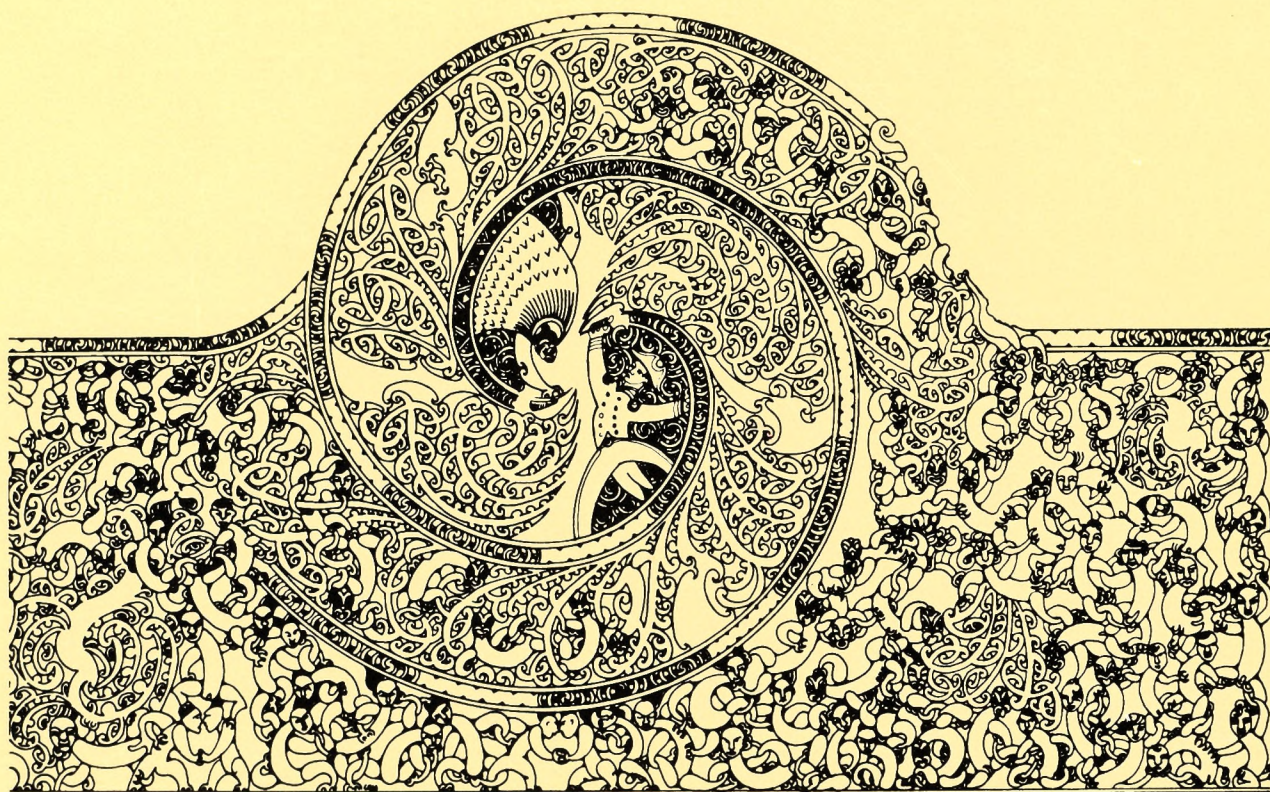


TE  
WHANGANUI-A-OROTU  
REPORT ON REMEDIES



WAITANGI TRIBUNAL REPORT 1998

# TE WHANGANUI-A-OROTU REPORT ON REMEDIES



TE  
WHANGANUI-A-OROTU  
REPORT ON REMEDIES

WAI 55

WAITANGI TRIBUNAL REPORT 1998



The cover design by Cliff Whiting invokes the signing  
of the Treaty of Waitangi and the consequent interwoven development  
of Maori and Pakeha history in New Zealand as it continuously  
unfolds in a pattern not yet completely known

A Waitangi Tribunal report

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## LIST OF ABBREVIATIONS

|       |   |
|-------|---|
| app   | appendix                                  |
| doc   | document                                  |
| DOC   | Department of Conservation                |
| DOSLI | Department of Survey and Land Information |
| ed    | edition                                   |
| NZLR  | <i>New Zealand Law Reports</i>            |
| p, pp | page, pages                               |
| para  | paragraph                                 |
| pt    | part                                      |
| ROD   | record of documents                       |
| ROI   | record of inquiry                         |
| sec   | section                                   |
| v     | versus                                    |
| VNZ   | Valuation New Zealand                     |
| vol   | volume                                    |
| Wai   | Waitangi Tribunal claim                   |



The Waitangi Tribunal  
Wellington

The Honourable Tau Henare  
Minister of Maori Affairs

and

The Honourable Douglas Graham  
Minister in Charge of Treaty of Waitangi Negotiations

Parliament Buildings  
Wellington

Tena korua

Enclosed is our report on remedies for the Te Whanganui-a-Orotu claim.

In 1995, we presented our substantive report, which concluded that the claim was well founded and that in several instances the Crown had breached the principles of the Treaty of Waitangi.

We have now considered what is an appropriate remedy to the claimants for the loss and despoliation of their taonga, Te Whanganui-a-Orotu. Accordingly, we have set out our recommendations in sections PTII.1 to PTII.5 of this report. They are summarised in section PTII.6.

The Landcorp farm should, we believe, be returned to the claimants. However, at this stage we do not make this proposal a binding order pursuant to section 8A(2)(a) of the Treaty of Waitangi Act 1975. We prefer that the farm is returned as part of a negotiated settlement. Indeed, our general recommendation is that the claimants and the Crown should negotiate.

We recommend that the Ahuriri Estuary be returned, in conjunction with the development of a new regime for its management. This should be achieved by negotiation. We recommend that other Crown-owned properties and the Crown's interest in the Hawke's Bay Airport form part of the negotiations between the claimants and the Crown.

We recommend that the claimants receive a substantial fund of money, the amount to be arrived at by negotiation. We also recommend that the Resource Management Act 1991 and other Acts be amended to prevent the claimants and other Maori from suffering prejudice in the future.

The Te Whanganui-a-Orotu claim is long overdue for settlement. It would be unfair and unnecessary to delay the provision of relief any longer. We strongly urge



that negotiations between the claimants and the Crown commence immediately. We sincerely hope that the negotiations will result in a comprehensive agreement for settlement of all aspects of this claim.

Heoi ano

## PART I

# INTRODUCTION

### PTI.1 BACKGROUND

#### PTI.1.1 *Te Whanganui-a-Orotu Report 1995*

In our *Te Whanganui-a-Orotu Report 1995*, we concluded that the claim by Te Otane Reti and others on behalf of seven claimant hapu lodged in 1988 and heard in 1993 and 1994 was well founded. By failing actively to protect the claimants' customary and Treaty rights to tino rangatiratanga over their resource and taonga in exchange for the right to kawanatanga (governance), the Crown had breached the general overarching principle of partnership, involving the duty to act responsibly and in good faith and to consult its Treaty partner. A list of the Treaty breaches found is reprinted in appendix III of this report.

#### PTI.1.2 A remedies hearing proposed

Having found that the Te Whanganui-a-Orotu claim was 'well founded' under section 6(3) of the Treaty of Waitangi Act 1975, we could have proceeded and, 'having regard to all the circumstances of the case', recommended to the Crown that action be taken to compensate the claimants or remove the prejudice. At that stage, however, we considered it inappropriate to make final recommendations for the following reasons:

- (a) the question of remedies was not extensively argued at the hearing;
- (b) we were considering a recommendation that the Landcorp farm be returned to the claimants and were conscious that such a recommendation would potentially be binding; and
- (c) we felt that the claimants should have the opportunity of reformulating the recommendations that they sought in light of the contents of our report.<sup>1</sup>

Instead, we set aside the week starting 30 October 1995 for a remedies hearing. To aid the remedies hearing process, we asked that several interim steps be taken and we offered a list of nine suggestions on possible recommendations on the information then available to us (see app iv).

In a joint memorandum of 27 September 1995, counsel for the Crown and claimants requested that the October hearing date be adjourned until February 1996. This was granted. A hearing date was eventually set for the week starting 12 August 1996.

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1. Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, 1st ed, Wellington, Brooker's Ltd, 1995 (doc 118), sec 12.4.2

**PTI.1.3 Remedies hearing and report**

The remedies hearing was held at the Great Wall Conference Centre in Napier on 12 and 13 August, by which time both parties had carried out the interim steps we had asked to be taken. The purpose of this report is to recommend the remedial action required to compensate the claimants for the loss of their taonga, Te Whanganui-a-Orotu. It is divided into two parts: the first provides background to the remedies hearing and summarises evidence given to us on remedies; in the second part, we set out our recommendations.

We greatly regret the long delay in the presentation of this report. There were two reasons for this delay. The first was that, as noted in the 1995 report at sections 12.4.1 and 12.4.2, the making of a recommendation that the Landcorp farm within the claim area be returned to the claimants was a possibility. Because the corporation is a State-owned enterprise, sections 8A to 8H of the Treaty of Waitangi Act 1975 (as inserted by the Treaty of Waitangi (State Enterprises) Act 1988) could apply. As yet, these provisions have not been applied by the Waitangi Tribunal. Their application raises a number of difficult legal issues. We are aware that, in the Turangi township claim (Wai 84), these issues are being considered in considerably more depth than they were in the remedies hearing before us. We had hoped that, before we reported on remedies, the Turangi township claim would have advanced to the point where this Tribunal would have the benefit of the consideration and determination in that claim of the legal issues that arise.

The second reason is that in 1993 the Te Whanganui-a-Orotu claim was accorded urgency by the Tribunal because of the possible freeholding of leasehold land owned by local bodies within the claim area. In the event, the enactment of the Treaty of Waitangi Amendment Act 1993 prevented the Tribunal from making any recommendations in respect of that land.<sup>2</sup> The consequence of the grant of urgency was, however, that the Te Whanganui-a-Orotu claim was required to be considered in isolation from other claims involving adjacent areas; in particular, claims Wai 168 (the Waiohiki lands claim), Wai 299 (the Mohaka–Waikare raupatu claim), and Wai 400 (the Ahuriri block claim). These claims are among the 20 that are currently being considered together by the Tribunal in the Mohaka ki Ahuriri regional claims inquiry. The issue of whether recommendations on the Te Whanganui-a-Orotu claim can be made in isolation of the wider claims is examined in the next section.

Notwithstanding the above issues, we accept that the Te Whanganui-a-Orotu claimants cannot be expected to wait indefinitely for our report, and accordingly this is now presented. As we said in our 1995 report, we do not want to see the question of relief delayed unnecessarily.<sup>3</sup>

---

2. *Te Whanganui-a-Orotu Report 1995*, secs 1.5.5, 12.4.1

3. *Ibid*, sec 12.4.2

**PTI.2 WHY SHOULD RECOMMENDATIONS BE MADE?****PTI.2.1 Crown counsel's submissions**

In his submissions to us at the remedies hearing, Crown counsel Brendan Brown QC argued that it was 'premature to make recommendations at this time'.<sup>4</sup> The thrust of his submission on this point was that the Wai 55 claimants have a 'substantial interest' in other claims to the Tribunal, and that the Tribunal should consider all the claims of a claimant group before any recommendations are made. He noted that it was not the Crown's intention to have issues concerning Te Whanganui-a-Orotu isolated from a claim to the wider Ahuriri area. He submitted that the reason for urgency being granted to this claim no longer existed, following the enactment of the Treaty of Waitangi Amendment Act 1993.<sup>5</sup> The inappropriateness of addressing remedies in isolation, Mr Brown submitted, was demonstrated by 'the fact of Wai 400 and its overlapping focus', and a similar situation existed with Wai 201 and possibly Wai 168.<sup>6</sup>

He added that, even if the Tribunal did feel it appropriate to make some recommendations, no recommendation pursuant to section 8A(2)(a) (ie, a binding order) should be made.

In the following section, we discuss the appropriateness of making recommendations at this time. In a later section, we address the question of binding orders.

**PTI.2.2 The Tribunal's view**

In our view, it is entirely appropriate to make some recommendations at this stage. First and foremost, we think that redress is long overdue to the claimants for the loss of their taonga, Te Whanganui-a-Orotu. Concern about the Crown's assumption of ownership of the inner harbour first surfaced in 1861. A petition was sent to Parliament and was discussed by a Native Affairs select committee in 1875. There were nine petitions between 1875 and 1965 protesting against the loss of Te Whanganui-a-Orotu. Numerous applications to courts and other inquiries were also made; the claimants had to wait 14 years for one report.<sup>7</sup> Moreover, there is strong circumstantial evidence that a past Prime Minister and Minister of Maori Affairs, Peter Fraser, made an offer in 1949 to return to the claimants' tipuna what was then the Landcorp farm. The offer was apparently declined because the claimant elders at the time wanted full redress for their loss.<sup>8</sup> Clearly, the claimants have waited long enough, and remedies for the loss of Te Whanganui-a-Orotu should not be unduly or unreasonably delayed once more.

