confirmed by the official documents investigated by Mr Walzl.¹⁵⁰ The Government’s planning coincided with an initiative from Arthur Grace, on behalf

of a block advisory committee of landowners. He proposed cooperation between the Crown and owners in bringing the many thousands of undeveloped acres of Maori land:

into production as an asset, not only for ourselves, our children, and our children’s children, but as a national asset as well, and knowing your [the Minister’s] sincere desire to see that the development of Maori lands is enhanced for the ultimate benefit of all ...¹⁵¹

The Government and the tribe both wanted to develop the eastern Taupo lands for forestry. A major obstacle was the nature of the land titles: potentially, there were 175 blocks and 5000 owners, so some vehicle was required to unite and manage these titles for the purpose of administering a forestry lease (and a forest). Further complicating the administration of any lease and its proceeds was the fact that only parts of some blocks would be required for actual planting.¹⁵² Ultimately, there were 61 blocks involved in the Lake Taupo Forest and 73 blocks in the Lake Rotoaira Forest.¹⁵³ The Government pushed for the amalgamation of titles and formation of an incorporation. The Tuwharetoa leadership, acting through one of its trust board’s committees, took on the task of consulting the owners, reaching a consensus, and then negotiating with the Government. It was soon clear that any kind of development – in this case, forestry – was desperately needed, but that the people wanted to keep their particular ties with their land and to see it managed as a tribal asset. They appear to have sought a tribal trust board, on the same lines as the board appointed to manage lake revenues (see chapter 18). The board would have administered the lease and decided which parts should be planted in grass and which parts in trees. This would have required special legislation, which the Government declined to enact, because other groups ‘around the country have the same idea in mind, and if it is done in one case, there will be great difficulty in preventing a further proliferation of these special bodies.’¹⁵⁴

The Government decided that any title and management solution had to come from within the existing law, and continued to push for an amalgamation of titles and an

incorporation structure.¹⁵⁵ The Maori Affairs Amendment Act 1967, however, had extended the powers of trusts, and the Maori owners were determined not to relinquish their ties (in the form of legal title) with their particular areas in the hundred thousand or so acres involved.¹⁵⁶ As Mr Asher explained to us, the eventual result was the preservation of the titles within a trust structure, set up through the Maori Land Court. Under that arrangement, the Court was (and is) responsible for identifying title changes and successors.¹⁵⁷ The Minister of Forests met with the owners, promising financial profits but also development in the form of employment, service industries, and other advantages that would last for generations.¹⁵⁸ The eventual lease of what became the Lake Taupo Forest Trust land was, as Mr Asher noted, based on a share of the profits (stumpage) more than a rental. Also, the owners have managed the forest in such a way as to implement the tribe's environmental and cultural values in practical ways, by preserving and protecting wahi tapu, reserving land from planting, and observing the proper protocols. It has become, in a very meaningful way, a Maori forest.¹⁵⁹

As Mr Asher pointed out, however, there are many thousands of acres of Taupo Maori land that have not been developed, because it is beyond the means of the owners to do so. Some of that land is suitable for forestry.¹⁶⁰ After the successful establishment of the Lake Taupo Forest Trust, the Government was inundated with offers for similar arrangements in the early 1970s. A second trust was established in 1974, involving the lands around Lake Rotoaira (and aimed also at protecting the Tongariro Power Development), which are partly within our inquiry district. As with the Lake Taupo Forest Trust, this lease was based on a token rental and a share of the stumpage when the forest is logged. The Forest Service admitted in the early 1970s that it lacked the finance to keep leasing and developing Maori land for forestry in the way sought by Taupo Maori. It appears that the Rotoaira forest was possible mainly because it contributed to the protection of the power project, although economic development and 'social values' (employment for Maori) were also a consideration.¹⁶¹

Other forestry leases were negotiated in the Central North Island. We have information on the Rotoiti lease, but did not hear from the Ngati Pikiao claimants concerned in it.¹⁶² We lack sufficient evidence to reach a view on these other leases.

In terms of the two big Taupo leases, we note the claimants' view that the leases have been a success in terms of land retention, land development, and tribal development. At the level of individual ownership, however, the forest leases have not been a significant source of income. When logging began in the 1990s, about one-third of the Lake Taupo Forest Trust's receipts were distributed to owners. In Mr Asher's evidence, about one-third of those owners receive less than \$10 per annum, 64 per cent of owners receive less than \$100 per annum, and only 7 per cent receive \$1000 or more.¹⁶³ About two-thirds of the trust's money is reinvested in the business. The fractionated state of the titles means that not only do individuals receive very little, but over half of the owners are unregistered. The dividends for the unregistered owners are held in trust, with the interest spent on tribal projects (education, marae grants, and others).¹⁶⁴ Thus, the trust structure does allow what was formerly a tribal asset to contribute to the current tribal base, but only because so many individuals have become lost in the system of fractionated titles.

The Tribunal's preliminary findings

In respect of this forestry opportunity, to what extent has the Crown met its obligations to Central North Island Maori in terms of their Treaty right to develop their lands? In our view, the evidence is insufficient for us to make full findings on this matter. We note agreement between the Crown and claimants that the two large Taupo forest trusts have been a success. The Crown assisted the owners to overcome unfair barriers to participation in development by providing capital and a trust structure that circumvented their title problems. As a result, forestry leases were established that enabled the development of significant areas of land. The financial benefits have been shared by claimants and the Crown. To that extent, the Crown has

met its Treaty obligations to Taupo Maori in respect of the development of those lands. Although it is partly the result of structural failures in the title system, the trusts are also assisting in the maintenance of a tribal base for their communities. Further, the trusts give effect to the tino rangatiranga of the claimants by managing the forests according to their needs and their cultural preferences.

