



## Waitangi Tribunal

Te Rōpū Whakamana i te Tiriti o Waitangi

*Tākiri te haeata, ka ao, ka awatea, horahia mai ko te ao mārāma*

The Honourable Te Ururoa Flavell  
Minister for Māori Development

The Honourable Christopher Finlayson  
Minister for Treaty of Waitangi Negotiations

The Honourable Maggie Barry  
Minister of Conservation

Parliament Buildings  
WELLINGTON

25 September 2015

E ngā Minita, ka whakatakotoria tēnei pūrongo, ki mua i ō koutou aroaro nā mātau nā Te Rōpū Whakamana i te Tiriti o Waitangi he mātai he wānanga hei whakatau mā te Karauna.

E tāpaetia ana nā mātau arā, nā te Taraipiunara tēnei pūrongo, ko ia ko te wāhanga wharaurarahi o ngā tūwhiringa kōrero a ngā uri a ngā ati o te hunga kua okoki ki te moengaroa o ngā mano tini o te pō. Ko tō mātau tūmanako kia 'utua te mamae ki te atawhai me te atawhai ki te atawhai.'

Nō konā, kia tau ki runga ki ngā iwi nā rātau ēnei inoi, ēnei tūmanako, otirā, ki runga anō ki a koutou me te Kāwanatanga ngā tauwhiro ngā manaakitanga a Te Wāhi Ngaro.

Here is the Waitangi Tribunal's report on its inquiry into 83 claims submitted by Māori of the Whanganui inquiry district. These claims focused principally on the relationship between tangata whenua and their land. The report can be viewed as a companion to the Tribunal's Whanganui River report of 1999, on which the Crown concluded a settlement last year.

It should not come as a surprise that the process of colonisation in Whanganui did not evolve in a way that was consistent with the Treaty of Waitangi, and especially the guarantee of te tino rangatiratanga in the Māori text. But the Crown also fell short of the standards of justice

Level 7, 141 The Terrace, Wellington, New Zealand. Postal: DX SX11237

Fujitsu Tower, 141 The Terrace, Te Whanganui-ā-Tara, Aotearoa. Pouaka Poutāpeta: DX SX11237

Phone/Waea: 04 914 3000 Fax/Waea Whakaahua: 04 914 3001

Email/E-mēra: [information@waitangitribunal.govt.nz](mailto:information@waitangitribunal.govt.nz) Web/Ipurangi: [www.waitangitribunal.govt.nz](http://www.waitangitribunal.govt.nz)



and fair dealing that flowed from the Magna Carta, and which British officials acknowledged independently of the Treaty. The claims we considered and reported on in were largely well-founded. The Crown has – through a multitude of policies, laws, decisions, acts, and omissions – caused substantial harm to Māori in Whanganui.

The Crown's first substantive engagement with Whanganui Māori was in the 1840s, over the long and drawn-out purchase of the Whanganui block. The Crown deliberately deceived tangata whenua about the terms of purchase, surreptitiously acquiring twice as much land as it should have, with no corresponding increase in the price. Even as early as 1848, the Crown limited the number of reserves that would be set aside for ongoing Māori use.

Among the many later purchases of Māori land, the Crown's purchase of the Waimarino block stands out. Not only was it one of the largest single Crown acquisitions in the North Island in the nineteenth century, but it was a truly shoddy affair: hurried, penny-pinching, and involving the illegal purchase of children's interests.

By the turn of the century, Māori in Whanganui retained only a third of their land. Soon after, the Stout–Ngata commission warned against further purchases in many blocks. The Crown steamed on regardless, and also allowed extensive private purchasing. Today, just 237,000 acres remain in Māori ownership, which amounts to about eleven per cent of the district.

Being left with relatively little land, often in scattered parcels in remote areas, was particularly damaging for the Māori of this district, because most of the land here is ill-suited to farming. The pervasive colonial vision of smallholders achieving agricultural prosperity was never going to work in ninety per cent of the district: successful farming ventures involved large landholdings and access to capital. Whanganui Māori had neither. The Crown bought nearly all of the good land very early on.

Māori in Whanganui recovered to some extent in the early twentieth century, but even today their living conditions are deprived compared to non-Māori – and compared with their ancestors, many live a life of social and cultural deprivation.

Few of the Crown's actions were, like the Whanganui purchase, a matter of outright deception. Whanganui Māori suffered most because of their effective exclusion from political institutions that passed legislation and made decisions relating to them and their affairs. Māori continue to be frustrated by their lack of control over matters concerning them, and rightly so.

We ask that you and the Government act on our concerns that:

- ▶ *Whanganui Māori continue to live in a deprived state:* The census statistics we have to hand show that Māori in Whanganui fare poorly compared to non-Māori in areas of health, education, housing and employment. We also heard evidence that many live in a state of cultural deprivation, which can have equally deleterious effects. Our report relates how the Crown's acts created or influenced these circumstances in multiple ways over the 175 years since 1840. The best way for you and your government to address this situation is to enter into a settlement

with Māori of Whanganui that supports their aspirations for economic and cultural revitalisation. This would also have the effect of stimulating economic growth in the district. Generous settlements have achieved such feats in other parts of New Zealand. Your manaakitanga would echo that of tangata whenua here, when they welcomed settlers after 1840.

- ▶ *Whanganui Māori have little control over matters that affect them:* The Crown reposed power in local authorities to make decisions affecting Māori lives, but often with little or no involvement of Māori. We were encouraged to see the then mayor and chief executive of Ruapehu District Council attend our hearings, and later engage with tangata whenua in an attempt to address several local grievances. Other councils did not. We now encourage the Crown to seek ways to structure more appropriate Māori involvement in local government, that sees them exercising more control over matters that affect them. At a micro level, the 'local issues' focus of this report provides the Crown with an avenue to work locally with claimants and local authorities to solve problems that have festered for a long time. It will require resources and dedication, but the relationship-building that would result would be more than worth the effort.
- ▶ *Whanganui Māori have little say in the management of the Whanganui National Park:* We have found that the Crown acquired the land that makes up the park unjustly and in breach of Treaty principles. The park was created in 1987, when the Treaty of Waitangi was beginning to influence public policy. This led to the inclusion of the Treaty in the Conservation Act of that year, but not to a role for Māori in managing the park. This continues to be a source of grievance. We make specific recommendations about the return to tangata whenua of title to land in the park, and a substantial management role for them.
- ▶ *Whanganui Māori should control their own language:* Our report explains how the town near the river mouth was originally called Petre, then later – ironically, given recent conflict over the current name – renamed 'Wanganui', which the settlers thought was the original name. Wanganui was a simple misspelling of 'Whanganui' (meaning, in te reo Māori, 'Whanga' – harbour, and 'nui' – big), probably reflecting the aspirated 'wh' sound in the Whanganui dialect. Control over language is important to any people, but particularly to people whose language is struggling for survival. As regards Whanganui, we conclude that tangata whenua should control their own language, and specifically the spelling of names in their rohe (tribal area). They say the word is 'Whanganui'. We recommend the Crown overturns a recent decision that authorised both 'Wanganui' and 'Whanganui' as legitimate spellings. They are not equally legitimate. One is right and one is wrong.
- ▶ *Public works legislation remains unchanged:* As this report goes to print in the second half of 2015, we are disappointed that the comprehensive Public Works recommendations of the Wairarapa ki Tararua Tribunal, which included several members of the present Tribunal, remain unheeded. This *Whanganui Land Report* shows yet again that public works takings

of Māori land were among the most-resented acts of central and local authorities. That those authorities still have the power to do this remains an impediment to the Treaty relationship between Māori and the Crown.