The Crown has submitted that it was not its desire to negotiate and settle the issues concerning the Te Whanganui-a-Orotu claim in isolation, particularly because the reason for urgency has passed. We accept that the reason was removed by the Treaty of Waitangi Amendment Act 1993. We also note the claimants' expression of dismay

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4. Document K13 (synopsis of submissions of Crown counsel on remedies, 13 August 1996), p 28

5. Ibid, pp 28–29

6. Ibid, p 31

7. The 1932 petition of Hori Tupaea resulted in a Native Land Court inquiry in 1934, which Judge Harvey reported on in 1948: see *Te Whanganui-a-Orotu Report 1995*, secs 10.3–10.11.9.

8. *Te Whanganui-a-Orotu Report 1995*, sec 10.12.1

that the Act effectively denied them the opportunity to have parts of Te Whanganui-a-Orotu returned to them,<sup>9</sup> and claimant counsel Charl Hirschfeld's unsuccessful attempt to argue the amendment had no application either because it was enacted after the hearing had commenced or, alternatively, because it breached the Treaty.<sup>10</sup>

The claimants have continued to bring this claim before us and have asked us to address the remedies required to settle it. Furthermore, they have not sought to reintegrate Te Whanganui-a-Orotu issues with those of other claims. Indeed, they filed a new claim, which was registered with the Tribunal in 1993 as Wai 400, to deal with land issues arising from the 1851 Ahuriri purchase. As we see it, it would be unfair and unnecessary to delay relief for this claim until the Mohaka ki Ahuriri report is completed.

### PTI.2.3 Pukemokimoki

A further submission from Mr Brown concerned definitions of the claim area. This was directed principally to the inclusion of the wahi tapu Pukemokimoki in the claim area. Mr Brown questioned claimant witness David Compton about its inclusion and was told that Pukemokimoki was included because of the Tribunal's suggested recommendations in the 1995 report, and on the advice of the claimants.

In our 1995 report, one of our suggested recommendations was that 'compensation should be paid for the taking of . . . Pukemokimoki'. This was made on the basis of the evidence from the claimants about the importance of Pukemokimoki to them and from others on its loss. And where was Pukemokimoki? On the Ahuriri deed plan, this hill is shown on the southern end of Mataruahou.<sup>11</sup> In our 1995 report, we discussed how the red line on the deed plan delineating the external boundary of the Ahuriri purchase was redrawn at the time of the negotiations to exclude Pukemokimoki.<sup>12</sup> We also quoted the description of the boundaries in the English translation of the original deed, which states that Pukemokimoki was 'the only portion of Mataruahou reserved for ourselves'.<sup>13</sup> In the report, we described the 1856 purchase of a piece of land adjoining Mataruahou 'that had been excluded from the Ahuriri purchase by the reservation of Pukemokimoki'.<sup>14</sup> We also included a separate section on the removal of the hill to make way for a railway.<sup>15</sup>

Mr Compton showed Mr Brown where Pukemokimoki was in relation to the area defined as the Te Whanganui-a-Orotu boundary. Mr Compton agreed with Mr Brown that Pukemokimoki had always been land, rather than water. Mr Brown submitted that Pukemokimoki was not a part of Te Whanganui-a-Orotu, nor was it an island of Te Whanganui-a-Orotu. It was land that was excluded from the Ahuriri purchase and became part of a later purchase. For those reasons, Mr Brown argued

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9. See, for example, doc K8 (brief of evidence of Heitia Hiha on redress)

10. *Te Whanganui-a-Orotu Report 1995*, sec 12.4.1

11. *Ibid*, p 69; see also p 128 for the 1865 plan.

12. *Ibid*, secs 4.8.1–4.8.5

13. *Ibid*, sec 4.3.3. Note that 'ourselves' refers to the Maori owners of Mataruahou.

14. *Ibid*, sec 5.3.2

15. *Ibid*, sec 6.2

that the Tribunal should be careful when considering the inclusion of Pukemokimoki in any calculation of loss suffered by the claimants.

We agree with the thrust of Mr Brown's submissions on this issue. Accordingly, we exclude the area of Pukemokimoki from the claim area. We expect that remedial action for the loss of Pukemokimoki will be addressed by the Wai 400 or Ahuriri block claimants.

#### **PTI.2.4 Overlapping claims**

##### **(1) *The Wai 400 claim***

Mr Brown submitted that Wai 400 has an overlapping focus, and that this is one reason why it is inappropriate for recommendations on remedies to be made in isolation of wider claims. The basis for Mr Brown's submission is the amendment to the Wai 400 statement of claim filed with the Tribunal on 29 May 1996.<sup>16</sup> The amendment reads: 'We allege that as a result of Crown purchase of Mataruahou (Scinde Is), Petane Block, Te Pahau Block, and Roro o Kuri we are prejudicially affected.'

We note first that neither this amendment nor the primary Wai 400 statement of claim mentions Te Whanganui-a-Orotu. Secondly, we note that no representative for Wai 400 wished to make submissions at the remedies hearing. And, thirdly, we note that Heitia Hiha, the chairperson of the Wai 55 claimant committee, assured us that this issue (of any overlap) would be resolved among the claimant groups. This has occurred. Following the remedies hearing, a letter was received from Haami Harmer, a representative for the Nga Hapu o Te Ahuriri Claimant Roopu (Wai 400) Charitable Trust.<sup>17</sup> In his letter, Mr Harmer explained that, in light of the recommendations sought by the Wai 55 claimants, the Wai 400 claimants wished to delete Roro o Kuri from their claim. Furthermore, we understand that the Wai 400 claim has now been heard as part of the Mohaka ki Ahuriri regional claims inquiry and note that the most recent and particularised Wai 400 statement of claim does not include Roro o Kuri or Te Whanganui-a-Orotu.<sup>18</sup> We conclude that it is understandable that, given that both claim areas were within the ambit of the Ahuriri deed of 1851, some confusion over the Wai 55 and Wai 400 claim boundaries may exist. But we believe that the evidence examined on the external boundary of the remedies claim in section PTI.3.2 of this report will resolve this issue.

##### **(2) *Roro o Kuri***

Because of the May 1996 amended statement of claim filed for Wai 400, Mr Brown asked us to be careful when considering the inclusion of Roro o Kuri as part of any remedial action. In our 1995 report, we mentioned Roro o Kuri many times. This reflected its importance as a site of many former pa, as a wahi tapu, and as a base for mahinga kai.<sup>19</sup> We detailed how it was alienated, as part of the Te Pahou block, and to

16. Wai 201 RO1, claim 1.23(b) (amendment to Wai 400 statement of claim, 27 May 1996)

17. Wai 201 RO1, claim 1.23(c) (amendment to Wai 400 statement of claim, 30 September 1996)

18. Wai 201 RO1, claim 1.23(d) (amendment to Wai 400 statement of claim, 26 September 1997)

19. *Te Whanganui-a-Orotu Report 1995*, sec 4.5

whom it was sold. We concluded that the sale of Te Pahou was inconsistent with Treaty principles, and we found that the Crown had failed to take appropriate action to remedy this situation and to reserve fishing and access rights to Maori.<sup>20</sup> The whole of Roro o Kuri (and two other islands, Te Ihu o Te Rei and Parapara), but not all of the Te Pahou block, has been included in the map defining the claim area (see facing page).

In our view, it is entirely appropriate that Roro o Kuri remains included within the Wai 55 claim area. We also think that the other islands in the Te Pahou block, Te Ihu o Te Rei and Parapara, should be included in the claim area, along with any other part of the Te Pahou block that is within the claim boundary.

### **(3) *The Wai 201 claim***

Mr Brown also submitted that Wai 201 had a similar overlapping focus to Wai 400. Again, we note that no counsel or representative for Wai 201 appeared at the remedies hearing. Mr Hiha told us that to his knowledge no one was prosecuting the Wai 201 claim any more. This appears to be confirmed by the progress of the claim within the Mohaka ki Ahuriri inquiry. Following correspondence with one of the named claimants, the Tribunal directed that no further inquiry take place into the parts of the Wai 201 statement of claim that relate to the Mohaka ki Ahuriri inquiry.<sup>21</sup> The Tribunal stated that it was satisfied that all the matters in the claim that relate to the inquiry were included in other statements of claim and would be fully inquired into by the Tribunal. We are also of the view that the parts of the Wai 201 claim that relate to Te Whanganui-a-Orotu (ie, para 3.5) have been sufficiently covered in the second amended statement of claim for Wai 55 before us.<sup>22</sup>

### **(4) *The Wai 168 claim***

Mr Brown also submitted that there was a possibility of overlap with the Wai 168 claim, but he was not able to substantiate this possibility. That claim has been heard as part of the Mohaka ki Ahuriri regional claims inquiry. A particularised statement of claim was filed by the claimants on 25 November 1996. At paragraph 3.2 of that claim, it is noted that no prayer for relief was sought regarding Te Whanganui-a-Orotu.<sup>23</sup> We note that counsel for the present claimants, Mr Hirschfeld, also appears for the Wai 168 claimants. Presumably, therefore, there is no conflict of interest between the two groups.

### **(5) *The Tribunal's conclusion***

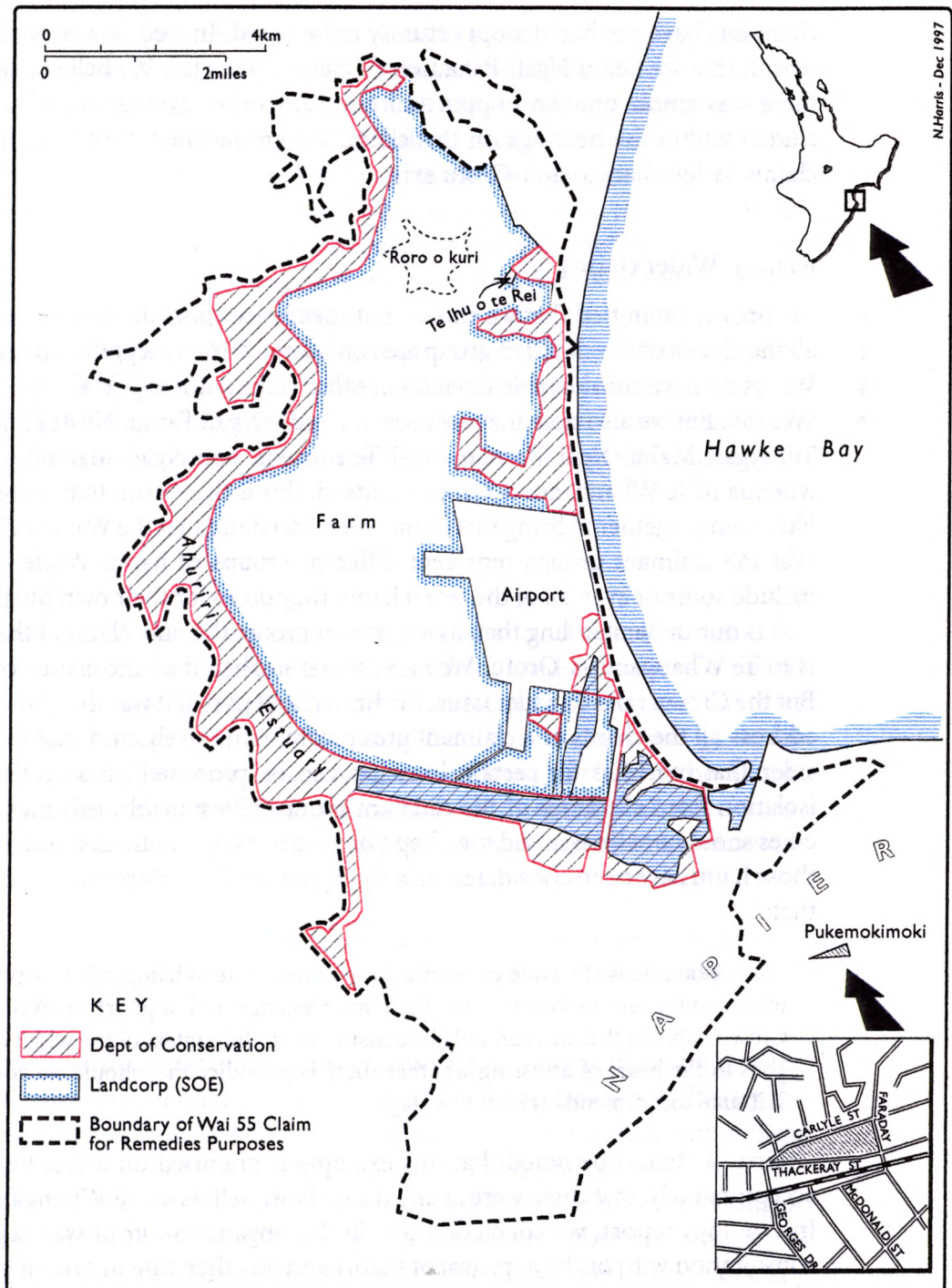
We acknowledge that the Crown has a responsibility to ensure that any overlapping interests in the Wai 55 claim area are identified, and therefore acted entirely properly in raising possible areas of overlap for our consideration. We accept that recommendations should not be made on this claim if overlapping claims exist and those

20. *Te Whanganui-a-Orotu Report 1995*, sec 5.5.4

21. Wai 201 RO1, paper 2.235 (Tribunal direction advising that there will be no further inquiry into those parts of the Wai 201 statement of claim that relate to the Mohaka ki Ahuriri inquiry, 14 July 1997)

22. Wai 201 RO1, claim 1.1 (Wai 201 statement of claim, 14 May 1991)

23. Wai 201 RO1, claim 1.9(c) (amended Wai 168 statement of claim, 1 December 1996), p 3



Location map



claimants have not had the opportunity to be heard. Indeed, it was precisely for this reason that we heard Ngati Pahauwera's claim (Wai 432). We believe, however, that there was ample time and opportunity for any other overlapping claims to be included within the hearings on this claim. We are satisfied, therefore, that no other claims to Te Whanganui-a-Orotu exist.