We note, however, that the Taupo tribes wanted to develop other suitable land for forestry, but were prevented by lack of Government funding. We do not have detailed evidence on the point. The Government appears to have prioritised land that would protect its massive hydro projects, in addition to meeting its other goals (afforestation and economic development). Significant areas of Taupo Maori land remain unutilised today. We lack comprehensive evidence on how much of it is suitable for forestry and the specific reasons why it has not been developed. In our view, however, the Crown's failure to engage fully with the Ngati Tuwharetoa people in their wish to develop their lands in the 1960s and 1970s, when forestry was a feasible option, was in breach of the Treaty. The Maori owners needed capital and they needed a tangible incentive to combine their land titles in trusts; the Government's refusal to assist them with forestry deprived them of both. In that respect, the Crown was in breach of their Treaty right of development. As we have found in part III and in chapters 13 and 14, the problems of access to finance and workable titles were interrelated and were in large part the outcome of earlier Treaty breaches. The Crown, therefore, was obliged to provide active assistance to overcome them as circumstances permitted.

We also think that the Crown could have done more than it did to solve the title problems facing the Maori owners of the forest trust lands. In particular, their tino rangatiranga could have been given effect had the Crown met the owners' wishes to establish a tribal trust board and to turn the lands into a tribal asset, while still retaining their links with their whenua. The Government's refusal to do so, on the basis that it did not want to set a precedent for the many other Maori who wanted the same thing, was in breach of the Treaty.

In terms of other forest leases, we have insufficient evidence to make preliminary findings. We note, however, that the terms and benefits appear to have varied significantly.

We turn next to the broader question of the Treaty right of Maori to develop as a people, in cultural, economic, and social senses, and the extent to which exotic forestry was a means for the Crown to meet its obligations to Central North Island Maori in this respect.

Giving effect to the right to develop as a people

DID THE CROWN GIVE EFFECT TO THE RIGHT OF MAORI TO DEVELOP AS A PEOPLE, AND FULFIL THE TREATY PROMISE OF MUTUAL BENEFIT, BY ITS ACTIVE FOSTERING OF EXOTIC FORESTRY IN THE CENTRAL NORTH ISLAND?

As we discussed in chapter 13, mid-twentieth-century governments were committed to policies of social and economic development. These policies operated at national and regional levels, and they included a growing concern with the provision of equality for Maori in housing, employment, education, and other areas. Also, governments became committed to providing full employment for their citizens, including Maori. Although ideologies and policies changed with the parties in government, these themes were fairly constant from the 1940s to the 1970s.

In 1948, the Maori Education and Employment Committee (an inter-departmental officials body) was set up to devise practical measures for ensuring full employment for Maori. Forestry was seen as a key way to provide rural employment for Central North Island Maori, with the idea that the expected growth in their population from the 1940s to the 1970s would all be absorbed in forestry and its service industries. In the committee's advice to Government in 1949, the need to provide employment for Maori was an important consideration in terms of how and where it should plan its forestry projects. Further, the committee hoped that the forestry industry would absorb Maori from other districts and provide employment for those local people who had land that was not being developed for farming. The Forest Service offered timber

for housing, planning to accommodate a greatly expanded Maori workforce in state houses in the new forestry towns. The plan for the development of forestry – and Maori – in the region was in place by the early 1950s.¹⁶⁵

As the claimants noted, they had no input into planning this remarkably ambitious project for their region and people, except – as at Murupara – when the Crown needed their land.¹⁶⁶ We observe, however, that the Government had passed the Maori Social and Economic Advancement Act in 1945. That Act had turned the voluntary Maori organisations of the Second World War into official marae committees and district tribal executives, with the express purpose of promoting Maori advancement through their own efforts. The committees were, in the Prime Minister's words, to be as 'independent' and 'autonomous as possible'.¹⁶⁷ Among other things, they were to obtain Government funding for approved welfare and farming projects, and to work with the Maori Affairs Department in administering the Maori welfare officers.¹⁶⁸ Given their proposed role and functions, we consider that the Government ought to have consulted such committees and tribal executives in the Central North Island during its formulation of exotic forestry policy, so that Maori of the region could have a voice in its development. With the Maori Affairs Department a key player on the Government's Maori Education and Employment Committee, involvement of these regional Maori bodies could have happened. On the evidence available to us, the Government did not consult these bodies, or tribal leaderships, on either the planning of exotic forestry or how Central North Island Maori might wish to be involved.¹⁶⁹

Exotic forestry did in fact become a major employment opportunity in this region from the 1950s, in part because of the Government's desire to promote full employment for Maori, but also because of the growing need and market for wood products – a need that had to be satisfied from land that was less useful for farming. By providing housing, along with jobs, the Government encouraged Maori to move to Murupara and the other forestry towns to take up these opportunities. Maori welfare officers actively recruited

Maori into forestry, recognising that the Government was benefiting as much as Maori from the latter's contribution to this project of national importance.¹⁷⁰

The claimants' evidence was that they benefited from this economic development.¹⁷¹ Mr Walzl's report, for example, shows that generations of Ngati Tahu in the Kaingaroa State Forest, Ngati Whaoa at Waiotapu, and Ngati Rangitihi at Matata were all employed in forestry work.¹⁷² As Maurice Toe Toe explained for Ngati Manawa, whole communities were dependent on the longer-term forestry employment.¹⁷³ Bibi Simon confirmed, in his evidence, that forestry was an important opportunity when employment ended on the power station projects.¹⁷⁴ But employment and housing came at a price; there was some disruption of communities, loss of wahi tapu and elements of their culture (including hunting and birding), and a high cost in terms of environmental damage and pollution. Central North Island Maori may have been more willing to pay this price when, as it seemed, their communities were guaranteed employment for generations.