These are all matters that will form part of the Treaty settlement negotiations with the claimants. We wish the parties well. The Māori of this district are due substantial redress for the harm caused to them.



Judge Wainwright  
Presiding Officer

CHAPTER 1

## INTRODUCTION

### 1.1 HE WHIRITAUNOKA

We have called this report *He Whiritaunoka* in the hope that it will mark the beginning of the next stage in the lives of Whanganui Māori, in which they will move beyond conflict with the Crown, and raruraru (difficulties) of their own, to fulfil their aspirations for a future full of harmony, unity, and cultural revival.

Where does the name *He Whiritaunoka* come from? Let us begin with the literal meaning of the Māori words: ‘whiri’ means to twist or plait and ‘taunoka’ is the name of the native broom, *Carmichaelia australis*. The stem of this shrub is pliable – as the image on the cover shows.

But *He Whiritaunoka* is layered with meaning that is historical, metaphorical, and symbolic. In 1865, just after fighting had ceased in Whanganui during the New Zealand wars, the Whanganui rangatira Hōri Kingi Te Anaua set about diplomatic moves to secure peace and unity. Journeying up the river to see Te Pēhi Tūroa, who had fought against the Government, he stopped at Te Pēhi’s pā Ōhinemutu, a Whanganui River settlement near Pipiriki that was razed during military operations. He tied a knot in a taunoka, and said, ‘I have made this knot that there may be peace inland of this place.’ His act of twisting the supple stalks together symbolised hope that conflict between Māori and Pākehā, and between Māori, would come to end. Māori invoked this act and what it signified for many years to come; ‘whiritaunoka’ became the word that referred to the long process of reconciliation and reunification in the wake of the wars.

We have the temerity to hope that our report might also be ‘he whiritaunoka’ – a symbol that peace and better times lie just ahead.

Kia tau te rangimārie i runga i a tātou katoa.

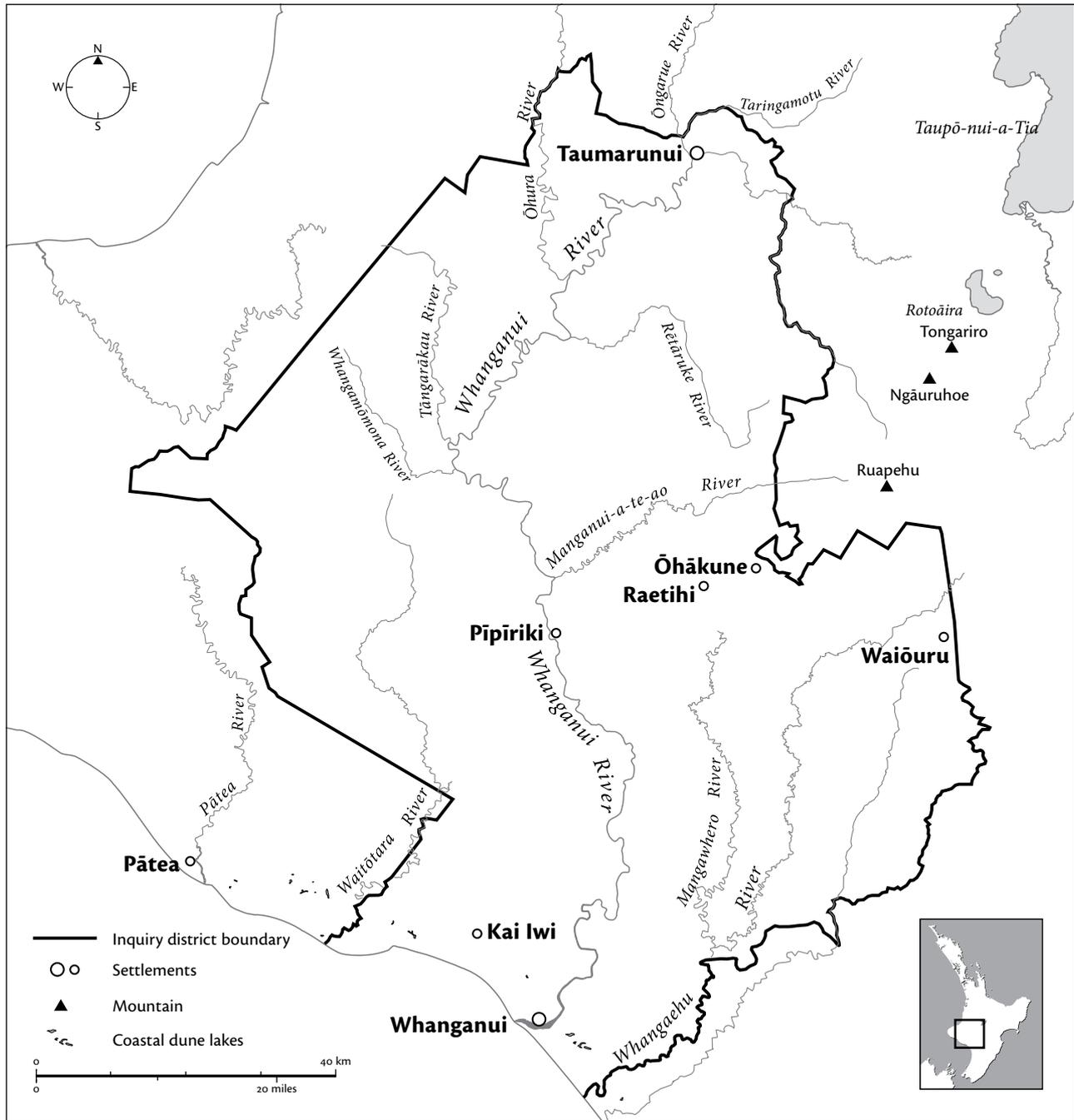
### 1.2 PREAMBLE

In this introduction, we cover three topics.

First, we explain who the claimants were and outline what their claims were about.

Secondly, we say what struck us most in this inquiry. We give a snapshot of evidence we found especially resonant and distinctively of this inquiry district.