### PTI.2.5 Wider claims

Mr Brown submitted that we should not make recommendations on remedies until all the claims of the claimant group are considered.<sup>24</sup> We accept that the seven hapu of Wai 55 do have considerable interests in other claims; notably, Wai 400, Wai 299, and Wai 168. But we also note that only seven hapu – Ngati Parau, Ngati Hinepare, Ngati Tu, Ngati Mahu, Ngai Tawhao, Ngai Te Ruruku, and Ngati Matepu – are tangata whenua of Te Whanganui-a-Orotu.<sup>25</sup> Indeed, this is the reason that these seven hapu have come together to bring this claim. We understand that the Wai 400, Wai 299, and Wai 168 claimant groups represent different groups of hapu. While these groups include some or even all of the seven hapu, they do so for their own purposes.

It is our understanding that, as a claimant group, the only claim of the seven hapu is to Te Whanganui-a-Orotu. We have, therefore, heard all the claims of this group. But the Crown raises a wider issue. Mr Brown told us that it was the Crown's policy to address all the claims of a claimant group comprehensively, and that it did not consider that remedies for certain breaches can be proposed on a sectional basis in isolation from all claims of the claimant group.<sup>26</sup> Presumably, this means that remedies should not be assessed for a hapu or group of hapu until all the claims of that or those hapu have been considered. In amplifying the Crown's position, Mr Brown said that:

An example is the issue of whether the sellers of Te Whanganui-a-Orotu were left with a sufficient endowment for their maintenance and support or livelihood. The Crown submits that this can only be considered in the context of the wider claim. This goes to the heart of assessing whether there is prejudice that should be addressed by Tribunal recommendations at this stage.

First, it should be noted that this example is premised on a fact that we do not accept: namely, that there were at any time Maori 'sellers' of Te Whanganui-a-Orotu. In our 1995 report, we concluded that Te Whanganui-a-Orotu was taken 'without consultation with or the approval of Maori and was therefore in breach of the principles of the Treaty [of Waitangi]'.<sup>27</sup> Issues of 'sufficient endowment', therefore, are perhaps better left to be assessed within the context of purchases where the Maori sellers knew that they were selling something. This was not the case for Te Whanganui-a-Orotu.

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24. Document K13, p 29

25. *Te Whanganui-a-Orotu Report 1995*, sec 1.3

26. Document K13, p 30

27. *Te Whanganui-a-Orotu Report 1995*, sec 12.3.5

Secondly, it should be noted that it is not now possible for this Tribunal to have an opportunity to assess 'wider claims'. A new Tribunal has been constituted to consider those that have been grouped into the Mohaka ki Ahuriri regional claims inquiry. Conversely, it is our understanding that the Mohaka ki Ahuriri Tribunal has not been asked by the claimants in that inquiry to include in any assessment of relief the prejudice suffered as a result of the loss of Te Whanganui-a-Orotu. Indeed, to do so, that Tribunal would presumably have to return to the evidence and come to its own conclusion on whether or not the present claim is well founded. If we were to accept the general thrust of the Crown's submission on 'wider claims', it is possible that no Tribunal would ever report on the remedies required for this long-standing claim. And if the Crown, having concluded its consideration of our 1995 report, were not to accept our findings, there is a danger that no compensation would ever be made for the loss of Te Whanganui-a-Orotu. In our view, this would be a denial of justice to the seven claimant hapu.

### PTI.2.6 Conclusion

As we have already said, the Treaty of Waitangi Act 1975 in section 6(3) allows the Tribunal, if it finds the claim submitted to it to be well founded, to make recommendations 'if it thinks fit having regard to all the circumstances of the case'. We have found that the claim is well founded. The 'case' before us is claim Wai 55, which concerns the despoliation and loss of Te Whanganui-a-Orotu, not land in the Ahuriri and other Crown purchases. We believe that we have had regard to all the circumstances of the case. Consequently, we consider that we should make recommendations at this stage. Section 6(4) of the Treaty of Waitangi Act 1975 states that:

A recommendation under subsection (3) of this section may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take.

At this stage, we have decided to make mostly general recommendations on how the claimants' rangatiratanga should be restored and how other Treaty breaches by the Crown should be compensated for and otherwise remedied. The main thrust of these recommendations is that the Crown and claimants should negotiate.

In our 1995 report, we concluded that the Crown had breached the overarching or central principle of the Treaty by failing actively to protect the claimants' rangatiratanga over their taonga, Te Whanganui-a-Orotu.<sup>28</sup> The Crown now has a fiduciary duty to ensure that the rangatiratanga of the claimants over their taonga is restored. Indeed, this should be a primary goal of the negotiations. These negotiations should commence immediately and not be unduly or unreasonably delayed. We sincerely hope that they will result in a comprehensive agreement for settlement of all aspects of this claim.

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28. Ibid, sec 12.3.6

Because we have decided to make mostly general recommendations, we propose to grant the claimants leave to return to us to seek more detailed recommendations if negotiations with the Crown are unsuccessful.

### **PTI.3 INTERIM STEPS TAKEN AND EVIDENCE PRESENTED**

#### **PTI.3.1 Introduction**

In our 1995 report, we outlined the interim steps that should be taken prior to a remedies hearing. We asked that the Crown identify the boundaries and precise ownership details of all Crown and State-owned enterprise land within the pre-European settlement boundaries of Te Whanganui-a-Orotu. We sought an update of the present-day land utilisation of the Landcorp farm. We suggested that there should be no further alienation of Crown or State-owned enterprise land within the boundaries of Te Whanganui-a-Orotu. We asked the claimants to file a schedule of the recommendations that they sought. Finally, we proposed that, if the claimants lacked sufficient resources to prepare those recommendations, they should approach the Crown for financial or expert assistance or both.<sup>29</sup> In the following sections, we discuss the evidence filed by the claimants and Crown in response to these directions. We also discuss other evidence presented to us at the remedies hearing.

#### **PTI.3.2 Identification of pre-European settlement boundaries**

The claimants filed with the Tribunal a map of Crown, State-owned enterprise, Crown health enterprise, and local authority properties within Te Whanganui-a-Orotu.<sup>30</sup> It contained a defined boundary of the Te Whanganui-a-Orotu area. This map was produced by the then Department of Survey and Land Information (DOSLI), now Land Information New Zealand. The Crown filed an amended copy of the same map.<sup>31</sup> The Crown's version, which was only slightly modified and which did not alter the boundary of Te Whanganui-a-Orotu, was used at the hearing.

In our 1995 report, we noted that, in its pre-European settlement state, Te Whanganui-a-Orotu was estimated to be 3840 hectares or 9500 acres in area.<sup>32</sup> The boundary of Te Whanganui-a-Orotu in the DOSLI-produced maps presented to us as documents K3 and K6 was calculated by claimant witness David Compton to encompass 3627 hectares or 8959 acres. The difference can be explained by how much of the swamp and mudflats in south Napier are included. These maps then do not represent the whole Te Whanganui-a-Orotu in its pre-European settlement state. Yet, since the claimants and Crown agree on the boundary of Te Whanganui-a-Orotu, we accept

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29. *Te Whanganui-a-Orotu Report 1995*, sec 12.4.3

30. Document K3

31. Document K6

32. *Te Whanganui-a-Orotu Report 1995*, secs 9.2, 12.4.3. This was taken from Wai 201 ROD, doc 19(e) (Hastings District Council, Hawke's Bay Regional Council, City of Napier, and DOC, *Ahuriri Estuary Management Plan*, September 1992), p 13.

that this boundary should be used to define the claim area for the purposes of this report. As we have previously stated, the claim area excludes Pukemokimoki.

### **PTI.3.3 Identification of ownership details of Crown and State enterprise land**

The Crown filed a schedule of Crown and State-owned enterprise properties within Te Whanganui-a-Orotu bounded by the deed map of the 1851 Ahuriri purchase.<sup>33</sup> The bulk of the properties are designated for conservation purposes. Ten ex-New Zealand Rail properties are listed. Other Crown-owned sites include schools and kindergartens, a police station at Petane, social welfare institutions, a Public Works depot, and four former New Zealand Electricity Department properties. One former New Zealand Rail property is now administered by the Office of Treaty Settlements. The only State-owned enterprise properties in the schedule are the three titles of the Landcorp farm.

The title of the schedule indicates that this list includes only properties within a boundary defined by the 1851 Ahuriri purchase deed plan. The schedule is not explicitly linked to the DOSLI-produced map presented by the Crown as evidence.<sup>34</sup> It is possible, therefore, that there may be other Crown or State-owned enterprise properties that fall within the boundary defined in the DOSLI map.

The claimants also filed a schedule of Crown and State-owned enterprise properties 'from within the claim area'.<sup>35</sup> The claimants' schedule, prepared by K E Parker for Valuation New Zealand (VNZ), included more types of property, such as those owned by Crown entities, Crown health enterprises, and local authorities. The inclusion of these properties indicates that this schedule was prepared by reference to the DOSLI-produced map.<sup>36</sup> The information in the claimants' schedule differs in format. Title registration numbers and legal descriptions are not used; instead, valuation references and Government valuation figures are given. Also, a large number of Housing New Zealand properties are listed in the claimants' schedule.

Neither schedule lists any former State-owned enterprise properties that have been on-sold to third parties but that have memorials attached to their titles advising of an interest subject to section 27B of the State-Owned Enterprises Act 1986 (providing for the resumption of land on the recommendation of the Waitangi Tribunal). It may be that there are none. Nor does either schedule provide a separate list of any properties that have been landbanked for the future settlement of Treaty claims. Presumably, the property being administered by the Office of Treaty Settlements is held for that purpose. It appears that up to five other surplus properties are being held from sale by the office.<sup>37</sup> The direction in our 1995 report did not explicitly ask that the Crown or claimants provide this information. We note the omissions merely to highlight the

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33. Document K7

34. Document K6

35. Document K9(c) (K E Parker to David Compton, 17 July 1996), p 1

36. One obvious difference between the maps at documents K3 and K6 is the absence of identification of the Corunna Bay Telecom property in document K6.

37. Document K9(b) (Office of Treaty Settlements to V L Pomeroy, 25 June 1996)

fact that other properties might be available for settlement purposes, and in order to aid negotiations between the Crown and the claimants.

#### PTI.3.4 Valuations and calculations of economic loss

##### (1) *Introduction*

Much of the evidence presented by the claimants prior to and at the remedies hearing was directed to land valuations in order to calculate a quantum of economic loss suffered as a result of the expropriation of Te Whanganui-a-Orotu. In response to one of our interim steps, the Crown supplied valuation material regarding the Landcorp farm. The claimants also offered a first attempt at valuing the Hawke's Bay Airport business, because it was suggested that the Crown's interest in the airport might form part of a settlement package. In the following sections, we review the evidence presented to us on the valuations and calculations of loss.

##### (2) *The Landcorp farm*

Included in the Tribunal's recommendations on the interim steps to be taken before the remedies hearing was a request to the Crown to update the September 1982 *Ahuriri Farm Settlement Utilisation Study* and to provide further evidence identifying and advising the Tribunal and claimants of the present-day land utilisation of the Landcorp farm. In response, the Crown filed a report by W R Hawkins (for VNZ) on a market valuation of the Ahuriri Lagoon Landcorp farm property as at 28 May 1996.<sup>38</sup> The report highlighted significant and relevant changes that have occurred since 1982. The basis of the valuation was evidence of current market sales of pastoral properties within the central Hawke's Bay district. A small discount of approximately 5 percent was made to acknowledge the section 27B memorial appearing on the title.<sup>39</sup> The capital value was assessed at \$2.4 million.

The review of changes since 1982 showed that the property had continued to be farmed as a large entity, with the ongoing development of a 120-hectare deer unit. By 1996, it was specialising as a stock finishing enterprise for lambs, ewes, cattle, and deer progeny brought in from other Landcorp farms. The outfall channel, wildlife refuge, and Ahuriri Estuary areas had been transferred to the administration of the Department of Conservation (DOC). The land was no longer designated for a proposed motorway extension from Taradale to Westshore.

The property was no longer used for community, recreational, educational, and research purposes, as it was in 1982, although there was a public walkway over Roro o Kuri (except at lambing time, when the walkway was closed for six weeks). Given these changes, it appears to us that the conclusion reached in the 1982 study – that the farm's existence for public and community purposes 'justifies its existence as public land' – no longer applies.<sup>40</sup>

38. Document K5

39. Ibid, p 5

40. Wai 201 ROD, doc D6(a), vol 3, pp 1057–1059 (Department of Lands and Survey, *Ahuriri Farm Settlement Utilisation Study*, Napier, September 1982, pp 29–31)

### ***(3) Present-day valuations and calculations of economic loss***

One of the key pieces of evidence presented to us by the claimants comprised valuations of Te Whanganui-a-Orotu, made in order to assess the monetary value of the loss they suffered. The claimants commissioned David Compton, a chartered accountant of the Napier firm Oldershaw and Company. Mr Compton's principal report was filed with the Tribunal in early July 1996.<sup>41</sup> At the hearing, Mr Compton presented a summary of his evidence, and tabled a supplementary brief and three sets of correspondence (see sec PTI.3.2).