There was a telling exchange between Crown counsel Sally McKechnie and Colin Amopiu of Ngati Raukawa:

McKechnie: We heard evidence from Ngati Tutemohuta yesterday about forestry, and one of their witnesses said notwithstanding all the problems with forestry it had been good for Maori, do you agree?

Amopiu: I wouldn't agree with that. It was good, if they said it was good it saw them into early death. The goodness of a thing it provided – what it did, it took away the marae-style of living, it took away the nomadic type of roaming, the hunting, that sort of living, it took that right away. It took away the homes and the dwellings of our birds, our fish and all that sort of thing, and that's what it did. So in terms of did it do any good for our people, I would say no.

McKechnie: It provided employment for your people?

Amopiu: Is that employment still around? Not today, so they call it progress, we've now got to go back to our old people and say go and get an education. All that lifestyle has gone.¹⁷⁵

So, a high price has been paid for development, but the permanent employment that it seemed to promise is gone. We will return to this point below. In part, some of Mr Amopiu's concerns were related to the impacts of indigenous forestry, but they were also concerned with the way in which exotic forestry was developed in the Central North Island. In particular, the evidence of Mr Walzl and many tangata whenua witnesses was that Maori did not obtain a sufficient proportion of managerial or professional roles to have a meaningful say in decision-making. Mr Toe Toe gave evidence, for example, of the destruction of Ngati Manawa wahi tapu in the Kaingaroa State Forest, and how the most that his people could do, as workers, was absent themselves – only to be labelled as 'lazy'.¹⁷⁶

Exotic forestry on Maori land, however, in which the owners were able to call the shots, was conducted in a different manner. Mr Asher described how wahi tapu were protected, stands of indigenous timber were preserved, waterways and fisheries were safeguarded, and the cultural preferences of the owners were given effect.¹⁷⁷ Had Maori been able to secure a more meaningful role in state forestry management, perhaps, the same objects could have been achieved without significant harm to commercial success (as evidenced in the Taupo forest trusts). Even as workers, however, Central North Island Maori did have some influence. By the late 1960s, both the Forest Service and companies such as Tasman Pulp and Paper saw the need to take greater care in their treatment of wahi tapu in state forests.¹⁷⁸ By the 1980s, according to Bibi Simon of Ngati Tutemohuta, the Forest Service had protocols in place for dealing with injuries or deaths, giving local kaumatua access for conducting the appropriate rites. These things were done in consultation with the local iwi.¹⁷⁹ There had

been some accommodation of Maori cultural needs and preferences.

As part of its increasing commitment to Maori social and economic development, the Government monitored the forestry towns and industry quite closely in the 1950s and 1960s. Mr Walzl relied on Maori Affairs Department reports and commissioned studies from the time, as well as the oral evidence of informants such as Peter Staite of Ngati Whaoa and Tame Iti of Tuhoe, to reach the conclusion that Maori were significantly under-represented in managerial and professional roles. Some officials were concerned at what appeared to be racial discrimination in employment and promotions, but others attributed the problem to systemic differences in education and training.¹⁸⁰

It appears, from the oral evidence of the claimants and the documentary and oral research of Mr Walzl, that the Government took little action to deal with this problem, even though Maori welfare officers and other officials reported it to their superiors. Remedial action was not beyond what could have been contemplated at the time. In chapter 14, we noted the advice to the Government of Professor Belshaw in 1939 and 1940, that assistance was required to enable Maori to participate in a variety of employment opportunities, at managerial and skilled levels as well as at the level of manual workers. There is evidence, both in Mr Walzl's report and in the Bayley-Shoebridge document bank, which indicates that racism did occur in employment in this industry. We are not persuaded, however, that racism in employment was accepted in Government policies. Rather, we have evidence indicating that the Government's welfare officers tried to find ways to blunt the worst of it through education and encouragement.¹⁸¹ Nonetheless, Maori were heavily represented in wage worker and skilled occupations in the industry, and under-represented in professional and managerial positions. This represented a failing by the Crown to take steps to encourage opportunities for Maori to enter a much greater range of occupations. The Crown's failure to do so, until late in the century, left Maori workers concentrated

in a relatively narrow range of occupations and vulnerable to any decline or contraction of the industry. It also left them vulnerable when the Crown decided to rapidly privatise the industry.

We also note the evidence of George Asher and other witnesses that there were differing opportunities for iwi to gain the skills necessary for business management. On the evidence available to us, the commercial success of Ngati Tuwharetoa with their exotic timber trusts was possible, in part, because of the experience, expertise, and confidence that they had developed as participants in the business of indigenous timber (see chapter 15). Maori communities clearly did have the capacity and the will to participate in these industries at a business level. They could resolve internal tensions over whether and how to engage in new forms of development in ways that enabled communities to manage businesses for their own benefit, and to meet their cultural and social preferences. This tends to confirm the Ngati Tuwharetoa claim that earlier underdevelopment and inexperience creates barriers to participation in new development opportunities.