Thirdly, in a section we call ‘Housekeeping’, we outline the history of this inquiry. This section is procedural, administrative, and legal in nature, rather than about the substance of the claims. We need to review some matters of process to give context for this report, and record some quite unusual steps that we took along the way. However,



Map 1.1: The Whanganui inquiry district

a reader concerned with only the claims themselves can skip ‘Housekeeping’ and go straight to chapter 2.

### 1.3 THE CLAIMANTS

The many claimants in this inquiry are Māori men and women who devoted time, energy and resources over many years to an important cause: pursuing justice on behalf of their tūpuna, and the uri (descendants) of those tūpuna who are alive today.

The claims were variously brought on behalf of whānau, individual hapū and iwi, and groups of hapū and iwi. Some came to us in the name of particular tūpuna. Others came in the names of entities that reflect aspects of Māori life in the modern age – trusts, boards, societies, incorporations, and owners of particular land blocks.

#### 1.3.1 He korowai – the ancestral cloak

When this Tribunal first came to the region to commence the process of inquiring into land claims, it was evident to us that, since the Waitangi Tribunal’s inquiry into the Whanganui River, hapū and iwi had been involved in a process of redefinition. In the River inquiry, some groups had become unhappy about the representation of their interests through the Whanganui River Trust Board, and rejected what they saw as an undue emphasis on the ancestral river siblings Hinengākau, Tamaūpoko and Tūpoho. We saw a desire for other ancestors – Ruatipua, Paerangi o te Maungaroa, Tamahaki, Uenuku, and Tamakana – to come to the fore.

It was a period when groups needed to focus on the relationships between them, and to settle any differences. They needed to find ways of moving forward with a sense of common purpose, while still maintaining their separate identities and mana. We saw, over the years of working together with the hapū and iwi of this inquiry district, how their relationships steadily strengthened. This came about as a result of the work of many individuals – and also, we thought, as a result of the shared experience of tangata whenua participating in this district inquiry.

For all participants, the Waitangi Tribunal process, stretching over years, was both an experience and an

education. We all became immersed in the rich tapestry of ancestral life. As the Tribunal sat at different marae and heard whakapapa and histories, tangata whenua from across the rohe listened too. We became acquainted with all the tūpuna, and learned how they responded to the many challenging experiences of the past. The lives that those old people led continued to speak to their uri, enhancing their mana, and reminding them of their connections through time and across strands of whakapapa. Through them, people made sense of their lives and their connection to land, and – in pursuing their claims – what they were seeking to re-establish in a modern context.

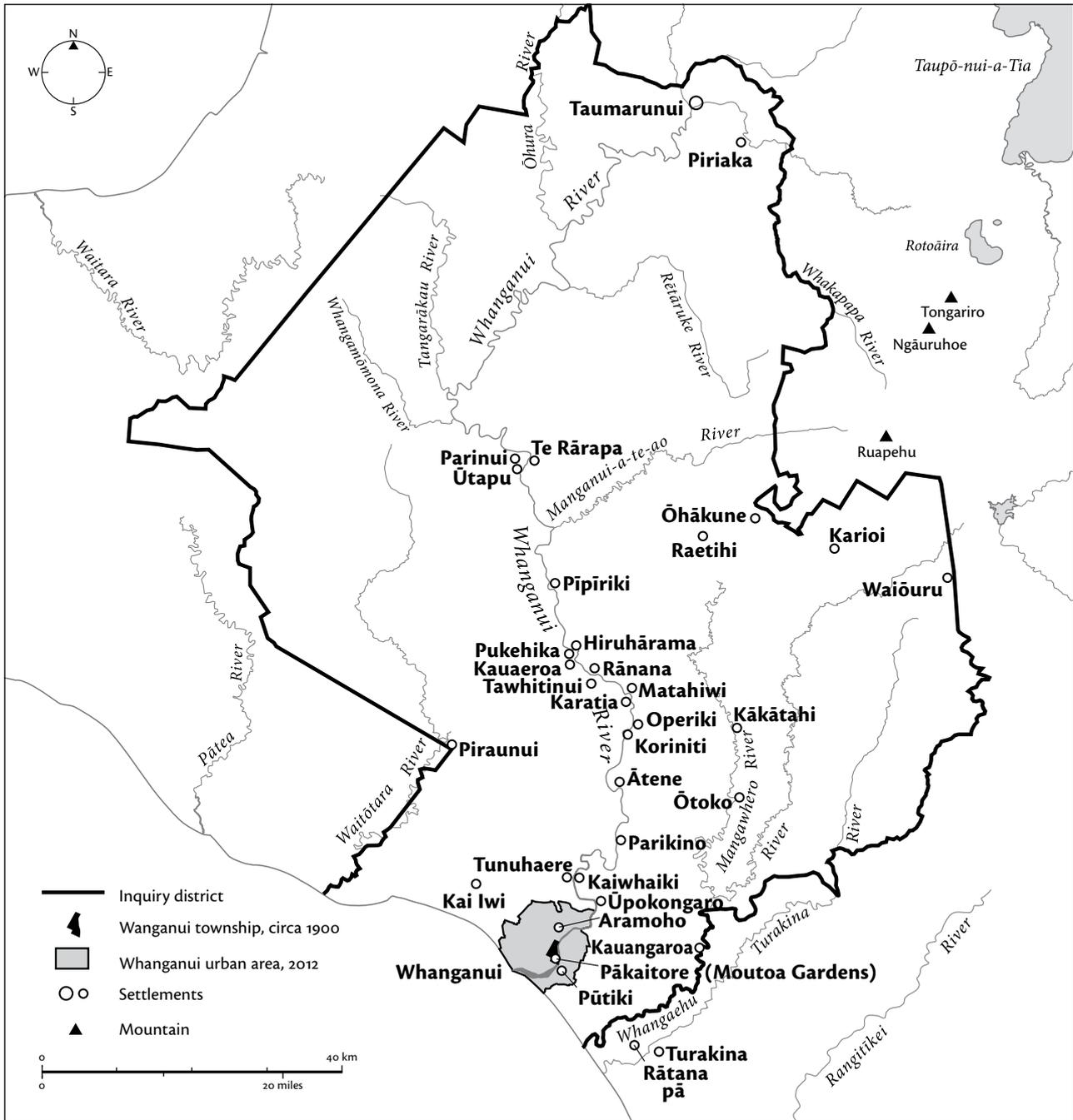
Exactly how and with whom iwi choose to identify will always be a matter for them, but we discerned in all the stories and images common threads: links between the present and the past; between individuals and their kin groups; and between kin groups. The English metaphor ‘common threads’ is very like ‘te taura whiri a Hinengākau’ (the plaited rope of Hinengākau). The image is one where many ties interweave to create a larger, stronger textile: this evokes how iwi and hapū interconnect, woven together, yet autonomous; related, but from different points of origin. Those unfamiliar with Māori society sometimes struggle to come to grips with how people experience community in this way. For the Māori who came before us in this district inquiry, it was fundamental to their existence as a people, and part of their everyday reality.