Mr Compton's evidence set out how he had calculated the current value of the land within the former boundaries of Te Whanganui-a-Orotu. It also calculated the extent of the claimants' economic loss through their being deprived of the use of the reclaimed sections of Te Whanganui-a-Orotu, and it attempted to identify the value of properties available to the claimants for possible return as compensation.

To calculate the current value of the land, Mr Compton used the DOSLI and VNZ reports presented as part of his evidence in order to locate the properties within boundaries identified by the claimants. A series of matching exercises was carried out in order to eliminate the duplication of properties from the different lists provided. Land valuations were then reduced by VNZ to their 'unimproved state', that being the value of the land less any improvements made.<sup>42</sup> This value totalled \$16,065,000. Mr Compton also had VNZ itemise valuations of Te Pakake and six former islands.<sup>43</sup>

The second part of Mr Compton's evidence related to the past loss of Te Whanganui-a-Orotu as a taonga, of both tangible and intangible value, and as a hapu or iwi economic base. As Mr Compton explained, his brief was limited to calculating economic loss. Losses of an intangible value would be additional to this. Therefore, no value was attached by him to the land that is still covered by water and administered by DOC and to the other waters comprising the inner harbour and the 'Iron Pot'. Nor was any attempt made to quantify the loss of kaimoana or the cultural and spiritual importance of Te Whanganui-a-Orotu to the claimants.

The calculation of economic loss suffered by the claimants was carried out by VNZ working from instructions provided by Mr Compton. No attempt was made to quantify any economic loss suffered before 1900, probably because relatively little land had been reclaimed by that date.<sup>44</sup> Rather, VNZ focused its calculations of economic loss on the twentieth century and, in particular, on the development of land reclaimed after the 1931 earthquake. Economic loss was calculated by estimating what rentals could have been earned if reclaimed land had been leased by Maori under the Glasgow system of 21-year terms, which was adopted when a good portion of the land

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41. Document K1 (financial statements prepared by Oldershaw and Company). This document contains a report by David Compton of Oldershaw and Company, a report by K E Parker of VNZ, supplementary documents submitted by Compton, a further report from VNZ on unmatched land parcels, and reports and maps generated by DOSLI. Each report has its own pagination.

42. Document K9 (brief of evidence of David Compton), p 6

43. Document K9(d) (K E Parker, to David Compton, 7 August 1997)

44. Document K1, VNZ report, pp 4-5; see also *Te Whanganui-a-Orotu Report 1995*, secs 6.5.1-6.5.7, for a discussion on pre-1900 reclamations.

was initially developed. Based on an annual return of 4 percent for urban land and 5 percent for rural land, VNZ estimated that the economic loss suffered by the claimants totalled \$7 million.<sup>45</sup> Deductions for management, servicing, and taxation were factored into the final figure. Although citing the ‘considerable difficulties’ associated with this task, Mr Parker, for VNZ, stated that his institution had produced valuations that provided a ‘fair and reasonable basis to measure the compensation items arising from the Wai 55 claim’.<sup>46</sup>

Mr Compton added the current valuation of the land in its undeveloped state, \$16,065,000, to VNZ’s figure of estimated economic loss, \$7,000,000. This equalled \$23,065,000, which Mr Compton believed was the total amount of monetary compensation due to the claimants for ‘tangible losses’.<sup>47</sup>

If this figure of \$23,065,000 is to be referred to in negotiations between the claimants and the Crown, the following points should be taken into consideration: the exclusion of the 2.07-hectare Pukemokimoki area from the claim area would decrease this figure<sup>48</sup> and, in response to questions from the Tribunal, Mr Compton stated that it was likely that the value of one or more of the islands was double-counted in his calculations.

#### **(4) The Hawke’s Bay Airport**

The claimants commissioned Mr Compton to provide an estimated value for the Hawke’s Bay Airport.<sup>49</sup> Mr Compton obtained a 1993 valuation of the airport by VNZ, which gave a capital value figure of \$2,340,000. In his opinion, this figure would be appropriate only if the airport business were wound up and the assets sold. Instead, he felt the airport should be valued as a going concern. He estimated future profits based on the 1994 to 1995 financial year operating profit figures, and applied 20 and 25 percent capitalisation rates to determine a share value. Basing his valuation on a capitalisation rate of 20 percent, Mr Compton arrived at the figure of \$1,285,000.<sup>50</sup>

In the summary he read to us, Mr Compton emphasised the limitations of his estimate of the value of the Hawke’s Bay Airport. Following questions from Crown counsel and the Tribunal, Mr Compton stated that his estimate should be considered as a starting point only. He said that, if the Crown’s shares in the airport were to become part of the settlement package, a new valuation would have to be carried out. We agree. Whether the Crown’s interest in the airport should form part of the remedies for this claim is discussed below (see sec PTII.2).

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45. Document K1 (financial statements prepared by Oldershaw and Company concerning the value of the claim), VNZ report, p 5

46. Ibid, p 6

47. Document K9, p 8

48. The present-day undeveloped land value of this area is \$300,000 (doc K1, p 4). From the evidence presented to us, however, it is not possible to extract from VNZ’s \$7 million figure the amount of economic loss calculated as a result of the loss of Pukemokimoki.

49. Document K2 (David Compton to Charl Hirschfeld, 13 June 1996)

50. Ibid, p 3

### PT1.3.5 Other interim steps

In our directions on the interim steps to be taken prior to the remedies hearing, we stated that there should be no further alienation of Crown land or State-owned enterprise land lying within the pre-1851 boundaries of Te Whanganui-a-Orotu. We understand that no such properties have been alienated and that at least five 'key surplus properties' in the claim area have been withheld from sale pending the Tribunal's inquiry into remedies.<sup>51</sup>

In response to our direction that the claimants should file with the Tribunal a schedule of the recommendations they seek, claimant counsel filed a third amendment to the second amended statement of claim, dated 12 July 1996. This statement of claim, and the further amendment to it, are reprinted as appendix 1 of this report.

Our final interim suggestion was that, if the claimants lacked sufficient resources to prepare the recommendations they sought, they should approach the Crown for assistance. We record that Cabinet approval was obtained for funding of up to \$20,000 for the claimants' reasonable costs incurred in preparing for the remedies hearing.<sup>52</sup>

### PT1.3.6 The evidence of Heitia Hiha

Mr Hiha gave evidence to us at the remedies hearing. He began by acknowledging that the *Te Whanganui-a-Orotu Report* had 'laid to rest over a hundred years of sadness and loss', enabling the claimants to 'move forward to a new dawn of hapu development, one based on optimism rather than grievance, frustration, and even anger'.<sup>53</sup> Reading from his prepared brief, Mr Hiha criticised the *Crown Proposals for the Settlement of Treaty of Waitangi Claims* policy released in 1994.<sup>54</sup> In particular, he addressed the Crown's policies on natural resources and the use of DOC lands for Treaty settlements.

He accused the Crown of breaching the principles of the Treaty of Waitangi by not recognising the tino rangatiratanga of the claimant hapu. He called for the Crown to compensate the claimants with the return of land and by the payment of a sum of money, in order to 'restore its honour now'.<sup>55</sup> On behalf of the claimant hapu, Mr Hiha rejected the Crown's policy on natural resources, claiming that the hapu had tino rangatiratanga over Te Whanganui-a-Orotu, not just 'use and value interests'. He also rejected the Crown's policy of not having the lands administered by DOC 'readily available' for the settlement of Treaty claims: 'We want our title to Te Whanganui-a-Orotu recognised and we want to be involved in decisions affecting this great taonga of ours,' he added on this topic.<sup>56</sup>

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51. Document K9(b), Office of Treaty Settlements to V L Pomeroy, 25 June 1996

52. Ibid

53. Document K8 (brief of evidence of Heitia Hiha), p 1

54. Document K10 (Office of Treaty Settlements, *Crown Proposals for the Settlement of Treaty of Waitangi Claims: Detailed Proposals*, Wellington, Department of Justice, 1994)

55. Document K8, p 2

56. Ibid, pp 2-3



Mr Hiha asked that a joint management board be constituted to manage the Ahuriri wetlands and Ahuriri Estuary. He envisaged the board membership as consisting of a representative for each of the seven claimant hapu and representatives for DOC. He wanted a similarly constituted hapu committee to work with the Hawke's Bay Regional Council and the Napier City Council in order to manage areas administered by the local authorities. Finally, Mr Hiha expressed disquiet at the Crown's policy of negotiating 'full and final settlements'. The claimant hapu, he explained, believe any settlement should see the Crown and claimants 'move into a new era of cooperation and partnership that will ultimately benefit the hapu of Te Whanganui-a-Orotu, the people of Napier and the nation'.<sup>57</sup>

To support these submissions, Mr Hiha read an address that he had given on 15 March 1995 at Omaha Marae during the hui organised by the Crown in order to consult with Ngati Kahungunu about the Crown's Treaty settlement policy. He also read another short paper that defined the claimants' vision of partnership between themselves and the Crown.

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57. Document K8, p 4

## PART II

# RECOMMENDATIONS

### PTII.1 THE LAND TO BE RETURNED

#### PTII.1.1 The Landcorp farm

One possible recommendation suggested in our 1995 report was that the area of Crown land to be considered for possible return to the claimants should include the Landcorp farm and Roro o Kuri.<sup>1</sup> Having heard the parties on remedies, our belief that the Landcorp farm and Roro o Kuri should be returned to the claimants has been confirmed for three main reasons. First, the farm is the largest single property of those that were formerly under the waters of Te Whanganui-a-Orotu.<sup>2</sup> Secondly, it includes the former islands of Roro o Kuri and Tapu Te Ranga. Both are of inestimable value to the claimants, because they bear the imprint of illustrious ancestors and are wahi tapu.<sup>3</sup> Thirdly, to restore the claimants' mana and tino rangatiratanga, it is vital that any settlement enable the claimants to be physically reunited with at least part of Te Whanganui-a-Orotu. The Crown should, we think, therefore return the Landcorp farm, Roro o Kuri, and Tapu Te Ranga, and recognise Tapu Te Ranga as Maori customary land.

We emphasise, however, that at this stage our proposal is not a binding order pursuant to section 8A(2)(a) of the Treaty of Waitangi Act 1975. We would prefer the Landcorp farm to be returned as part of a negotiated settlement.

#### PTII.1.2 The Ahuriri Estuary

##### (1) Introduction

Included in the area of Crown land we suggested for possible return was the Ahuriri Estuary.<sup>4</sup> This is, in effect, the last remaining portion of Te Whanganui-a-Orotu that is still largely water. It is owned by the Crown and managed as part of DOC's estate. Another possible recommendation we suggested was that a new management regime be developed that would ensure that the claimants have effective representation. We

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1. Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, 1st ed, Wellington, Brooker's Ltd, 1995 (doc 118), sec 12.4.4
  2. Document K7 (list of Crown and State-owned enterprise properties within Te Whanganui-a-Orotu bounded by the deed map of the 1851 Ahuriri purchase)
  3. For further information on the importance of Roro o Kuri, see *Te Whanganui-a-Orotu Report 1995*, sec 4.5; for information on the importance of Tapu Te Ranga, see sec 2.2.3.
  4. Ibid, sec 12.4.4

added that, in developing a proposed model, the claimants should not feel bound by conditions that the Resource Management Act 1991 requires to be imposed upon the handing over of any part of the conservation estate.<sup>5</sup> In this section, we discuss whether the Ahuriri Estuary should be returned to the claimants. In a later section, we will discuss the development of a new management regime for the conservation land (see sec PTII.5.2).

## **(2) Claimant counsel submissions**

In reviewing how conservation land could be transferred to the claimants, claimant counsel Caren Wickliffe noted that there had been a shift in Government policy following the 1994 publication of the Crown's proposals for Treaty settlements.<sup>6</sup> She listed the Crown's three mechanisms for re-vesting conservation land in Maori, and went on to analyse each mechanism in light of the remedies appropriate to this claim.

The first mechanism involved the Crown directly re-vesting land in Maori. Ms Wickliffe pointed out that, if this were done, the Crown would probably seek legal encumbrance on the title to secure conservation and public access objectives. Such restrictions would be greater than those under the Resource Management Act 1991 for private landowners. Counsel expressed her concern that this mechanism was appropriate only in limited circumstances and that these circumstances might not include the return of Te Whanganui-a-Orotu. Consequently, alternative settlement options should be considered.<sup>7</sup>

Ms Wickliffe dismissed the third mechanism, whereby the Crown retained title but transferred a significant management role to Maori. She conceded that it correctly distinguished between management and ownership of conservation land, in which case, she argued, there was no need for the Crown to retain the ownership of its part of the Ahuriri Estuary. Indeed, the Crown had a duty to return the part of the estuary that it owned.<sup>8</sup>

Ms Wickliffe preferred the second mechanism, whereby the Crown returned land to Maori under the Reserves Act 1977 or through special legislation. Returning it under the Reserves Act would provide the Crown with too wide a discretion to revoke the return of the land if the conditions of the vesting were not met and, for this reason, counsel submitted that the enactment of special legislation was the best way of returning conservation land to Maori. Such legislation should include the special statutory conditions necessary for the continued management of the conservation values of the land.