As a legacy of these earlier barriers to development, Maori of the Central North Island appear to have been under-represented in exotic forestry management in the 1950s and 1960s. This left them much less able to influence the decisions that affected their values, their wahi tapu, and their environment. We have less evidence of the situation in the 1970s, although it clearly left Maori vulnerable when the Government restructured the industry in the 1980s, as we will see.

Mr Walzl concludes:

In some cases, Central North Island Maori were encouraged (some would say forced), by government policy to leave their homes and resettle in new environments. The cost of doing so was to lose connections with their homelands. For others, there were few other options than to participate in the new rising industries as previous land loss, insufficiency of productive land or absence of capital had rendered other options unfeasible. Those who hesitated to do so were encouraged by

the promise of an industry being developed that would provide jobs for life for themselves and their descendants. Such a promise, made by prominent men of business and government, and reiterated by countless officials, was sufficiently strong to bring about participation on a large scale. A social contract was struck. In return for participation a good wage was paid, good work conditions were given (at different places and times), a standard of living was raised and a lifestyle was secured. Participants were given a sense of continuity as three or four generations of whanau worked in the forestry. Young men were given a sense of achievement and pride in their work and their own prowess at the job. Communities grew up in the knowledge that they were participating in something from which the whole country benefited. In return for the promise of work without end, participation was to occur without protest or complaint, despite the hard work, the demands of an industrialised work regime, the sometimes gruelling conditions, the social upheavals of living in new environments, the encounter with racial discrimination and the accumulating health risks that resulted for some in early deaths.¹⁸²

The Tribunal's preliminary findings

In our view, the evidence is not comprehensive enough to make full and final findings on the matters at issue. It is, however, sufficient for us to have reached a preliminary view. We find that the Crown did meet its Treaty obligations to Central North Island Maori in respect of their right to develop as a people, and in terms of delivering on the Treaty promise of mutual benefit, in its fostering of the exotic forestry industry. In the mid-twentieth century, the Maori Education and Employment Committee advised the Government on how forestry could provide housing and employment that would absorb Maori population growth in the Bay of Plenty for the next 25 years. In its provision of forestry towns, housing, and employment, the Crown intentionally promoted the social and economic development of the Maori people in the Central North Island. Tangata whenua witnesses spoke of the great economic value of forestry to them, their reliance on it for

employment, and their belief that it was to be not just full but permanent employment.

A high price was paid for this development. In our view, the price need not have been so high. The Taupo forest trusts indicate that forestry could have been managed in such a way as to protect wahi tapu, valued sites, areas of native bush, waterways, fisheries, and the cultural values of tangata whenua, without damaging commercial success. What was required was for Maori to have a full and appropriate say in decision-making.

In the first place, the Government should have consulted and worked with the marae committees and tribal executives that it had just established under the Maori Social and Economic Advancement Act. Its failure to do so in this instance, so critical to the social and economic development of Central North Island Maori, was inconsistent with its Treaty obligations.

Secondly, the Crown ought to have ensured Central North Island Maori a fair and level playing field for advancement and for the exercise of authority within the industry itself. The Government knew, from its own monitoring, that Maori were not being promoted as managers to the same extent – or gaining the same entrepreneurial experience – as non-Maori. On the evidence available to us, it took no action to address this problem. Its failure to do so was critical to the exclusion of Central North Island Maori from positions where they could have promoted management of the forests (which grew on their former lands) more in keeping with their cultural preferences.

The Forest Service and companies such as Tasman (which was partly Crown-owned) began to show some sensitivity to Maori concerns from the late 1960s, and dialogue with local iwi was clearly possible, as in the case of providing for rituals following a death in the forest. Had such opportunities for dialogue with Maori and empowerment of Maori been taken up in a systematic way, and had better promotion policies been established within the industry (as was called for by Maori), the Crown could have managed the industry more in partnership with the tribes of the region.

We find the Crown in breach of the Treaty for not providing effectively for the tino rangatiratanga (full authority) of Central North Island Maori in the exotic forestry industry. This failure had long-term consequences in terms of the environmental and cultural harm that came in the wake of exotic forestry. It also had consequences when the Government restructured the industry, to which we now turn.

The restructuring of the 1980s and 1990s

DID THE CROWN MEET ITS TREATY OBLIGATIONS TO CENTRAL NORTH ISLAND MAORI DURING ITS RESTRUCTURING OF THE EXOTIC FORESTRY INDUSTRY IN THE 1980S AND 1990S?

For Ngati Hineuru, forestry became so central that they see it as the fulfilment of Ratana's prophecy, made to them in 1930 at the opening of their dining hall, Piriwiritua (the Campaigner):

Another thing that was spoken of by Ratana was when he, from the Marae pointing towards the hills, said to the people, 'See those hills? There is a gold mine'. The people were perplexed and puzzled at his statement. However, we today, the present generation, look at the forestry as being the 'gold mine' that perhaps Tahupotiki Wiremu Ratana was referring to.¹⁸³

The importance of forestry, the 'gold mine' for the sustenance of the people, was even greater where the tribes felt a sense of ownership that went beyond employment, housing, and other benefits. As generations worked on the same land and forests, Peehi Hemopo explained to Mr Walzl, they came to feel that they owned it: 'All the trees were seen as being theirs as they and their forebears had put them there.'¹⁸⁴ There was a further level to this sense of kinship, whakapapa, and ownership, where the tangata whenua worked and lived for generations on land that had once been theirs. Mr Walzl found:

Despite it being seen by officials that these Ngati Whaoa people were living on Forest Service land in Forest Service

buildings, the people themselves had a different viewpoint. As Peter Staite notes: 'The significance to me, is that they lived and they died there as their tupuna had.' The people continued to see this land as their land, as they were living on it. When Peter Staite's grandfather and grand-uncles went to Waitapu to work in the forest they saw that they were working on their own lands. There was an unbroken chain of occupation. 'They never lost their mana to the land; their occupation was continuous.'¹⁸⁵

In addition, many Central North Island Maori felt that they had made sacrifices to ensure the progress of this industry of national importance, in return for promises by ministers and officials that generations of their people would have secure employment and prosperity. These promises took the form of specific undertakings by ministers at the start of projects and ongoing assurances from officials to forestry workers.

The oral history of Ngati Manawa, for example, was passed to Maurice Toe Toe from his elders, Ngakorau Kaka, Charlie Kaka, and Kapu Maher. In their view, Prime Minister Peter Fraser entered into an agreement with the tribe in 1949, in which the forestry industry would be developed around the town of Murupara (for which their land was needed), in return for 'continued employment in the forestry industry as long as there were mature trees to work with.'¹⁸⁶

Mr Walzl's review of the documentary sources shows that at the meeting concerned the Assistant Director of Forestry told Ngati Manawa that the Government's proposal would 'benefit the Maori people for generations,' especially in terms of jobs. The Prime Minister added that there would be service industries as well as forestry jobs, a town, schools, and increased opportunities for horticulture. The Maori Land Court and Maori Affairs Department would assist, and the proposal was 'for their benefit'. Although the specific promise as remembered by Ngati Manawa was not recorded, we think that its spirit was clearly part of the Government's persuasions, which

were based on a genuine belief that the Maori people would indeed benefit for generations to come.'¹⁸⁷

Examples of the second category of promise, that of assurances from officials, were also recorded by Mr Walzl:

When Peehi Hemopo worked in the Kaingaroa forest he thought he had a job for life. He felt this way because this is what was told to he and his fellow workers throughout the time they worked there. Forest Service officials would tell them this at times when they were trying to encourage them to push for certain logging targets. They also told them this when they were trying to bring workers into line or head off any dissension over working conditions.'¹⁸⁸

In sum, the claimants believe that a social contract was created between the Crown and Central North Island Maori by means of such promises and assurances, in addition to the particular circumstances surrounding their participation in the exotic forestry industry. The Crown's view, on the other hand, is that no Government can guarantee jobs for life, and nor is it required to do so by the Treaty.

The parties approached the restructuring of the 1980s, therefore, from very different positions. In the claimants' view, the principles of the Treaty required the Crown to consult with them fully before and during the restructuring, and to actively protect their interests in any corporatising and privatising of the industry. These obligations were all the more acute because of the size and scope of the Maori interest in forestry, and the social contract that had been forged in respect of that industry.

The Crown conceded that the restructuring had a significant impact on Central North Island Maori (and non-Maori), resulting in extensive unemployment and dislocation among those dependent on forestry. It also conceded that, while there was some consultation, it was 'limited' and 'not extensive'. It maintained, however, that the complex interplay of private and international pressures was not clarified by the claimants' evidence, and suggested that we

leave the issue to be decided upon the more comprehensive evidence in the Urewera inquiry.

We agree with the Crown on some points. The Treaty does not require it to guarantee jobs for life. As we noted in chapter 3, however, the honour of the Crown requires it to keep its solemn undertakings and promises. In its submissions, the Crown did not address the question of whether it had made such promises in this case. In our view, these promises became part of the Crown's Treaty relationship with iwi and hapu, which changed and developed with the times. The promise of benefits was fulfilled for some generations of Central North Island Maori, as we have found above. The question is whether, by the 1980s, a binding contract had been created of the type posited by the claimants. Counsel for the claimants submitted that the 1980s restructuring was carried out without proper consultation or regard for the effects on Maori, and that this was a breach of the 'social contract' and 'a breach of an agreement between two Treaty partners'.¹⁸⁹

Promises of employment and social benefits (not just for the present but for generations to come) were in keeping with the Treaty right of development and the principle of mutual benefits. In our view, they were not insincere. Governments of the day wanted to promote Maori economic and social development, and believed that exotic forestry was a means to that end, as well as an end in its own right. Some 35 years after Fraser's meeting with Ngati Manawa, the circumstances in which the Crown was required to give effect to this Treaty right of development had changed. As the Labour Government put it to Maori in 1988, the bottom line was a policy shift that the State should no longer be directly involved in the commercial forestry business, and that its assets should be sold to pay off the national debt. But, in carrying out its policies, the Government recognised that it had to act in accordance with the principles of the Treaty of Waitangi.¹⁹⁰ That should, in our view, have guaranteed a fair and appropriate process that was carried out in the spirit of partnership and active protection, principles well known at the time.

The Crown suggests that we must take account of the private, commercial, and international forces behind the decision to restructure and privatise forestry in the 1980s. In our view, those matters are not relevant. We accept that the Government of the time knew its business, and that it had a policy to withdraw from commercial forestry and privatise the state forests. The policy merits of that decision are not at issue in our inquiry. We are concerned with the manner in which the Crown consulted with Central North Island Maori and protected their interests, in the making and execution of its decisions. The Crown has conceded that its consultation was 'limited' and 'not extensive'. After reviewing the claimants' oral evidence and Mr Walzl's historical report, we think that that description falls short of the reality. Even so, the parties are not so far apart. The consultation was clearly inadequate. As such, it did not provide a base from which the Government could truly assess or protect Maori interests.