#### 1.3.2 Ngā whenua, ngā awa – the land and rivers

When we speak of ‘Whanganui’, we refer to the broad expanse of land that stretches towards the source of the ancestral river and spreads out into the hinterland.

It is first and foremost an ancestral landscape, in which the Whanganui River is the dominant feature. This saying, heard time and again, expresses how the river really is the people who have lived there for generations:

*I rere mai te awa nui  
mai i te Kāhui Maunga ki Tangaroa  
Ko au te awa,  
Ko te awa ko au<sup>2</sup>*



Map 1.2: The location of Māori communities in Whanganui

*For as long as the great river  
has run its course from the noble assemblage of ancestral  
mountains to the sea  
I am the river,  
and the river is me<sup>3</sup>*

From the source of the river emerges another source of ancestry. The Kāhui Maunga – Tongariro, Ruapehu, and their companion mountains – are themselves tūpuna. There are other ancestral rivers besides Whanganui – Whakapapa, Whangaehu, Manganui-a-te-ao, Manga-whatu, and Waitōtara, to name but five – as well as many wetlands and lakes.

Each part of the landscape is named for tūpuna and incidents of lore. It is land that has since colonisation been designated as blocks, many named after tūpuna. It is land that now features towns, farms, and conservation estate, including the great expanse of Whanganui National Park.

It is a landscape that gives identity and mana.

It is also a landscape that is the source of grievance.

### 1.3.3 Te ao hurihuri – Whanganui Māori of today

In 2006, Māori made up a quarter of the population of the Whanganui district.<sup>4</sup> Te Āti Haunui-ā-Pāpārangi was the iwi with whom people living in the district primarily identified, numbering 3,306. Ngāti Tūwharetoa was next, with just over 2,000 people. More than two thirds of Te Āti Haunui-ā-Pāpārangi, however, were living outside Whanganui. In total, there were 10,434 people who identified as Te Āti Haunui-ā-Pāpārangi. By 2013, that number had increased to 11,691.<sup>5</sup>

Although we address the social data about Whanganui Māori in chapters 21 and 27, and although we hesitate to recite facts about Māori disadvantage at the very beginning of a report that in many ways celebrates the uniqueness and splendour of Whanganuitanga, we nevertheless decided to put some sobering facts upfront. It is the task of the Waitangi Tribunal to shed light on the interactions that comprised the process of colonisation in New Zealand. In this report, we illuminate as never before what happened between the Crown and the Māori people of this region. We think it is important to acknowledge from

the outset that, 175 years since the Treaty was signed, the construction of the New Zealand of the twenty-first century has not brought equal levels of prosperity and wellbeing to the Māori people of this region.

The data comes mostly from the 2006 census. At that time, Māori had lower incomes, were more likely to work in low-skilled jobs, and were more likely to be unemployed than non-Māori. While Māori and non-Māori were equally likely to be in receipt of a benefit, non-Māori beneficiaries were more likely to be on a pension or superannuation, whereas Māori beneficiaries tended to be on benefits that are not age-related, like the unemployment, domestic purposes, and sickness benefits.

Māori in Whanganui, as in all of New Zealand, were significantly less healthy than non-Māori. Mortality rates in 2006 were twice as high for Māori as for non-Māori. For some diseases the difference was much higher. Māori men died on average nearly nine years earlier than non-Māori men, while Māori women died nearly eight years earlier than non-Māori women.

Māori in Whanganui were less likely to achieve success in education than non-Māori. Both nationally and in our inquiry district, Māori in 2006 were significantly more likely to be expelled, stood down, or excluded from school. Non-Māori school leavers in our inquiry district were more than twice as likely as Māori to be qualified to enter university, and around a third more likely to have NCEA level 2 or above. Whanganui Māori aged 15 or older were significantly less likely than Whanganui non-Māori of the same age to hold tertiary, trade, or school qualifications.

Māori in Whanganui also had lower standards of housing than their non-Māori counterparts. Of Whanganui Māori households, 45 per cent were renting, compared to just 21 percent of non-Māori households, and Māori renters were nearly twice as likely to have as their landlord Housing New Zealand. Māori also seemed to experience more crowding than non-Māori: half of Māori households of five or more people had three or fewer bedrooms, compared to just under a third of non-Māori households of five or more.

In short, Māori were worse off than non-Māori.

Although Whanganui Māori have made considerable efforts to preserve and nurture their culture and language, the majority cannot speak or understand te reo Māori. Some (15.8 per cent) did not know their iwi.

This inquiry district comprises over 2 million acres. In 1840, Māori owned all of it. In 2004, they owned just over 237,000 acres, or about 11 per cent.<sup>6</sup>

Looking at all this data, the question naturally arises: how did Māori in this district come to be so badly off? And the next question – *the* question for this Waitangi Tribunal – is to what extent the Crown was responsible. This report seeks to provide answers.

#### 1.4 THE CLAIMS

The claimants alleged that the Crown breached the principles of the Treaty from the outset. There were many claims, and most alleged a string of breaches across time. There were also many discrete claims that related to local areas and particular actions or events, some within living memory.

##### 1.4.1 A Treaty exchange?

The claimants' starting point was their view of the meaning and effect of the Treaty of Waitangi and how it applied to them. They said that they did not cede te tino rangatiratanga through the Treaty, though the Crown continued to act as if they had done so. It assumed power to act on their behalf, and excluded them from the political institutions of the colony. This usurpation of Māori authority expanded in the twentieth century, as the Crown delegated to local authorities power to manage and control land, rivers and the environment.

##### 1.4.2 Crown purchase and war

They said that the Crown unfairly acquired the land around the Whanganui township through a purchase that was finalised in 1848, many years (and with much confusion) after the New Zealand Company first tried to buy the land. The purchase was pushed through in an atmosphere

of tension following a military clash between Whanganui Māori and imperial troops in 1847. The troops were maintaining a garrison in the town at the time. Then conflict erupted in the 1860s – this time with Māori sometimes fighting each other, most famously at Moutoa Island in 1864. This left a bitter legacy that was, the claimants maintained, of the Crown's making.

##### 1.4.3 The Native Land Court and more land alienated

The claimants were unanimous as to the damage caused after the introduction to the district of the Native Land Court in the late 1860s. Large-scale alienation of land quickly followed (and in some cases coincided with) the court's sittings. More land alienation continued into the twentieth century, leaving Māori with the fraction of land that remains in their ownership today.

##### 1.4.4 Land and rivers taken, used, or restricted

The twentieth century, they said, was when the Crown took actions that decisively undermined their tribal estate and te tino rangatiratanga. Foremost among these was the compulsory and unjust acquisition of land for scenic reserves and other public works. There was also, they said, the coercive and unfair creation of native townships at Taumarunui and Pipiriki; the forcible and unfair vesting of their land in bodies in which they had little or no authority; and the unfortunate and unsuccessful implementation of various development schemes. On top of this, various Crown actions caused harmful environmental effects to land and waterways, and tangata whenua were unfairly excluded from management decisions about the Whanganui National Park from the time of its inception in the 1980s.