It should also include a joint system of management in which hapu are sufficiently trained and resourced to manage the land in accordance with the special conditions.<sup>9</sup> Ms Wickliffe went on to critique what was required in Treaty terms in any formal joint management of conservation land. We return to this in a later section (see sec PTII.5.4(1)).

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5. *Te Whanganui-a-Orotu Report 1995*, sec 12.4.4

6. Document K4 (submissions of claimant counsel concerning recommendations 12.4.4(d)-(h)), p 17

7. *Ibid*, p 20

8. *Ibid*, pp 25-26

9. *Ibid*, pp 22-23

**(3) Crown submissions**

The Crown submitted that it was not appropriate for the Tribunal to issue final recommendations at this stage. Accordingly, it did not make any specific submissions on the suggested return to the claimants of the Ahuriri Estuary.

**(4) The Tribunal's conclusion**

Having heard claimant and Crown counsel on remedies, we find no reason to alter the tentative views that we expressed in our 1995 report. Accordingly, we recommend that the Ahuriri Estuary be returned to the claimants. While we support the thrust of Ms Wickliffe's submissions, we consider that the time and manner in which the return is accomplished is principally a matter to be negotiated between the Crown and the claimants. The return of the Ahuriri Estuary must occur, however, in conjunction with the development of a new regime for its management (see sec PTII.5.2).

**PTII.1.3 Other Crown-owned land**

We are aware of the other Crown-owned properties in the Wai 55 claim area (see sec PTI.3.3), and that they include DOC land, Ministry of Education land (school sites), former Electricity Department and Railways land owned by Land Information New Zealand, a few Police, Justice, and Social Welfare Department sites, and a former Railways site now owned by the Office of Treaty Settlements.<sup>10</sup> We did not hear submissions directed to each of these properties or types of property. The third amendment to the second amended statement of claim states that the claimants seek, *inter alia*, 'any other Crown land, within the meaning of the Public Finance Act 1989, such as the Tribunal so directs'.<sup>11</sup>

We support within limits the use of these properties for the purpose of settling this claim. We do not, however, think it is appropriate for us at this stage to make specific recommendations on other Crown-owned properties within the Wai 55 claim boundaries. The claimants should negotiate with the Crown for the return of specific properties.

If negotiations are unsuccessful, leave is granted to the claimants to request that we provide more detailed recommendations for the return of other Crown-owned properties.

**PTII.2 THE HAWKE'S BAY AIRPORT**

Part J of the claimants' third amendment to the second amended statement of claim asked the Tribunal to recommend that the Crown 'transfer its entire share-holding or any part thereof in the Hawke's Bay Airport Authority to the claimants without cost to them'.<sup>12</sup>

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10. Document K7

11. Claim 1.2(g) (third amendment to the second amended statement of claim, 12 July 1996), p 3 (see app 1)

12. *Ibid*, p 7

As we described in our 1995 report, the Hawke's Bay Airport was constructed on part of Te Whanganui-a-Orotu reclaimed after the 1931 earthquake. Included in the 467-acre or 189-hectare (at 1965) area were the islands of Tuteranuku, Tirowhangahe, Awa a Waka, and Matawhero, compulsorily acquired by the Crown in 1939 without the payment of any compensation.<sup>13</sup>

The Crown does not own the Hawke's Bay Airport land but runs the airport as a joint venture with the Napier City Council and the Hastings District Council.<sup>14</sup> The claimants have asked that any interest held by the Crown in the airport be transferred to them. Following the remedies hearing in August 1996, when it became apparent that the Crown was seeking to corporatise the airport business, we asked that the Crown retain its 50 percent shareholding in the airport until all aspects of the Wai 55 claim were finalised.<sup>15</sup>

On 8 December 1997, Crown counsel advised the Tribunal that the Crown is still in the process of negotiating with the Napier City Council and the Hastings District Council to terminate the joint venture agreement so that the airport can be corporatised.<sup>16</sup> Crown counsel further notified the Tribunal that the two councils had been advised that, should a company be formed to operate the airport, the Crown did not wish to grant to them pre-emptive rights over the Crown's shareholding.

In principle, we find the concept of the claimants being able to enter into a partnership with the two councils to own the Hawke's Bay Airport to be a most satisfying one. Such an arrangement could well reflect the spirit of the Treaty of Waitangi in a more meaningful way than the award of monetary compensation. However, we do not wish to make any final recommendation at this stage. Exactly what options exist for the possible place of the Crown shareholding in any settlement is a matter still to be determined. We do recommend, however, that the Crown's interest in the Hawke's Bay Airport form part of the negotiations between the claimants and the Crown.

If negotiations do not eventuate or fail, the claimants have leave to request that we make more detailed recommendations about the Hawke's Bay Airport.

### PTII.3 MONETARY COMPENSATION

In our 1995 report, one of the possible recommendations suggested was that:

A substantial fund should be set up as compensation for the past loss of Te Whanganui-a-Orotu as a taonga, of both tangible and intangible value, and as a hapu/

13. *Te Whanganui-a-Orotu Report 1995*, sec 8.3.1; see also the 1865 map at p 128 (fig 15) and discussion at secs 7.7.7–7.8, the 1965 map at p 129 (fig 15), and the 1868 plan at p 93 (fig 13).

14. Paper 2.167 (memorandum of Crown counsel concerning the Hawke's Bay Airport Authority, 20 September 1996), p 1. The claimants questioned the current arrangement of the airport venture. They suggested that it might now be incorporated as a local authority trading enterprise or a partnership: see paper 2.178 (memorandum of claimant counsel in reply to paper 2.167, 5 November 1996).

15. Paper 2.163 (Tribunal memorandum concerning the Hawke's Bay Airport Authority, 4 September 1996)

16. Paper 2.256(a) (memorandum of Crown counsel concerning negotiations with the Napier City Council and the Hastings District Council, 8 December 1997)

iwi economic base, to which the claimants and their tipuna had Treaty rights of resource development.<sup>17</sup>

We find no reason to change the substance of this tentative recommendation. We therefore recommend that the claimants receive a substantial fund of money in order to be compensated in part for, principally, the loss and despoliation of Te Whanganui-a-Orotu as a resource and taonga. More particularly, there should be compensation for the islands Te Pakake and Te Ihu o Te Rei, which, like Roro o Kuri and Tapu Te Ranga, have special significance as wahi tapu and as urupa. Te Ihu o Te Rei is now owned by the Napier City Council, and the claimants remain concerned at the ongoing desecration that we observed on our site visit in 1993.<sup>18</sup> In his closing address, Mr Hirschfeld submitted that we recommend:

that the Crown should take steps to obtain a long-term lease over the property; and that this was not precluded by the 1993 Amendment. The property could then be leased to the claimants.<sup>19</sup>

We do not agree; the plain words of the amendment preclude any such recommendation.

Te Pakake and Te Ihu o Te Rei are just two examples of the severe losses suffered by the claimants through the Crown's appropriation of the islands of Te Whanganui-a-Orotu and reclaimed lands. Yet, because they are now private property or have been vested by the Crown in local authorities, we cannot recommend their return to the claimants. For what in effect are double losses, not even 'a substantial fund of money' can compensate.

As we have already seen, the claimants attempted to assess the appropriate compensation to which they are entitled by obtaining expert evidence from Mr Compton. The total arrived at for land and economic losses – excluding loss of an intangible value – was \$23,065,000 (see sec PTI.3.4(3)). The Crown took no position on appropriate levels of quantum.<sup>20</sup>

In our view, the appropriate means by which an amount of monetary compensation should be arrived at is by negotiation, following negotiations over the return of land to the claimants. Obviously, any final compensation figure will be affected by the value of such land returned to the claimants. We believe that a substantial sum of money is required to reflect the loss of a taonga of both tangible and intangible value and to establish a hapu economic base to which the claimants and their descendants will have access.

If negotiations fail and the claimants and the Crown are unable to agree on the amount of compensation that should be paid, the Tribunal would give favourable consideration to a request for more detailed recommendations.

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17. *Te Whanganui-a-Orotu Report 1995*, sec 12.4.4

18. Document K14 (closing address of senior claimant counsel Charl Hirschfeld, 13 August 1996), pp 24–25

19. *Ibid*, p 25

20. Document K13 (synopsis of submissions of Crown counsel on remedies, 13 August 1996), p 33

**PTII.4 THE CONTROL AND MANAGEMENT OF SETTLEMENT ASSETS**

Having recommended that the claimants receive monetary and other forms of compensation, we need to consider briefly the means by which the claimants will control and manage these assets. The claimants held a hui on 11 August 1996 at Waiohiki Marae, where they decided that their own statutory entity would be the best vehicle by which to receive, control, and manage settlement assets. Accordingly, at the remedies hearing, Mr Hirschfeld amended the statement of claim to request the following recommendation:

Should any remedies in terms of recommendation be made in favour of the claimants, such as for the return of land or interest in land or money or both or for anything otherwise then the Tribunal should further recommend that the legal entity to receive any such remedy be established by an Act of Parliament which constitutes the seven hapu claimants as an hapu authority.<sup>21</sup>

Mr Hirschfeld told us that a statute:

would enshrine, more concretely, the identity of the hapu and property over which they would have control . . . the relationship between the hapu and the Crown would be better enhanced and preserved in Treaty terms particularly.<sup>22</sup>

When discussing representation and mandate issues, Mr Brown raised a number of points that the Crown believed were relevant to the question of what claimant vehicle should receive settlement assets.<sup>23</sup> He observed that a statutory entity might not be a 'panacea for internal wrangling', which was one of the problems the claimants sought to overcome. In this connection, Mr Brown recalled that in cross-examination Mr Hiha had conceded that other claimant groups may also want to have their own statutory entity. Counsel asked the Tribunal to give careful consideration to the fact that the precedents for a statutory entity involved large tribal authorities, rather than smaller groups of hapu. In summary, Mr Brown submitted that there were worthy features in favour of establishing a statutory entity but that they should be assessed against all the advantages that are sought to be derived from such a process.

In our view, it is the claimants' responsibility to decide on the most appropriate vehicle for the receipt and management of settlement assets and the way in which those assets are to be managed. Accordingly, we recommend that a legal entity to receive remedies be established by an Act of Parliament and that the statute constitute the seven claimant hapu as a hapu authority.

We do not at this stage wish to make any more detailed recommendations about the composition of a statutory entity. This should be a matter for negotiation between the parties. Leave is granted to the claimants to return to us for more detailed recommendations on this matter if negotiations do not eventuate or fail to result in an agreement.

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21. Claim 1.2(h) (fourth amendment to the second amended statement of claim, 12 August 1996), p 2 (see app 1)

22. Document K14, p 23

23. Document K13, p 27

**PTII.5 PREVENTING FUTURE PREJUDICE****PTII.5.1 Introduction**

Part of section 6(3) of the Treaty of Waitangi Act 1975 states that the Tribunal can ‘recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future’. So far we have made recommendations designed to compensate for the prejudice suffered by the claimants. In addition to compensatory recommendations, we also have the power to make recommendations designed to prevent future prejudice to the claimants and others. In this section, therefore, we will recount, by reference to our 1995 report and the submissions of counsel, the ways in which the Crown continues to breach the principles of the Treaty in order that we may recommend legislative amendment so that future prejudice can be prevented.

**PTII.5.2 The management of conservation land (the Ahuriri Estuary)****(1) Introduction**

In our 1995 report, we found that the Crown had breached the principles of the Treaty by:

- depriving Maori of access to Te Whanganui-a-Orotu for fishing, shellfish gathering, transportation, and other uses, including kaitiakitanga of wahi tapu;
- permitting serious environmental damage and destruction to occur to Te Whanganui-a-Orotu; and
- failing to ensure, by legislation or other means, that Maori had an effective role in the conservation and resource management of Te Whanganui-a-Orotu in accordance with their status as tangata whenua and Treaty partners (see app III).

Based on the identification of these breaches, one possible recommendation we suggested was that a new management regime be developed for the conservation land within Te Whanganui-a-Orotu to ensure that the claimants have effective representation. In developing a proposed model, we added that the claimants should not feel bound by conditions that the Resource Management Act 1991 imposes upon the handing over of any part of the conservation estate.<sup>24</sup> All the conservation land in Te Whanganui-a-Orotu is contained within the Ahuriri Estuary. We have already recommended that the estuary be returned to the claimants (see sec PTII.1.2(4)). This action would in part compensate the claimants for the loss of their taonga, Te Whanganui-a-Orotu. To prevent future prejudice from occurring, however, what is required is the development of a new management regime for the estuary. Below, we summarise the submissions we received on this topic and make some concluding remarks.