The question then becomes: how far did the Crown actually protect the interests and Treaty rights of Central North Island Maori when it restructured the forestry industry? In part, the argument before us was diverted into a side-channel. The claimants' characterisation of the 'social contract', and Mr Walzl's evidence of promises of 'jobs for life', led the Crown to respond that its 'Treaty obligations did not extend to guaranteeing Maori employment in the forestry industry'.¹⁹¹ The argument then became: did the active protection of Maori interests in the restructuring require the Government to guarantee employment as it existed (and at the levels it existed) at the time?

In our view, the arguments of both parties have merit. Promises of mutual benefit from settlement had been made since the time of the Treaty, and were partly fulfilled (by deliberate policy) in the Central North Island exotic forestry industry. On the other hand, the principles of the Treaty of Waitangi, including the right of development, do not require any one particular means of delivering that promised prosperity. In the changed circumstances of the 1980s, the Crown could no longer guarantee the kind and

scale of employment that had formerly been protected in state forestry. As Mr Walzl put it: 'As unemployment rose during the 1970s, those in forestry felt protected.'¹⁹² That protection was no longer possible in the 1980s. Even so, Government agencies acknowledged that Central North Island Maori communities were heavily reliant on exotic forestry. As we have found above, they had paid a heavy price for its benefits, their rohe had been transformed by it, and they were now reliant on it for housing and employment. It was known that the effects on them of restructuring would be extreme unless mitigated in a significant manner.

In these circumstances, the Crown had to recognise the special relationship between Central North Island Maori and the forests on their (former) lands. It had to take into account the history of intense Maori involvement in forestry, their economic dependence on it, and their right of development. It had to decide the way forward in partnership with them and had actively to protect their interests (including their right to develop). Had it done these things, the Crown's restructuring of exotic forestry could have met its policy objectives while remaining consistent with the Treaty. Consultation was necessary with Maori leaderships and affected communities, and the Government had to commit to a reasonable amount of planning and investment so as to enable those communities to adapt to the new situation and build new development opportunities. This planning and consultation had to be more than a formality. Nor did its focus have to be restricted to forestry. As John Simon pointed out for Ngati Tutemohuta, the Crown could have assisted with opportunities in tourism after they had become so much narrower in forestry.¹⁹³

The restructuring of the exotic forestry industry in the 1980s did not have to be inevitably and overwhelmingly destructive or negative in its impacts on Maori communities. Handled carefully, damage could have been minimised. As some witnesses noted, it did create new opportunities for entrepreneurial activities on their part, including contracts for aspects of forest work and the development of small – and sometimes large – businesses. It was

not sufficient, however, for the Crown to simply assume that Maori could participate in this way without ensuring that they had time to adapt to the changes and providing assistance to overcome barriers to participating in new ways in the industry. This should have included, for example, access to lending finance to establish businesses, and assistance to overcome the Crown's previous failures to encourage Maori into management and professional roles in the industry. Without active assistance, therefore, many communities would be left facing the same barriers that had always restricted their development in the past, including difficulties gaining access to loan finance and a lack of sufficient skills, expertise, and experience in business management.

In addition to Mr Walzl's extensive reports, we heard much evidence from the tangata whenua of how they were affected by the restructuring and the Crown's failure to provide them with the necessary development assistance. Mr Toe Toe, for example, claimed that after the conversion from wage crews to contract logging, 30 contractors set up business in Murupara, but only two survived. The Government's abrupt withdrawal from the forestry industry left his people with skills and experience particular to the past shape of the industry, and without help to adjust to its new form or to other opportunities.¹⁹⁴ Douglas Rewi described how workers were faced with the costs of training and equipping themselves, costs that the Government (or companies) had paid for before 1986:

A very different type of bush man exists today. Any person who wants to work in the forest must first obtain forest training modules (qualifications) within each working area they apply for. They must have, and be familiar with, their own health and safety policies. They are required to be audited on a regular basis on each of the modules they hold. They are responsible for purchasing their own equipment, machinery pertaining to their particular jobs.¹⁹⁵

Relatively small redundancy payments were made, many of which were used to buy state houses in the forest towns. A \$5 million contingency fund was established to provide

support functions, advisory services, and needs assessments. In Mr Walzl's evidence, funding did not extend sufficiently to actual assistance with ways and means of adapting to the new circumstances and opportunities. In particular, there was no funding for 'alternative opportunities or community-based enterprises which may have had the most potential to minimise social impact'.¹⁹⁶

A job search programme was set up to help people find new employment elsewhere. At first, the Government approved funding, in 1986, for Maori tribal authorities to identify economic opportunities for their people. The trust boards in the Central North Island submitted some preliminary proposals, but the initiative was shut down on Treasury advice in November of that year. There was some funding for an Enterprise Opportunity Scheme, intended to assist individuals and groups to identify and develop new jobs and business enterprises. Moves into contracting for logging and silviculture predominated, but they were hampered by a lack of business skills and training. Even so, the Government's provision of advice and assistance was essentially short-term, despite officials' view that special job search programmes ought to continue, and that longer-term effects would inevitably arise and must be planned for.¹⁹⁷

The Crown has conceded the following:

The Crown does not deny that the restructuring of Crown Forest agencies in the 1980s had a significant impact on Central North Island Maori communities. It is acknowledged that extensive unemployment and dislocation occurred as a result amongst both Maori and Pakeha communities reliant upon the forest industry.¹⁹⁸

Counsel suggested that more extensive evidence on the impact of restructuring has been presented in the Urewera inquiry, and that this Tribunal should wait for those findings. We accept that the Urewera Tribunal will be able to make more detailed findings, but we have agreed to present our generic findings as soon as possible so as to assist parties to negotiate. There was clearly considerable prejudice to Maori communities of this region, as both the Crown and claimants agree. We do not have the detailed evidence

available to us to determine the extent of prejudice for the communities affected. This is a matter for further research and for negotiation between parties.