##### 1.4.5 Social services and socio-economic outcomes

Finally, they believed that the Crown's provision of health, education, housing and other social services was inadequate and unequal, in both the nineteenth and twentieth centuries.

Through these actions and inactions, the claimants

considered that the Crown caused them to be marginalised in their ancestral rohe (territory), and was responsible for the deprived and scattered state in which many find themselves today.

### 1.5 WHAT STRUCK US MOST

It is difficult to summarise the experience of being part of an inquiry of this dimension. We met so many people, went to so many places, heard so much evidence, in order to come to the findings set out in this report. We cannot capture it all, even in a report of this size. We shared so much: tears, laughter, disagreement, food, tangi, wisdom, and love. The hearings are a slice of life that will remain always in the memories of those who took part. We set out here the facts and our opinions in thousands of words, but many of the feelings we felt, the jokes we heard, the hands we clasped, and the hongis we shared, will remain only in the hearts and minds of those of us who were there.

As a Tribunal, we witnessed the ongoing commitment of these communities to their Whanganuitanga. We saw a core of dedicated young people – young to us anyway – whose knowledge and commitment will see them become the rangatira and tohunga of tomorrow. Even in the years when our hearings were happening, we were seeing the process of the old guard giving way to the new. We were grateful to them all, because their leadership enabled our hearing process to run smoothly and productively on the many marae that hosted us.

Many of the claims we heard about were about the experiences of communities in their localities. Accordingly, the report as a whole reflects local experiences as far as possible. Nevertheless, when we came to look back over the inquiry, there were two general impressions that we wanted to note.

#### 1.5.1 First, that Māori remained optimistic and creative

While there were diverse responses to the arrival of Europeans in the Whanganui district, most rangatira were willing to accommodate – and some encouraged – settler

communities. They looked to the benefits they could gain, and were curious to learn about the new ideas and new ways of doing things. It was rare to see chiefs completely opposed to settlers, even after their initial expectations of how Pākehā would live cooperatively with them were dashed. However, common to all the hapū was determination to retain authority over their land. Rangatira were keen to engage in transactions, but only so long as they were in control of the situation.

The changes that gathered around them were ineluctable, though, and they generally meant incremental diminution of Māori authority. Even so, the history of this region tells the story of people who never gave up looking for opportunities to benefit from the changes, and to turn them into a win for te tino rangatiratanga.

In the 1860s and 1870s, tangata whenua adapted their own institutions to new circumstances. Hui and komiti and rūnanga took on new roles under the leadership of men such as Metekīngi Paetahi, and enjoyed considerable support. Others preferred to work through the institutions of the Kīngitanga.

Even after the wars of the 1860s, Māori leaders continued to seek ways to assert authority in the political process as it directly affected them, especially deciding who owned the land and whether to sell it. Influential in this sphere was the famous military leader Te Keepa Te Rangihwinui, known to Pākehā as Major Kemp. He did not speak for all hapū and iwi in the district, but he expressed a commonly-held desire when he asserted that Māori institutions ought to be given recognition in the political machinery of the colony. His brainchild, Kemp's Trust, was a classic instance of using Pākehā law (the law of trusts) to suit the Māori purpose of holding on to Māori land as a collective.

Whanganui support for the idea of land councils at the end of the nineteenth century was another instance of Māori reaching out to new concepts to find ways to exercise control over their land. Despite the experience of much of the foregoing period, when most of the land passed from their ownership, Māori seized every opportunity that colonial politics offered to take back some

authority. Another effort to manage their landholdings was their support for creating specially designated townships, a scheme which they hoped would yield an income and protect their land from sale. Whanganui Māori support for these initiatives demonstrated their belief that they would find a way not only to benefit from colonisation, but to have a say in how that would be achieved.

Such optimism was evident as recently as the 1980s, when Whanganui Māori engaged with the Crown in discussions about creating the new national park in their rohe as a Māori national park. Optimism notwithstanding, they carried on preparing their Waitangi Tribunal claims about how the Crown wrongfully acquired the land that eventually became Whanganui National Park.

### **1.5.2 Secondly, how the colonists refused to share power**

We were equally struck – though perhaps not surprised – by the extent to which colonial authorities took advantage of the optimism Māori displayed.

The generosity and optimism of tangata whenua was perhaps even more evident in Whanganui than elsewhere, as they extended their customary manaaki to the newcomers from the outset. They employed the metaphor of marriage between Māori land and Pākehā settlers on formal occasions, and helped the new settlers to get established.

There was no answering generosity or integrity on the part of the authorities. Negotiating the final stages of the Whanganui purchase in the late 1840s, officials duped Māori about how much land was changing hands, paid them a poor price, and kept the military there to underscore the new power dynamic. Before long, colonial authorities assumed political power and created political institutions that did not include Māori. Those institutions passed legislation that established ways of acquiring Māori land and resources that minimised the means for opposition. It was by no means a continuous march of oppression and dispossession, for there were meanderings and movements back and forth with different governments, different policies, and different trends in legislation. In hindsight, though, it all has an air of inevitably

that flowed from the colonists' adamant refusal to share power.

There were real opportunities to do so, especially around the turn of the twentieth century, with the dynamism of the Kotahitanga movement, and bicultural leaders such as Āpirana Ngata and James Carroll coming to the fore. The Crown created Māori land councils, in which Māori were well represented, and in Whanganui Māori responded with enthusiasm and vested a great deal of land in their council. The transformation of the land councils to land boards, in which Māori had little authority, must have been particularly galling for Whanganui Māori, who vested so much of their land in the council in the expectation that it would be an institution that they could influence. Instead, they lost control of their remaining land for long periods. Similarly, the native townships, for which tangata whenua at Pipiriki and Taumarunui had high hopes, became sites of marginalisation.

The Crown moved right away from the idea that Māori would be protected in the use and ownership of their land. They viewed scenic Whanganui as a resource for everybody, not its owners, to enjoy, and bought even reserved land indiscriminately. Exploiting Māori and their resources in the Whanganui district was by this time a habit. Even in the 1980s, when the Treaty had attained a different status in our country, the Crown created Whanganui National Park without a significant role for Māori – even though ‘a very “[M]āori” national park’ seemed briefly to be a genuine prospect.<sup>7</sup>

Only now are Māori in Whanganui beginning to be able to exercise authority in their rohe. The Whanganui River settlement will provide more scope for them to influence the river environment than they have had since the nineteenth century. New leaders are emerging, and Whanganuitanga is revitalising. Soon, 175 years after it signed the Treaty, and after much water has flowed under the bridges that span the Whanganui and the other ancestral waterways of this region, the Crown will shortly sit down at the table with Whanganui Māori to work out with them – really for the first time – what Treaty partnership might look like in this whole region.