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24. *Te Whanganui-a-Orotu Report 1995*, sec 12.4.4



**(2) Submissions of claimant counsel**

By way of introduction, claimant counsel Ms Wickliffe emphasised the history of the ‘central exchange’ or ‘general overarching’ principle of the Treaty.<sup>25</sup> On the basis of the relevant case law and Tribunal reports, she argued that the Treaty guarantees to the seven claimant hapu rangatiratanga over their taonga, Te Whanganui-a-Orotu. Ms Wickliffe went on to explain the interrelationship between the overarching Treaty principle and the principle of self-regulation or full tribal authority (derived as it is from rangatiratanga).<sup>26</sup> She summarised and quoted from the Privy Council judgment *New Zealand Maori Council v Attorney General* [1994] 1 NZLR 513 and the Tribunal’s *Ngawha Geothermal Resource Report 1993* to explain the principle of active protection.<sup>27</sup> Counsel submitted that the Crown had a duty actively to protect the rangatiratanga of the claimant hapu over Te Whanganui-a-Orotu.

Ms Wickliffe went on to review the claimants’ relationship with DOC and the case law that had clarified the meaning of section 4 of the Conservation Act 1987.<sup>28</sup> Drawing on Court of Appeal decisions, she submitted that the Crown was obliged to ensure that the claimant hapu had effective representation in the management of Te Whanganui-a-Orotu.<sup>29</sup>

In her concluding remarks on Treaty principles and conservation land, Ms Wickliffe submitted that the exercise of the claimants’ rangatiratanga over Te Whanganui-a-Orotu should be consistent with the principle of partnership implicit in the Treaty. In practical terms, this meant that the management of the Ahuriri Estuary should be implemented in conjunction with DOC. The issues, objectives, and policies of importance to claimants would be identified in a hapu management plan.<sup>30</sup>

**(3) Crown questions and submissions**

Mr Brown explored some of the issues relating to the management of conservation land with Mr Hiha in cross-examination, and he later submitted, with considerable justification, that ‘the interface between . . . proposed regimes was left in a very uncertain state’.<sup>31</sup> Mr Brown told us that the Crown is currently developing policies on natural resources and that these policies will influence its position on this claim.<sup>32</sup>

**(4) The Tribunal’s conclusion**

We recommend that a new joint management regime be developed for the Ahuriri Estuary that will enable the proposed hapu authority and DOC to work together in accordance with the Treaty principles of central exchange and partnership.

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25. See *Te Whanganui-a-Orotu Report 1995*, sec 12.2.1, for our explanation of this principle; see doc K4, pp 1–2, for Ms Wickliffe’s explanation.

26. Document K4, pp 3–4

27. *Ibid*, pp 5–6

28. *Ibid*, pp 9–10

29. *Ibid*, p 14

30. *Ibid*, p 15

31. Document K13, p 32

32. *Ibid*, p 33

We realise that the Hawke's Bay Regional Council, the Napier City Council, and the Hastings District Council also have statutory responsibilities in the management of the Ahuriri Estuary and that the Napier City Council owns part of it. We deal with their responsibilities in the following sections. Suffice to say, any local authority that has responsibilities to fulfil in the management of the estuary should work together with the claimants in accordance with the Treaty principles of central exchange and partnership.

The composition of the new joint management regime and its terms of reference are matters to be negotiated.

### **PTII.5.3 Effective representation and Maori advisory standing committees**

#### ***(1) Introduction***

In our 1995 report, one of our suggestions for possible recommendations was that:

The local authorities responsible for the sustained resource management of natural and physical resources in the claim area should be required, by legislation if necessary, to match their words with action and develop the present Maori advisory standing committee structure and process to give the seven claimant hapu a more effective representative and responsible role, in accordance with their status as tangata whenua.<sup>33</sup>

#### ***(2) Claimant counsel's suggested amendment***

Ms Wickliffe asked that the Tribunal amend this suggested recommendation.<sup>34</sup> Her main concern with the suggested recommendation was that the present Maori advisory standing committee did not adequately represent tangata whenua. Instead, she submitted, standing committees were responsible for a broad and diverse range of Maori groups. Counsel noted that this constituency goes far wider than the seven hapu that are tangata whenua of Te Whanganui-a-Orotu. While this was appropriate for general territorial and regional issues, it was not acceptable in terms of the relationship between tangata whenua and their ancestral lands, water, and other taonga.<sup>35</sup> It was only through their tangata whenua status or hapu relationship with Te Whanganui-a-Orotu that customary and Treaty rights existed.

Building on this argument, Ms Wickliffe submitted that the only way local authorities could appropriately fulfil their duties to Maori under the relevant parts and sections of the Resource Management Act 1991 was through the transfer to tangata whenua of powers over their lands, waters, and taonga. The best form for this transfer of powers to take, she contended, is by the development of a hapu management plan, to be administered by a hapu authority.<sup>36</sup> Counsel added that the claimants wanted representation on the Maori standing committee in addition to a hapu authority; that a two-layered process was envisaged.

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33. *Te Whanganui-a-Orotu Report 1995*, sec 12.4.4

34. Document K15 (amended submissions of junior claimant counsel Caren Wickliffe on recommendations 12.4.4(e)-(g), 12-13 August 1996), p 31

35. *Ibid*, p 32

36. *Ibid*

Ms Wickliffe then went on to summarise some of the recent decisions of Judge Kenderdine in the Planning Tribunal, which tended to support an interpretation of the Resource Management Act that enabled tangata whenua to exercise autonomous decision-making power over customary land, water, and taonga. However, Ms Wickliffe pointed out that not all Planning Tribunal decisions followed this line of interpretation, and that consequently local and regional authorities had difficulty in coming to terms with their obligations under the Act.<sup>37</sup> She concluded that it was important that the Resource Management Act be amended as suggested by the Tribunal (with her suggested modification) because there was no guarantee that an approach similar to that of Judge Kenderdine would always prevail.<sup>38</sup>

### ***(3) The Tribunal's conclusion and recommendation***

We agree with Ms Wickliffe's approach and suggested amendment. Accordingly, we recommend that, in order that tangata whenua may have a representative and responsible role reflecting their status, two distinct bodies be created. The first would be a hapu authority comprised of tangata whenua and endowed with powers of policy determination and planning over their taonga. The second body would be a strengthened Maori standing committee, to enable the seven hapu to have continued representation on wider regional issues.

## **PTII.5.4 Hapu authorities, hapu management plans, and transfers of power**

### ***(1) Introduction***

As already noted, the claimants have submitted that there is a need for the seven hapu to establish themselves as a hapu authority. Once this authority is established, and the claimants have made clear their preference that this be effected by special legislation, a hapu management plan would be drafted and implemented. It is through this management plan, Ms Wickliffe has argued, that the claimants would be able to participate in joint management of the Ahuriri Estuary (see sec PTII.1.2(2)). Below, we discuss further submissions on hapu authorities and hapu management plans and the transfer of powers to hapu authorities under section 33 of the Resource Management Act 1991.

### ***(2) Claimant counsel submissions***

Ms Wickliffe provided us with submissions on the sections of the Resource Management Act relating to the transfer of powers to a hapu authority.<sup>39</sup> She explained how it might be possible for local authorities to transfer not only the powers of policy and plan formation but also the power of consent over areas of taonga.<sup>40</sup> She noted that such a transfer of powers would properly acknowledge the partnership created from

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37. Document K15, p 34; Ms Wickliffe referred to the Ministry for the Environment's 1994 working paper *Case Law on Consultation* (doc K11), p 9.

38. Document K15, pp 35-39

39. Ibid, p 41

40. Ibid, p 41

the overarching Treaty principle of ‘central exchange’. The Treaty of Waitangi, counsel argued, provided for a distribution of power in which the Crown would control activities of government, while hapu would retain autonomous control over their resources.<sup>41</sup> She linked this general description to the relevant parts of the Hawke’s Bay Regional Council’s *Regional Policy Statement*,<sup>42</sup> and concluded that the regional council and the local authority could transfer powers to the claimants but that the claimants wanted the security of knowing that this would in fact happen.<sup>43</sup>

Ms Wickliffe then discussed to whom the transfer of powers could be made. She noted that there was uncertainty about the definition of an iwi authority in section 2 of the Resource Management Act.<sup>44</sup> Ms Wickliffe noted that, although iwi authorities do not refer to hapu, they could conceivably be limited to only some of the hapu of an iwi for the purposes of exercising authority over ancestral land. Having noted this, however, counsel acknowledged that confusion exists and that an appropriate amendment to the Act would settle the matter.

Ms Wickliffe also made submissions on the extent to which hapu management plans should be taken into account by local authorities when preparing regional policy statements and plans. Noting that local authorities need only ‘have regard to’ a hapu management plan, she submitted that this meant that a plan’s provisions might not be considered to outweigh any contrary considerations. It would depend on how local authorities chose to interpret their obligations to recognise and provide for the relationship of Maori with their ancestral lands, to have particular regard to kaitiakitanga, and to take into account the principles of the Treaty. This was ‘highly unsatisfactory’, she argued, and provided a further reason why the Resource Management Act should be amended.<sup>45</sup>

### **(3) *The Tribunal’s conclusions and recommendations***

We have already agreed that the claimants should be established as a hapu authority. It follows that a hapu management plan should be drafted and implemented. For this to occur without unnecessary confusion, we recommend that section 2 of the Resource Management Act 1991 be amended so that ‘iwi authorities’ include authorities representing hapu that are tangata whenua.

We also recommend that the Resource Management Act be amended to ensure that hapu management plans are accorded an appropriate weight by local authorities, given that the plans represent the view of a Treaty partner and not just one sector of the community.

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41. Ibid, p 42

42. See *Te Whanganui-a-Orotu Report 1995*, app v, for our previous comment on the Hawke’s Bay Regional Council’s *Regional Policy Statement*.

43. Document K15, p 45

44. Ibid, p 45. We note that the Ministry for the Environment, in its *Case Law on Consultation* (doc K11) at pp 20–21, referred to the Runanga Iwi Act 1990 (repealed in 1991) to help define ‘iwi’.

45. Document K15, pp 48–50

### PTII.5.5 Further changes to the Resource Management Act 1991

In our 1995 report, we found that what has been and is occurring in the claim area in respect of environmental management and planning processes clearly indicates that the structure established under the Resource Management Act 1991 is inappropriate.<sup>46</sup> One of our suggested recommendations, therefore, was that appropriate amendments to the Act be made as recommended in the *Ngawha Geothermal Resource Report 1993*. The Ngawha Tribunal recommended that:

an appropriate amendment be made to the Resource Management Act 1991 providing that in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall act in a manner that is consistent with the principles of the Treaty of Waitangi.

As Part II of the Resource Management Act is presently worded, those exercising powers and functions which may impact on Maori natural resource taonga are not required to ensure that Maori Treaty rights are accorded their appropriate standing. Accordingly, such rights are at risk of being depreciated or outweighed by other considerations and as a consequence Maori Treaty rights are not given the protection which article 2 requires. We see no alternative to the amendment we have recommended if Treaty breaches are to be avoided in the implementation of the Resource Management Act.<sup>47</sup>

Ms Wickliffe advised us that the claimants supported the suggested recommendation, because they felt it called for a statutory requirement that definitively acknowledged the Crown's responsibility to fulfil its duties under article 2 of the Treaty. The amendment would add potency to our recommendation that the seven claimant hapu be given a more effective representative and responsible role to reflect their status as tangata whenua (see sec PTII.5.3(3)).<sup>48</sup>

We confirm our tentative recommendation.

### PTII.5.6 The Conservation Law Reform Act 1990

In our 1995 report, we found that there was a lack of tangata whenua representation on the Conservation Authority and conservation boards.<sup>49</sup> We therefore included as one of our suggested recommendations that appropriate amendments be made to the Conservation Law Reform Act 1990 to give effect to Treaty principles as provided for in section 4 of the Conservation Act 1987.<sup>50</sup> We confirm this recommendation.

Ms Wickliffe submitted that any amendment to the Act should include:

- recognition that tangata whenua participate in conservation management because of their special status, rather than as one of many interest groups;

46. *Te Whanganui-a-Orotu Report 1995*, sec 9.13.5

47. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, Wellington, Brooker and Friend Ltd, 1993, sec 8.5.2

48. Document K15, p 68

49. *Te Whanganui-a-Orotu Report 1995*, sec 9.13.4

50. *Ibid*, sec 12.4.4

- a higher ratio of tangata whenua membership of the authority and boards; and
- a framework for joint management that provides for the equal participation of both Treaty partners.<sup>51</sup>

#### PTII.5.7 Compulsory acquisitions of Maori land under the Public Works Act 1981

Following our finding that the Crown had breached the principles of the Treaty by compulsorily acquiring islands by use of the Public Works Act 1928 and not paying any compensation, we assessed whether the Public Works Act 1981 had rectified some of the faults of the previous Act. It had not. Accordingly, one of the possible recommendations suggested in our 1995 report was that appropriate amendments be made to the Public Works Act 1981 as outlined by the *Te Maunga Railways Land Report*.<sup>52</sup> Since the publication of our report, the Turangi township Tribunal, building on the recommendations of the Te Maunga railways land Tribunal and the Ngai Tahu Tribunal (in their *Ngai Tahu Ancillary Claims Report 1995*<sup>53</sup>), has proposed three comprehensive recommendations to amend the Public Works Act 1981, on which Mr Hirschfeld relied in his submissions at the remedies hearing.<sup>54</sup>

Clearly, a review of this Act is long overdue, and we therefore lend our support to the Turangi township Tribunal's recommendations. Not all them, however, are applicable to the circumstances concerning the compulsory acquisition of the former islands in Te Whanganui-a-Orotu, where no compensation was paid. We therefore recommend that the Crown promote the following amendments to Part II of the Act:

- (a) The Crown or a local authority should not seek to acquire Maori land without first ensuring that no other suitable land is available as an alternative.
- (b) If the Crown or a local authority wishes to acquire Maori land for a public work or purpose, it should first give the owners adequate notice and by full consultation seek to obtain their informed consent at an agreed price.
- (c) If the owners are unwilling to agree, the power of compulsory acquisition for a public work or purpose should be exercised only in exceptional circumstances and as a last resort in the national interest.
- (d) If the Crown or a local authority does seek to acquire the use of Maori land for a public work, it should do so by acquiring a lease, licence, or easement, as appropriate, on terms agreed upon with the Maori owners or, failing agreement, by appropriate arbitration. Should there be exceptional circumstances where the acquisition of the freehold by the Crown or a local authority is considered to be essential, Maori should have the right to have that question determined by an appropriate person or body independent of the Crown or local authority, as the case may be.