The Tribunal's preliminary findings

As with other aspects of the claims about exotic forestry, we do not have comprehensive evidence on the restructuring and its effects. Our findings are preliminary. We note the Crown's concessions that its consultation over the restructuring was 'limited' and 'not extensive', and that the restructuring caused extensive unemployment and social dislocation for the Maori communities of this inquiry region.

We agree that the consultation was inadequate. It did not recognise the special relationship between the tangata whenua and the forests on their former lands. The intensive history of Maori development in exotic forestry, the high price that they had paid for it in social and cultural terms, and the degree of their economic reliance on it, were not sufficiently taken into account. Although we do not accept that there was a binding social contract requiring the Crown to maintain its pre-1980s protection of forestry employment, the Crown was (and is) required to abide by Treaty principles. We find that the Crown's failure to consult adequately with Central North Island Maori, or to take proper steps to ascertain and protect their interests, was in breach of the Treaty principles of partnership and active protection. It was to have serious consequences.

In the circumstances of the 1980s, and given the particular history of Central North Island Maori in exotic forestry, the Crown was required to provide active assistance for them to participate equally with others in the new forestry opportunities or in development alternatives. It could have done so by facilitating access to loan finance, to training, to business advice and expertise, and to other means of reversing its previous failure to address disparities between Maori and non-Maori. We find that in its restructuring, the Crown failed to provide sufficient assistance for Maori to overcome past barriers to development, failed to negotiate and provide adequate transitional arrangements, and

failed actively to protect the economic and social interests of Central North Island Maori. These failures were in breach of the Treaty. Although the parties do not agree on the extent of the prejudice suffered, both claimants and the Crown agree that it was significant.

We would note also, for the guidance of parties before us, that one consequence of the Crown's withdrawal from forestry was to throw Maori of the region back on their retained lands and taonga, which brought to the fore its other failures of active protection. For example, the impact of problems with some of the land development schemes had been mitigated, to an extent, because those involved could obtain well-paid work in the forestry industry. When the industry was restructured and privatised, the impacts of loss of land development opportunities and of exclusion from the profits of hydroelectricity and geothermal power, for example, became much more important again. These consequences need to be taken into account when considering the extent of prejudice for Maori communities as a result of the Crown's Treaty breaches in restructuring.

Exotic forestry today

DOES THE TREATY RIGHT OF DEVELOPMENT APPLY TO EXOTIC FORESTRY TODAY?

Some claimants, such as Ngati Tutemohuta, submitted that they want to be involved in new development opportunities in forestry today. In our view, the future of exotic forestry as a development prospect is uncertain. Commercial forestry is a major sector in the New Zealand economy. Compared to the nation's other principal export industries, however, it is (unlike dairy) a small player in international markets and (unlike fisheries) not exploiting a dwindling global resource for which there is increasing demand. As a bulk primary export product, it is largely dependent on world commodity prices that it cannot influence. Efforts to establish wood-based manufacturing exports have not succeeded on any scale, and even first-stage wood processing has faced serious difficulties in sustaining profitability in the last decade.

There are, though, some positive long-term factors. One is the impact of world economic expansion, especially in large industrialising countries such as India and China. This expansion has, in recent years, driven a world commodities boom, from which log and wood product exports have also benefited. Since the importing countries are resource-poor, world demand for forest products is likely to be sustained. A second factor is the positive role that forestry is expected to play in combating global warming. Both international and national policies have begun to promote forestry and afforestation as primary instruments to mitigate climate change, in particular as a carbon sink. Forestry is likely to be influenced by increased demand as a result of expanding carbon credit markets and national incentives to retain and expand forest cover.

The benefits should not be overstated. Exotic forestry is organised for large-scale operation, requires expert targeting of export markets, has a long lead time to harvest, and faces always unpredictable price trends. The optimistic expectations of previous decades that led to widespread investment in commercial forestry have, on the whole, not been borne out in recent years. Unexpected external forces may also have an impact, a recent example being the way high shipping costs, driven up by the same global economic expansion, have eaten into gains from improving log prices. For land with poor soil or rugged terrain, commercial forestry retains the same general advantages as an investment option that led to large-scale state and private sector afforestation over the last half-century. Alternative commercial uses of the land, especially intensive farming, are likely to face increasingly costly overheads and restrictions on account of their adverse environmental impact. As we heard from Ngati Tuwharetoa, they are now facing such restrictions on their lands adjacent to Lake Taupo. As with any development prospect, there can be no guarantees of success in commercial forestry, and rather less economic certainty than in sea fisheries.