## 1.6 HOUSEKEEPING

In the following sections, we outline the history of this Tribunal's inquiry into the Whanganui land claims. We explain its relationship with the Whanganui River Inquiry, and how the inquiry into Whanganui land developed. We took a number of unusual steps along the way that need to be noted, and we also came to an understanding with the claimants about the scope of the report. This section provides background and concerns legal, procedural, and administrative matters. It is not about the substance of the claims.

### 1.6.1 Where the Waitangi Tribunal came in

By the mid-1990s, the Waitangi Tribunal had heard and reported on a handful of historical claims, following the expansion of the Tribunal's jurisdiction to inquire into Crown actions from 1840. The landmark *Ngai Tahu Report* was released in 1991, but the Tribunal was beginning to consider how historical claims could be heard together in whole districts, rather than proceeding claim by claim. Some claims, however, warranted exceptional consideration, and the Whanganui River claim was one of them.

### 1.6.2 The Whanganui River inquiry

Nine trustees of the Whanganui River Māori Trust Board, and kaumatua Hikaia Amohia, brought the Whanganui River claim on behalf of Te Āti Haunui-a-Pāpārangi as a whole, and it was registered in December 1990.<sup>8</sup> The Trust Board was established under the Whanganui River Trust Board Act 1988 following a commission of inquiry into how the Crown acquired ownership of the river – only the latest of many inquiries, petitions, and court cases on the same subject dating back to 1873. The Act empowered the Trust Board to

deal with outstanding claims relating to the customary rights and usages of Te Iwi o Whanganui in respect of te Awa Whanganui River including the bed of the River, its minerals, its water and its fish.<sup>9</sup>

Though the claim raised matters concerning the land,

the Tribunal decided to focus on the river in a dedicated urgent inquiry.<sup>10</sup> From March to July 1994, the Tribunal held hearings at marae up and down the river.

### 1.6.3 The Whanganui River Report

In its *Whanganui River Report*, issued in 1999, the Tribunal found that Te Āti Haunui-a-Pāpārangi were denied rightful ownership of the Whanganui River through Crown actions that breached Treaty principles. The people owned the whole river, and not simply its bed. That right of ownership was based on universal principles of law – principles that were further guaranteed in the Treaty of Waitangi. 'Contrary to some popular opinions, New Zealand was not colonised on the basis that rivers were publicly owned.'<sup>11</sup> The English law that was applied in New Zealand recognised the territorial possession of indigenous peoples and that riverbeds were owned by the riparian owners to the centre line, from the tidal reaches to the source. The Tribunal found that, following the establishment of responsible government in New Zealand, successive parliaments enacted statutes affecting rivers. One such statute, in 1903, vested the bed of all navigable rivers in the Crown: the interests of Māori were expropriated without consultation or compensation.<sup>12</sup>

In the opinion of the majority of the panel, it was important that any remedy acknowledged the unique aspects of the case. Because the Whanganui River is, from its source to the sea, central to the lives and identity of the river people, the Tribunal considered that exceptional consideration was warranted. They looked for a solution in the Resource Management Act 1991, but found none. Instead, they proposed recognition of the authority of Te Āti Haunui-a-Pāpārangi in appropriate legislation, which should include recognition of their right of ownership of the river. Existing use rights and public access should also be protected. Two options were proposed for implementing these provisions, both involving major roles for the Whanganui River Maori Trust Board in the management of the river. The Tribunal recommended that the parties enter into negotiations.<sup>13</sup>

In a dissenting opinion, one member was unable to

support any proposal involving Māori ownership of natural water:

It is an unfortunate reality that the Whanganui River is both the tangible focus of Atihaunui spiritual and physical wellbeing and the main arterial trench of a very large drainage system in industrialised contemporary society.

The member recommended that the Crown give serious consideration to an equal sharing of the ownership of the riverbed and advocated that the Crown and claimants jointly establish a body through which all rights and responsibilities of legal ownership could be exercised.<sup>14</sup>

#### **1.6.4 The Whanganui River settlement**

The Whanganui River is the passion and lifeblood of most of the claimants in our area, so it was a huge milestone for them to settle their Whanganui River claim with the Crown. Terms of settlement were agreed in August 2012.<sup>15</sup> A deed of settlement was initialled in March 2014, and signed later that year.<sup>16</sup>

The settlement, called *Ruruku Whakatupua: Te Mana o te Awa Tupua*, sets out a framework for establishing the Whanganui River as a single, indivisible legal entity, from the mountains to the sea. The settlement will also allow for the creation of Te Pou Tupua, the 'human face' of Te Awa Tupua, which will act and speak for the river. Te Pou Tupua will comprise representatives of Whanganui Māori and the Crown, symbolic of the Treaty relationship. It will be supported by a strategy group consisting of representatives from iwi, local and central government, commercial and recreational users and environmental groups. Legislation, which will give effect to these terms, is expected to be introduced to parliament in 2016.

#### **1.6.5 The Whanganui land inquiry**

After the river inquiry was completed, plans for an inquiry into land claims commenced. In the intervening years, the Tribunal received many more claims concerning land issues.

#### **(1) Planning, research, and pleadings**

In 2002, planning began for the historical research that would be conducted in support of the inquiry.<sup>17</sup> Once Judge Wainwright was appointed presiding officer of the inquiry, she commissioned a series of research reports, as did the Crown Forestry Rental Trust (on behalf of the claimants) and the Crown. The Tribunal and Crown Forestry Rental Trust reports were filed in 2004, and the Crown reports followed in 2006. In total, 59 research reports were filed, many with voluminous supporting papers. Research reports from other inquiries were also placed on the Whanganui record of inquiry.

With substantial research now to hand, the Tribunal required counsel for the various claimant groups to cooperate in the production of a joint statement of claim on common issues and separate particularised statements of claim on behalf of each group.<sup>18</sup> The Crown's statement of response set out its position.<sup>19</sup> From these documents, the Tribunal produced a 'statement of issues' – a series of questions that would clear away the areas where the claimants and the Crown were in agreement, and focus on where they differed.<sup>20</sup>

#### **(2) Determining the inquiry boundary**

From 2002, the parties discussed with the Tribunal the boundary of the inquiry district. There were a number of issues to consider. Around the Whanganui inquiry district lay five others: Taranaki to the west, Te Rohe Pōtae to the north, National Park to the north-east, Taihape to the east, and Porirua ki Manawatu to the south-east. As usual, a careful process was needed to establish where the boundaries should be drawn, to ensure that the claims of groups with interests in the border areas would be fully heard.