The Act should also be amended to provide that it is to be interpreted and administered so as to give effect to the principles of the Treaty of Waitangi.

51. Document K15, p 63

52. Waitangi Tribunal, *Te Maunga Railways Land Report*, 1st ed, Wellington, Brooker's Ltd, 1994, pp 82–83

53. Waitangi Tribunal, *The Ngai Tahu Ancillary Claims Report 1995*, Wellington, Brooker's Ltd, 1995, sec 9.4.6

54. Waitangi Tribunal, *The Turangi Township Report 1995*, Wellington, Brooker's Ltd, 1995, secs 22.4.1–22.4.3; doc K4, pp 66–84

**PTII.6 SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS**

We have reached several conclusions and made a number of recommendations in this report, most of which confirmed the conclusions and tentative recommendations made in our 1995 report (see apps III, IV). In the following sections, we restate and summarise our conclusions and recommendations.

**PTII.6.1 Why should recommendations be made?**

We first determined whether or not it was appropriate to make recommendations. The Crown submitted that we should not. We disagree, and have concluded that it is entirely appropriate to make some recommendations at this stage, for the following reasons:

- the claim is well founded (sec PTI.2.6);
- we have had regard to all the circumstances of the case (sec PTI.2.6);
- the seven claimant hapu are the tangata whenua of Te Whanganui-a-Orotu (sec PTI.2.5);
- the claimants have asked us to address questions of remedies (sec PTI.2.2);
- no other claims to Te Whanganui-a-Orotu exist (sec PTI.2.4(5));
- redress is long overdue for this claim (sec PTI.2.2); and
- it would be unfair and unnecessary to delay relief (sec PTI.2.2).

**PTII.6.2 General conclusion and recommendation**

We have already concluded that the Crown breached the overarching basic Treaty principle of central exchange and partnership by failing actively to protect the claimants' rangatiratanga over their taonga, Te Whanganui-a-Orotu (sec PTI.2.6). We conclude that the Crown has a fiduciary duty to ensure that the rangatiratanga of the claimants over their taonga is restored. How this is achieved should be negotiated between the parties, for the benefit not only of the claimants themselves but, generally, of the whole district.

We recommend that the claimants and the Crown negotiate. These negotiations should commence immediately and not be unduly or unreasonably delayed. We sincerely hope that the negotiations will result in a comprehensive agreement for settlement of all aspects of this claim (sec PTI.2.6).

Most of our recommendations are made in general terms. We therefore grant the claimants leave to return to us to seek more detailed recommendations if negotiations with the Crown are unsuccessful (sec PTI.2.6).

**PTII.6.3 The claim area**

We conclude that the Wai 55 claim area for remedies purposes is represented on maps presented to us by the claimants and the Crown (sec PTI.3.2). The claim boundary is shown on the location map (see p 7). Pukemokimoki is excluded from the claim area (sec PTI.2.3).

#### **PTII.6.4 The land to be returned**

To restore the mana and rangatiratanga of the claimants over Te Whanganui-a-Orotu, it is necessary for the Crown to return land as part of any settlement.

##### **(1) *The Landcorp farm***

We propose that the Landcorp farm and the islands of Roro o Kuri and Tapu Te Ranga should be returned to the claimants for the following reasons (sec PTII.1.1):

- the farm is the largest single property of those that were formerly under the waters of Te Whanganui-a-Orotu;
- the farm includes islands of inestimable value to the claimants; and
- the claimants should be physically reunited with at least part of Te Whanganui-a-Orotu.

We emphasise, however, that at this stage we do not make our proposal a binding order pursuant to section 8A(2)(a) of the Treaty of Waitangi Act 1975. We would prefer the Landcorp farm to be returned as part of a negotiated settlement.

##### **(2) *The Ahuriri Estuary***

We recommend that the Ahuriri Estuary be returned to the claimants (sec PTII.1.2(4)). How and under what conditions it should be returned are principally matters to be negotiated between the Crown and the claimants. Its return must occur in conjunction with the development of a new regime for the joint management of the estuary (secs PTII.5.2, PTII.6.9).

##### **(3) *Other Crown-owned properties***

We recommend that the claimants negotiate with the Crown for the return of other specific Crown-owned properties within the claim area (sec PTII.1.3).

#### **PTII.6.5 The Hawke's Bay Airport**

We support in principle the concept of the claimants entering into a partnership with the Napier City Council and the Hastings District Council to own the Hawke's Bay Airport (sec PTII.2). We recommend that the Crown's interest in the airport form part of the negotiations between the Crown and the claimants.

#### **PTII.6.6 Monetary compensation**

We recommend that the claimants receive a substantial fund of money (sec PTII.3). The fund will compensate the claimants to some degree for:

- the expropriation of Te Whanganui-a-Orotu;
- the past loss and despoliation of Te Whanganui-a-Orotu as a taonga of both tangible and intangible value;
- the past loss and despoliation of Te Whanganui-a-Orotu as a resource and hapu economic base, to which the claimants and their tipuna had rights of resource development;



- the parts of Te Whanganui-a-Orotu that were destroyed for the development of the city of Napier and the port;
- the loss of significant islands Te Pakake and Te Ihu o Te Rei; and
- the parts of Te Whanganui-a-Orotu which are now in private or local authority ownership.

We recommend that the amount of monetary compensation be arrived at by negotiation. The final compensation figure will be affected by the value of any land returned to the claimants.

#### **PTII.6.7 The control and management of settlement assets**

We consider that it is the claimants' responsibility to decide on the most appropriate vehicle for the receipt and management of settlement assets (sec PTII.4). Having regard to claimant submissions, we recommend that a legal entity be established by an Act of Parliament and that the statute constitute the seven claimant hapu as a hapu authority.

#### **PTII.6.8 The management of the Ahuriri Estuary**

We recommend that a new joint management regime be developed for the Ahuriri Estuary. The claimants, DOC, and other authorities with management responsibilities should work together in accordance with the Treaty principles of central exchange and partnership (sec PTII.5.2(4)). The composition of the new joint management regime and its terms of reference are matters to be negotiated.

#### **PTII.6.9 The Resource Management Act 1991**

To prevent future prejudice occurring to the claimants, several amendments to the Resource Management Act 1991 are necessary. The amendments affect the new joint management regime we recommend be developed for the Ahuriri Estuary. They also affect the management of physical and natural resources in the wider claim area.

We recommend that, in order that tangata whenua may have a representative and responsible role in accordance with their status as Treaty partner, two distinct bodies be created. The first would be a hapu authority comprised of tangata whenua and endowed with powers of policy determination and planning over their taonga. The second body would be a strengthened Maori standing committee, to enable the seven hapu to have continued representation on wider regional issues (sec PTII.5.3(3)).

We recommend that the hapu authority be sufficiently resourced to draft a hapu management plan. For the plan's implementation to occur without unnecessary confusion, we recommend that section 2 of the Resource Management Act be amended so that 'iwi authorities' include authorities representing hapu that are tangata whenua.

We recommend that the Resource Management Act be amended to ensure that hapu management plans are accorded an appropriate weight by local authorities,

given that the plans represent the view of a Treaty partner and not just one sector of the community. This recommendation accords with that of the Ngawha geothermal resources Tribunal, which we also endorse (sec PTII.5.5).

**PTII.6.10 The Conservation Law Reform Act 1990**

We recommend that the Conservation Law Reform Act 1990 be amended to give effect to Treaty principles as provided for in section 4 of the Conservation Act 1987.

**PTII.6.11 The Public Works Act 1981**

We believe that a review of the Public Works Act 1981 is long overdue, and we lend our support to the amendments proposed by the Turangi township Tribunal (sec PTII.5.7).

Dated at *Wellington* this *11<sup>th</sup>* day of *May* 1998

*W M Wilson*

W M Wilson, presiding officer

*M. A. Bennett*

M A Bennett, member

*M B Boyd*

M B Boyd, member

*J H Ingram*

J H Ingram, member





APPENDIX I

**AMENDMENTS TO  
THE STATEMENT OF CLAIM**

BEFORE THE WAITANGI TRIBUNAL

WAI 55

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

IN THE MATTER of Te Whanganui-a-Orotu

AND

IN THE MATTER of a Claim by Te Otane Reti (Deceased) and others

**THIRD AMENDMENT TO THE  
SECOND AMENDED STATEMENT OF CLAIM (14 JULY 1993)**

Dated this 12th day of July 1996

**1.0 Introduction**

**1.1** This amendment to the amended statement of claim dated 14 July 1993 is in respect of paragraphs 12.4.2 and 12.4.3 and 12.4.4 on pages 212 to 214 of the *Te Whanganui-a-Orotu Report* ('the Report').

**1.2** In essence this amended statement of claim pleads remedies that are sought under the Wai 55 claim on behalf of the claimants.

**2.0 Final Recommendations (Recitals)**

**2.1** Whereas the Tribunal is now called upon to decide what if any recommendations to make in respect of its findings in the *Te Whanganui-a-Orotu Report 1995*, namely that a series of breaches by the Crown of the principles of the Treaty have occurred; and

2.2 Whereas the Tribunal has advised as to interim steps to be taken (paragraph 12.4.3 page 213 of the Report); and

2.3 Whereas the Tribunal has advised on suggestions on possible recommendations (paragraph 12.4.4 pages 213 and 214 of the Report).

2.4 The claimants seek the following recommendations.

### 3.0 Recommendations Sought

3.1 Namely recommendations that the Crown be immediately required:

#### PART A – (THE RETURN OF CROWN LANDS OR INTERESTS IN LAND)

3.2 To return to the claimants, in fee simple without cost to the claimants, the following Crown Land:

- i the Landcorp farm
- ii Roro o Kuri
- iii the Ahuriri Estuary
- iv any other Crown Land, or Crown entity within the meaning of the Public Finance Act 1989, such as the Tribunal so directs.

3.3 To transfer to the claimants without cost to them any legal estate in any land within the boundaries of Te Whanganui-a-Orotu in which the Crown has any such legal estate not being an estate in fee simple (such as a lease).

#### PART B – (COMPENSATION FUND)

3.4 To compensate for the past loss of Te Whanganui-a-Orotu, as a taonga or otherwise – in any or all its meanings to the claimants as a taonga or otherwise – wherefore the amount sought for a compensation fund is \$23,065,000 (twenty three million and sixty five thousand dollars).

#### PART C – (COMPENSATION FOR ISLANDS AND OTHER LOSSES)

3.5 To compensate for the taking of the Island Reserves and wahi tapu, namely Te Pakake and Pukemokimoki and for the six former lagoon islands (Maori customary land), that were compulsorily acquired under the Public Works Act 1928 without any compensation then being paid, and to compensate for other losses including loss of fishing and access rights, and loss by the drainage and development that followed the 1931 earthquake, wherefore compensation should be paid in a sum to be determined by the Tribunal upon hearing or taking evidence and the hearing or taking of submissions by counsel for the claimants and the Crown.

**PART D – (REGIME FOR THE MANAGEMENT OF CONSERVATION LANDS)**

3.6 To direct the Department of Conservation to give effect to any future hapu management plan in the development of any new management regime for Te Whanganui-a-Orotu; and

3.7 To direct the Whanganui-a-Orotu conservation land be revested as an estate in fee simple in the claimants, provided such revestment may be subject to any special conditions required to guarantee the maintenance of conservation value as mutually agreed upon between the Department of Conservation and claimants; and

3.8 To direct the Whanganui-a-Orotu conservation land be revested through special legislation.

**PART E – (SUSTAINED RESOURCE MANAGEMENT AND REPRESENTATION)**

3.9 By reference to sections 6, 7, 8 and 33 of the Resource Management Act 1991, to direct, by amendment to the Resource Management Act 1991 if necessary, that local authorities be compelled to provide for hapu actual effective participatory representation and an actual effective role of responsibility commensurate with their status as tangata whenua, whereby if this recommendation is made by the Tribunal requiring the Crown to be so directed then a further direction for the Crown to provide resource and technical assistance for:

- i hapu management authorities; and
- ii Maori Consultative Committees; and
- iii any other mechanism at the disposal of local authorities which would provide proper recognition of and give effect to the principles of the Treaty of Waitangi as outlined in the Report.