The Crown is not required to guarantee the success of development opportunities. Rather, it is required actively to protect and give effect to the Treaty right of development

by assisting Maori of the Central North Island to take up opportunities where appropriate. In terms of the criteria discussed in chapter 13, exotic forestry in our inquiry region:

- ▶ is analogous to traditional practices of indigenous forestry and the indigenous timber trade;
- ▶ is carried out on some of the claimants' taonga (their land or their former land) and could be carried out on parts of their remaining undeveloped land;
- ▶ is carried out on much land that was acquired from the claimants in breach of the Treaty;
- ▶ is the subject of a long and intense historical association, including the great contribution Maori have made to its development in the twentieth century;

- ▶ is the subject of past Treaty breaches; and
- ▶ has current development opportunities that would contribute to the development of the Central North Island tribes and would assist in the redress of past Treaty breaches.

In our view, the combination of some or all of these factors means that the Crown, as a reasonable Treaty partner, would accept that there is a right of development for Central North Island Maori in exotic forestry today, should they wish to pursue it.

SUMMARY

Hydroelectricity

- ▶ There is a Maori property right in water resources, capable of development for profit, which was guaranteed and protected by the Treaty of Waitangi.
- ▶ This development right included the right to develop the resource for hydroelectricity or to profit from that development.
- ▶ In terms of the Central North Island, the Crown expropriated the 'right to use the waters' in the 1920s, in legislation that purported to give effect to agreements between itself and Maori, without such agreement and without payment. This was in breach of the Treaty.
- ▶ There is a Treaty right of development in hydroelectric power today, and a right to compensation for present and past use of Maori taonga for hydroelectricity.

Geothermal power

- ▶ There was a Maori property right in the subsurface geothermal taonga, which they possessed in 1840 and have never voluntarily or knowingly relinquished.
- ▶ The failure to inquire into and ascertain that right prior to the Geothermal Energy Act 1953 was in breach of the Treaty. The failure to compensate Maori for the use of their proprietary interests in the geothermal subsurface resource to generate geothermal power (from that time until the present day) was and is in breach of the Treaty.

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- Maori have a Treaty development right in geothermal power today.

Exotic forestry

- Our findings on exotic forestry are preliminary.
- The Crown has met its Treaty obligation to assist the development of Maori land via exotic forestry for the two large Taupo trusts.
- We are not in a position to comment on other forestry leases. Significant areas of land suitable for forestry remain undeveloped, despite their owners' wishes. The Crown's failure to provide appropriate development assistance was in breach of the Treaty.
- The Crown has met its Treaty obligation in terms of Maori development and the principle of mutual benefit in the case of exotic forestry, by fostering its growth in the Central North Island to provide employment, housing, and development for generations of Maori.
- Maori have paid a high price for that development, in terms of their cultural, environmental, and social interests. The price need not have been so high, had the Crown met its obligation to give effect to their tino rangatiratanga (full authority), or had it assisted them to overcome known obstacles to their gaining management and business positions and experience. As a result of these failures, they were left particularly vulnerable to the restructuring of the 1980s.
- The Crown failed to consult properly with Central North Island Maori or actively to protect their social and economic interests during that restructuring, and this included a failure to negotiate and provide appropriate development assistance. This was in breach of the Treaty. The parties agree that Maori suffered significant prejudice.

Notes

1. For example Karen Feint, closing submissions on behalf of Ngati Tuwharetoa, 9 September 2005 (paper 3.3.106), pp 110–112, 181–184; David Rangitauira and Miharo Armstrong, closing submissions on behalf of Ngati Hinekura, 2 September 2005 (paper 3.3.72), pp 19, 21, 24, 46–7, 48; Martin Taylor, Central North Island claimant replies: political engagement, tourism, geothermal, claimant specific, 31 October 2005 (paper 3.3.141), pp 57, 61; Matanuku Mahuika and Ebony Duff, closing submissions on behalf of the Ngati Whakaue cluster, 4 November 2005 (paper 3.3.146), p 71; Martin Taylor, generic closing submissions on political engagement, tourism, and geothermal issues, 2 September 2005 (paper 3.3.67), pp 188–189

2. For example, David Rangitauira and Miharo Armstrong, closing submissions on behalf of Ngati Hinekura, 2 September 2005 (paper 3.3.72), pp 19, 21, 24

3. For example, Matanuku Mahuika and Ebony Duff, closing submissions on behalf of the Ngati Whakaue cluster, 4 November 2005 (paper 3.3.146), p 71

4. Martin Taylor, Central North Island claimant replies: political engagement, tourism, geothermal, claimant specific, 31 October 2005 (paper 3.3.141), p 61

5. For example Kathy Ertel, closing submissions on behalf of Ngati Te Rangiunuora and Ngati Te Rongomai, 2 September 2005 (paper 3.3.71), pp 147–151; Karen Feint, closing submissions on behalf of Ngati Tuwharetoa, 9 September 2005 (paper 3.3.106), pp 246–247

6. Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999); Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: Brooker and Friend Ltd, 1993); and Waitangi Tribunal, *Turangi Township Report 1995* (Wellington: Brooker, 1995) (cited in Karen Feint, closing submissions on behalf of Ngati Tuwharetoa, 9 September 2005 (paper 3.3.106), pp 110–112)
7. Karen Feint, closing submissions on behalf of Ngati Tuwharetoa, 9 September 2005 (paper 3.3.106), pp 106–112
8. Karen Feint, submissions in reply on behalf of Ngati Tuwharetoa, 1 November 2005 (paper 3.3.142), p 40
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