The boundary first proposed in April 2002 covered the core Whanganui area, bounded by the Whangaehu River in the east and the Ōkehu Stream in the west, extending as far north as the Waimarino block.<sup>21</sup> Following discussions with the parties over some months, this boundary underwent a number of changes, with some additions and exclusions.<sup>22</sup> Ultimately,

- ▶ The western boundary was extended so as to include some blocks that were heard previously in the Taranaki inquiry (the Kaitangiwhenua and Waitōtara blocks, as well as some neighbouring blocks to the north). Issues relating to this land would be heard in so far as they related to Whanganui claims.
- ▶ The northern boundary was extended so as to include land where both Whanganui and Ngāti Maniapoto groups claimed interests, namely, the Kōiro, Ōpatu, and Ōhura South blocks, as well as Taumarunui township.
- ▶ The eastern boundary was extended to include land earmarked for the Taihape inquiry, in order to accommodate Ngāti Rangī's preference to have all their claim issues heard in the Whanganui inquiry, including those relating to the Murimotu and Rangiwaea blocks, and the Karioi Forest.

Finally, however, due to the extent of overlapping interests between Taupō and Whanganui groups, and issues of representation, it was decided that it was necessary to create a separate sub-district around the Tongariro National Park. The Whanganui and National Park Tribunals would sit together to hear evidence common to both, but Ngāti Rangī claims in respect of certain blocks would be heard in the National Park inquiry alone.

### **(3) *Appointing a panel***

Judge Carrie Wainwright was appointed presiding officer in 2001. Dr Angela Ballara was appointed a member of the panel in 2005, followed by Dr Ranginui Walker in 2006. In February 2007, Professor Wharehuia Milroy was appointed as the fourth and final member.

### **(4) *Hearings***

For the purposes of preparing and presenting evidence, and to facilitate funding from the Crown Forestry Rental Trust, the claimants organised themselves into regionally based 'clusters'. These became known as the southern, central, and northern clusters. Ngāti Rangī prepared and presented its evidence and its case as a separate entity.

At our first hearing, we sat together with the National

Park Tribunal to hear traditional evidence at Raketāpāuma Marae on 20 February 2006.

Whanganui Tribunal hearings recommenced with the evidence of the southern cluster, presented over four weeks in August and September 2007. Central cluster evidence followed, over five weeks from March to May 2008; and the northern cluster presented evidence over three weeks in the months of October and November 2008. Ngāti Rangī gave its evidence in one week in March 2009. Hearings concluded with four weeks of Crown evidence from May to August 2009. The Tribunal heard the closing submissions of all parties in three weeks from October to December 2009.

In addition to appearances and briefs of evidence from witnesses presenting 59 research reports, we received 327 briefs of evidence from the claimants, 225 of whom appeared before us in person. (A full description of clusters and the claims brought, as well as the hearings and evidence presented, can be found in appendixes I and II.)

With a few exceptions, all hearings were held at marae across the district.

### **(5) *Discrete remedies***

During our hearings we attempted to engage parties on a number of issues that we hoped would result in the settlement of small, discrete claims well ahead of the major Treaty settlement for tribes of the area. We asked the claimants to identify any issues that were small-scale, self-contained, and relating only to one particular group. Also necessary was that the remedy would involve the return of assets that were owned by the Crown. The discrete claims process was to run alongside the Tribunal's main hearings, hopefully resulting in the Crown providing early remedies to the claimants. The claimants identified 19 claims that they considered met these criteria. Disappointingly, the Crown delivered only one discrete remedy before the end of hearings. However, it was a very considerable one: the return to tangata whenua of 23 hectares (56 acres) comprising the former Pūtiki Rifle Range. (The discrete remedies process is more fully described in chapter 23, and

a full list of discrete remedies applications is set out in appendix 1v.)

**(6) Crown concessions**

The Crown made a number of concessions on major issues during the inquiry, but they tended to go only some of the way towards meeting the claimants' position. For example, the Crown said that, in the Whanganui purchase, it breached the Treaty and its principles by failing to inform Whanganui Māori that it was not in fact purchasing the area that the Spain commission had recommended, but was paying the same price for twice as much land.<sup>23</sup> This went only part of the way to meeting the claimants' position. Issues relating to the purchase remained live between the parties at the end of hearings. The Crown made similar, partial concessions on other issues, and many differences between the parties remained. These form the focus of our report.

**(7) Our earlier report on aspects of the Wai 655 claim**

While we were hearing the Crown's evidence in mid-2009, there was a development that prompted us into action. In May 2009, the Waitangi Tribunal declined an application to hold an urgent inquiry into a claim brought by the Wai 655 Ngā Wairiki claimants. They opposed the inclusion of Ngā Wairiki in the Ngāti Apa Treaty settlement on the ground that their inclusion prevented them from joining their Whanganui kin, to which some affiliated more, in a Whanganui settlement. We were told that it was only a matter of weeks before the Ngāti Apa settlement legislation was delivered to Parliament, which would bar us from further inquiry into the claim. Even though it was plain that we could not address their claims fully in the time available, we thought it necessary to say something about the Ngā Wairiki claims then, because the settlement legislation ruled out their inclusion in this report.

We issued a report that allowed the Wai 655 claimants to see some of our thinking on the evidence we received that related to their issues. Our focus was on how Ngā Wairiki identity was affected by Crown actions. This involved looking at the extent to which Ngā Wairiki were

known to Crown officials who negotiated the Rangitikei-Turakina purchase in 1849, their experience in the Native Land Court, and the effects of Crown actions on their identity into the twentieth century.<sup>24</sup>

We concluded that Ngā Wairiki was a separate iwi, though allied to and much intermarried with Ngāti Apa. The proximate causes of their decline as an independent group were Crown actions, particularly the negotiation of the Rangitikei-Turakina purchase. Ngā Wairiki were not sufficiently compensated for that purchase, nor was land set aside for their use. These actions constituted a breach of the Treaty principles of good faith and active protection, and undermined the ability of Ngā Wairiki to survive as a group with separate identity.<sup>25</sup>

For completeness, in this report we discuss Ngā Wairiki where that group arises in the context of other people and events we look at, and we complete our account of how Ngā Wairiki related to those groups where necessary. However, we make no findings on the Wai 655 claim.

**(8) This report**

In early 2010, with hearings behind us, the claimants informed us that they hoped, within a year, to be able to enter into negotiations with the Crown to settle the claims in this inquiry. The Crown estimated that it would take more than a year for negotiations to get underway, but it still appeared then that they would commence long before we could complete our report on all the claims. It was generally agreed, though, that it was important for the parties to receive our report before they negotiated a settlement. We entered into discussions about what kind of report we could deliver in the time available.

We discussed the possibilities with the parties and their counsel.<sup>26</sup> In the end, it was agreed that we would limit coverage to the subject areas that all considered were particular to Whanganui, and would be most likely to influence the settlement quantum. The claimants put forward the matters that they wanted the report to cover as a matter of priority: the origins and identity of hapū and iwi, and the nature and extent of their customary interests; political engagement; the Whanganui and Waimarino

purchases; the vesting of land in the twentieth century; and the creation and management of the Whanganui National Park.<sup>27</sup> Those became our focus.