**PART F – (AMENDMENTS TO THE CONSERVATION LAW REFORM ACT 1990)**

3.10 To amend the Conservation Law Reform Act 1990 so that such an amendment shall:

- i provide for a higher ratio of tangata whenua members on the Conservation Authority and conservation boards (in particular, in this region); and
- ii provide for joint management of Maori lands in possession or in any way under the control of the Department of Conservation together with equal participation between tangata whenua and the Department in the decision making process; and
- iii statutorily recognise tangata whenua in conservation management based on their special status as a Treaty partner.

**PART G – (AMENDMENTS TO THE RESOURCE MANAGEMENT ACT 1991)**

3.11 To amend the Resource Management Act 1991 so that such an amendment shall:

- i definitively acknowledge the Crown's responsibility to fulfil its duties as guaranteed under article 2 of the Treaty as well as to compel all those exercising powers and functions

under the Resource Management Act 1991 to provide real effect to the principles of the Treaty; and

- ii permit Kaitiakitanga to be exclusively exercised by Maori; and
- iii transfer applicable powers from local authorities to hapu authorities; and
- iv provide for tangata whenua to be adequately represented on consultative committees at both regional and territorial level.

#### **PART H – (AMENDMENTS TO THE PUBLIC WORKS ACT 1981 AND RETURN OF ISLANDS)**

**3.12** To amend the Public Works Act 1981 so that such an amendment shall:

- i give meaningful effect to the principles of the Treaty; and
- ii compel the Crown to fulfil its duties of active protection and redress under the Treaty.

**3.13** To return in fee simple without cost to claimants those six former lagoon islands or any parts thereof which are currently Crown land or lands, whereby if any of those six former lagoon islands or any parts thereof are private lands in terms of the Treaty of Waitangi Amendment Act 1993 then for compensation for their permanent loss to be paid by the Crown to the claimants in a sum to be determined by the Tribunal upon the hearing or taking of evidence and the hearing or taking of submissions by counsel for the claimants and the Crown.

#### **PART I – (REASONABLE COSTS)**

**3.14** To pay the claimants reasonable costs (for August 1996 and thereafter) and disbursements, but exclusive of counsel's fee, including those costs for:

- a the claimants' accountancy adviser's fee and his disbursements
- b valuations prepared for the claimants in support of the current round of hearing
- c any other costs determined by the Tribunal.

#### **PART J – (THE AIRPORT)**

**3.15** To transfer its entire share-holding or any part thereof in the Hawke's Bay Airport Authority to the claimants without cost to them.

Charl Hirschfeld  
Counsel for the Claimants

TO: The Registrar of the Waitangi Tribunal

AND TO: Counsel for the Crown

BEFORE THE WAITANGI TRIBUNAL

WAI 55

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

IN THE MATTER of Te Whanganui-a-Orotu

AND

IN THE MATTER of a Claim by Te Otane Reti (Deceased) and others

**FOURTH AMENDMENT TO THE  
SECOND AMENDED STATEMENT OF CLAIM (14 JULY 1993)**

Dated this 12th day of August 1996

1.0 This amendment to the amended statement of claim dated 14 July 1993 is to be read in conjunction to the third amended statement of claim dated 12 July 1996.

2.0 Whereas the representatives of the seven hapu of this claim have met at Waiohiki Marae on 11 August 1996 and resolved unanimously by voting the following motion, namely:

‘That all the seven hapu of Te Whanganui-a-Orotu agree that the legal entity to which the remedies for this claim should be made, should be established by an Act of Parliament’.

2.1 The claimants seek the additional following recommendation, namely that the Tribunal recommend that:

2.2 Should any remedies in terms of recommendation be made in favour of the claimants, such as for the return of land or interest in land or money or both or for anything otherwise then the Tribunal should further recommend that the legal entity to receive any such remedy be established by an Act of Parliament which constitutes the seven hapu claimants as an hapu authority.

Charl Hirschfeld  
Counsel for the Claimants

TO: The Registrar of the Waitangi Tribunal

AND TO: Counsel for the Crown





## APPENDIX II

# RECORD OF INQUIRY

### RECORD OF PROCEEDINGS

All references given are to the Wai 201 record of inquiry

#### 1. CLAIMS

##### 1.2

- (g) Third amendment to the second amended statement of claim, 12 July 1996
- (h) Fourth amendment to the second amended statement of claim, 12 August 1996

#### 2. PAPERS IN PROCEEDINGS

**2.131** Memorandum from Crown and claimant counsel requesting adjournment of October 1995 hearing on remedies, 21 September 1995

**2.132** Direction from Tribunal adjourning the October 1995 remedies hearing until February 1996, 27 September 1995

**2.142** Letter from V L Pomeroy to the Tribunal registrar concerning an application by the Napier City Council pursuant to section 8D of the Treaty of Waitangi Act 1975 regarding land at Byron Street, Napier, and the claimants' interest in that land, 9 May 1996

**2.145** Direction from Tribunal registering the third amendment to the second amended statement of claim, 19 July 1996

**2.146** Notice of the third amendment to the second amended statement of claim, 19 July 1996

**2.147** Notice of seventh hearing, 22 July 1996

**2.163** Memorandum from Tribunal concerning the Hawke's Bay Airport Authority, 4 September 1996

**2.167** Memorandum from Crown counsel concerning the Hawke's Bay Airport Authority, 20 September 1996

**2.178** Memorandum from claimant counsel in reply to paper 2.167, 5 November 1996

**2.256** Memorandum of Crown counsel concerning negotiations with the Napier City Council and the Hastings District Council, 8 December 1997

## RECORD OF DOCUMENTS

\* Document held in the Waitangi Tribunal library, Waitangi Tribunal offices, third floor, 110 Featherston Street, Wellington

The name of the person or party that produced each document or set of documents in evidence appears in parentheses after the reference, except where that source is already apparent.

### DOCUMENTS ADDED AFTER THE SEALING OF THE *TE WHANGANUI-A-OROTU* REPORT 1995, 13 JUNE 1995

**118\*** Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, 1st ed, Wellington, Brooker's Ltd, 1995 (registrar)

### SEVENTH HEARING, THE GREAT WALL CONFERENCE CENTRE, NAPIER, 12–13 AUGUST 1996

**κ1** Financial statements prepared by Oldershaw and Company concerning the value of the claim, 29 May 1996 (claimant counsel)

**κ2** Letter from David Compton of Oldershaw and Company to senior claimant counsel Charl Hirschfeld concerning the estimated value of the Hawke's Bay Airport, 13 June 1996 (claimant counsel)

**κ3** DOSLI map of Crown, State-owned enterprise, Crown health enterprise, and local authority properties within the Te Whanganui-a-Orotu boundary (claimant counsel)

**κ4** Submissions of claimant counsel concerning recommendations 12.4.4(d)–(h) (claimant counsel)

**(a)** Supporting documents for document κ4 (claimant counsel)

**κ5** Property valuation for the Ahuriri Lagoon Landcorp farm, June 1996 (Crown counsel)

**κ6** DOSLI map of Crown, State-owned enterprise, Crown health enterprise, and local authority properties within the Te Whanganui-a-Orotu boundary (Crown counsel)

**κ7** List of Crown and State-owned enterprise properties within Te Whanganui-a-Orotu bounded by the deed map of the 1851 Ahuriri purchase, undated (received 9 August 1996) (Crown counsel)

κ8 Brief of evidence of Heitia Hiha on redress (claimant counsel)

κ9 Brief of evidence of David Compton, 7 August 1996 (claimant counsel)

(a) Supplementary brief of evidence of David Compton, 12 August 1996 (claimant counsel)

(b) Assorted correspondence between Oldershaw and Company and Landcorp (2 October 1995, 3 October 1995), Oldershaw and Company and the Minister in Charge of Treaty of Waitangi Negotiations (20 December 1995, 9 January 1996, 5 February 1996), V L Pomeroy and the Minister in Charge of Treaty of Waitangi Negotiations (9 May 1996), and V L Pomeroy and the Office of Treaty Settlements (19 June 1996, 25 June 1996) concerning the Landcorp farm (claimant counsel)

(c) Letter from K E Parker of VNZ to David Compton concerning schedule of Crown-owned and State-owned enterprise land, 17 July 1996 (claimant counsel)

(d) Letter from K E Parker of VNZ to David Compton concerning land valuations of Te Pakake and six islands, 7 August 1996 (claimant counsel)

κ10 Office of Treaty Settlements, *Crown Proposals for the Settlement of Treaty of Waitangi Claims: Detailed Proposals*, Wellington, Department of Justice, 1994 (claimant counsel)

κ11 Ministry for the Environment, *Case Law on Consultation: Case Law under the Resource Management Act 1991, Regarding the Issue of Consultation with Tangata Whenua, to 30th November 1994*, Ministry for the Environment Working Paper 2, November 1994 (claimant counsel)

κ12 Closing submissions of claimant counsel, 13 August 1996

κ13 Synopsis of submissions of Crown counsel on remedies, 13 August 1996

(a) Supporting documents to document κ13

κ14 Closing address of senior claimant counsel Charl Hirschfeld, 13 August 1996

κ15 Amended submissions of junior claimant counsel Caren Wickliffe on recommendations, 12.4.4(e)–(g), 12–13 August 1996



## APPENDIX III

# TREATY BREACHES

The following text is reproduced from section 12.3.6 of the *Te Whanganui-a-Orotu Report 1995*, 1st ed, Wellington, Brooker's Ltd, 1995 (doc 118).

### 12.3.6 Summary of breaches of Treaty principles

... The Crown has been in breach [of the principles of the Treaty of Waitangi] by:

- (a) not making it clear that it believed that Te Whanganui-a-Orotu was included in the original purchase and then relying on what were, at most, legally ambiguous provisions in documents prepared by the Crown as a basis for claiming Te Whanganui-a-Orotu;
- (b) purporting to rely on the common law principle of 'arm of the sea' to acquire Te Whanganui-a-Orotu without the consent of Maori;
- (c) enacting legislation to vest Te Whanganui-a-Orotu in the Napier Harbour Board and to authorise a series of reclamations and sales and leases of it, more particularly to the Napier Borough (City) Council for urban development;
- (d) compulsorily acquiring islands, without paying any compensation, that were clearly outside the purchase and recognised by statute as customary Maori land;
- (e) depriving Maori of access to Te Whanganui-a-Orotu for fishing, shellfish gathering, transport, and other uses, including kaitiakitanga of wahi tapu;
- (f) permitting serious environmental damage and destruction to occur to Te Whanganui-a-Orotu; and
- (g) failing to ensure, by legislation or otherwise, that Maori had an effective role in the conservation and resource management of Te Whanganui-a-Orotu in accordance with their status as tangata whenua and Treaty partners.

... some of these matters, in addition to breaching the general overarching principle of active protection of rangatiratanga over a taonga, were breaches of other principles of the Treaty that were formulated by the Tribunal and the courts and relied on by the claimants. These were the principles of partnership, involving the duty of the Crown to act responsibly and in good faith and to consult, and the duty to provide effective redress for past breaches of the Treaty, which the Crown failed to do.



## APPENDIX IV

# SUGGESTED RECOMENDATIONS

The following text is reproduced from section 12.4.4 of the *Te Whanganui-a-Orotu Report 1995*, 1st ed, Wellington, Brooker's Ltd, 1995 (doc 118).

### 12.4.4 Suggestions on possible recommendations

To assist the parties in preparing for the further hearing, we make the following suggestions on possible recommendations (we emphasise that we make these on a tentative basis and on the information at present available to the Tribunal):

- (a) The area of Crown land to be considered for possible return should include the Landcorp farm, Roro o Kuri, and the Ahuriri Estuary.
- (b) A substantial fund should be set up as compensation for the past loss of Te Whanganui-a-Orotu as a taonga, of both tangible and intangible value, and as a hapu/iwi economic base, to which the claimants and their tipuna had Treaty rights of resource development.
- (c) More particularly, compensation should be paid for the taking of island reserves and wahi tapu, Te Pakake and Pukemokimoki, for the six former lagoon islands (Maori customary land) that were compulsorily acquired under the Public Works Act 1928 without any compensation being paid, and for the Crown's failure to compensate tangata whenua for the losses that they incurred, including a fishing and access right, by the drainage and development that followed the 1931 earthquake, even though half of this partially developed land was revested in Crown ownership in 1950.
- (d) A new regime should be developed for the management of conservation land within Te Whanganui-a-Orotu that will ensure that the claimants have effective representation. In developing a proposed model, the claimants should not feel bound by the conditions that the Resource Management Act 1991 at present requires to be imposed upon the handing over of any part of the conservation estate.
- (e) The local authorities responsible for the sustained resource management of natural and physical resources in the claim area should be required, by legislation if necessary, to match their words with action and develop the present Maori advisory standing committee structure and process to give the seven claimant hapu a more effective representative and responsible role, in accordance with their status as tangata whenua.
- (f) Appropriate amendments should be made to the Conservation Law Reform Act 1990 to give effect to Treaty principles as provided for in section 4 of the Conservation Act 1987.
- (g) Appropriate amendments should be made to the Resource Management Act 1991, as recommended by the *Ngawha Geothermal Resource Report 1993*.



- (h) Appropriate amendments should be made to the Public Works Act 1981, as outlined in recommendations 3(a), 3(b), 3(c), and 3(d) of the *Te Maunga Railways Land Report 1994*.
- (i) The Crown should pay to the claimants reasonable costs and disbursements.