However, as is so often the way, events did not unfold as expected. Iwi in Whanganui became immersed in negotiations to settle the Whanganui River claim, which ebbed and flowed over a number of years before settling last year. This delayed the commencement of settlement negotiations on the land claims, and in fact these are only now, in mid-2015, getting underway. Meanwhile, on the Tribunal side, a period of unprecedented activity with urgent inquiries resulted in the allocation of staff to other work, and other human factors also intervened, so that writing this report took considerably longer than expected.

Once it became apparent that the immediate need for a quick report to inform negotiations had changed, we engaged once more with the parties, ascertained their views, and expanded coverage.

The only topics this report does not now address are these: the Emissions Trading Scheme and the foreshore and seabed – both of which were adjourned *sine die* in the course of the inquiry as they were affected by legislation and other inquiries; the Tongariro Power Development Scheme, on which the National Park Tribunal reported in 2013; the environment, although we do report on Whanganui National Park and issues there with te tino rangatiratanga and the Department of Conservation; and fisheries. We do not report on the Whanganui River because that was the subject of the previous major inquiry, and we have not reported on other rivers and waterways in the area which raised similar issues. We do report on a particular ‘local issue’ claim concerning the Whangaehu River. Some topics (the main trunk railway; public works; and local government and rating) do not have their own chapters, but we address them in the context of local issues (to which we devote four chapters), and as part of other large subject areas. For example, we discuss the main trunk railway in chapters on Crown purchasing, nineteenth and twentieth century Māori land policy, and in various examinations of public works takings for railway.

The report is in three volumes. We need say nothing about their content that is not easily ascertained from the index. A feature that demands a brief explanation, though, is what we have called ‘matapihi’ (windows). There are four, and each one is intended to cast a shaft of light on to a uniquely Whanganui topic that came out of claims. They are interpolations between chapters that we hope are accessible and of particular local interest.

In the introduction to the glossary, which precedes this chapter, we explain how we have used the Māori language in this report.

### Notes

1. David Young, *Woven by Water: Histories from the Whanganui River* (Wellington: Huia, 1998), p 90; Waitangi Tribunal, *The Whanganui River Report* (Wellington: GP Publications, 1999), p 154
2. Document A128 (Waitai), p 5
3. Translation by Waitangi Tribunal.
4. ‘Ethnic Group by Age, 2006 Census’, Statistics New Zealand, <http://nzdotstat.stats.govt.nz/wbos/index.aspx>, accessed 4 August 2015
5. Statistics New Zealand, ‘Iwi (Total Responses) and Iwi Groupings, for the Maori Descent Census Usually Resident Population Count, 2001, 2006, and 2013 Censuses (RC, TA, AU)’, <http://nzdotstat.stats.govt.nz/wbos/index.aspx>, accessed 2 September 2015
6. Document A66(e) (Mitchell and Innes), p 3
7. The commissioner of Crown lands used these words when he spoke to an Ātihaunui delegation about the proposed park in 1984: Waitangi Tribunal, *The Whanganui River Report*, 1999, p 242.
8. Hikaia Amohia, Archie Taiaroa, Raumatiki Henry, Kevin Amohia, Hoana Akapita, Te Turi Ranginui, Brendan Puketapu, Michael Potaka, John Maihi, and Rangipo Mete-Kingi, claim concerning the Whanganui River, 14 October 1990 (Wai 167 RO1, claim 1.1); Chief Judge Eddie Durie, memorandum directing claim be registered, 11 December 1990 (Wai 167 RO1, memo 2.1)
9. Hikaia Amohia, Archie Taiaroa, Raumatiki Henry, Kevin Amohia, Hoana Akapita, Te Turi Ranginui, Brendan Puketapu, Michael Potaka, John Maihi, and Rangipo Mete-Kingi, claim concerning the Whanganui River, 14 October 1990 (Wai 167 RO1, claim 1.1), p 2
10. Waitangi Tribunal, *The Whanganui River Report*, p 8
11. *Ibid*, p 335
12. *Ibid*, pp 335–337
13. *Ibid*, pp 341–344
14. *Ibid*, pp 345–347
15. Whanganui Iwi and the Crown, *Tutohu Whakatupua*, 30 August 2012

16. Whanganui Iwi and the Crown, *Ruruku Whakatupua: Te Mana o te Awa Tupua*, 5 August 2014
17. See document A30 (Phillipson)
18. Statement 1.5.5
19. Statement 1.3.2
20. Statement 1.4.2
21. Memorandum 2.3.17, pp 1–2
22. Memorandum 2.5.8; pp 5–14; memo 2.5.10, pp 2–3; memo 2.5.15, pp 2–10; memo 2.5.18, p 2
23. Paper 3.3.118, p 41
24. Waitangi Tribunal, *Report on Aspects of the Wai 655 Claim* (Wellington: Waitangi Tribunal, 2009), pp 12–25
25. *Ibid*, pp 29–30
26. Memoranda 2.3.104, 2.3.110, 2.3.112, 2.3.116, 2.3.117, 3.4.10, 3.4.20, 3.4.92, 3.4.93, 3.4.95, 3.4.96, 3.4.97, 3.4.98, 3.4.99, 3.4.100
27. Paper 3.4.10, p 4

## FINDINGS AND RECOMMENDATIONS

### 28.1 INTRODUCTION

Here, we set out in digest form the Tribunal's findings and recommendations, with relevant Crown concessions. We reproduce our findings here in summary form for ease of reference.

Not all chapters had findings. For some, there are findings but no recommendations. This depends on the subject matter. We make no findings or recommendations about events before 1840. We make findings but no specific recommendations about nineteenth and twentieth century grievances that relate to land, because the Treaty of Waitangi Act 1975 does not allow us to make recommendations about land unless it is still in Crown title. Needless to say, the greater part of the land in the inquiry district is not in Crown title. Redress for those kinds of grievances will be the subject of negotiation between claimants and Crown.

The most detailed recommendations tend to be those relating to the 'local issues', which we canvassed in three chapters of this report. The presentation to us of claims like these was encouraged by our discrete remedies process (see chapter 23 for a description of that process). Although, with one exception, these claims were not dealt with discretely as originally planned, we report on them separately, and anticipate that separate remedies will be available to the particular individuals or groups concerned.

We expect that both the larger and smaller Treaty breaches will be the subject of redress, and it is for the parties to determine its nature and extent, and their priorities. Nevertheless, should there be particular questions that require answers that we may be able to provide, we grant leave to the parties to make further application.

### 28.2 MATAPIHI 1: WHANGANUI – WANGANUI

#### 28.2.1 What did this matapihi cover?

In this matapihi we described and analysed:

- › the history of, and controversy connected with, the name of the settlement that was founded at the mouth of the Whanganui River.
- › how this settlement was originally called Petre, but became 'Wanganui' after local settlers successfully petitioned for the name to revert to what they thought was the original name of the place;
- › how, in te reo Māori, the name was 'Whanganui': 'whanga' – the Māori word for a stretch of water or harbour – and 'nui' – large or great; and

- ▶ what happened when the question was put to the New Zealand Geographic Board, which referred the matter to the Minister of Land Information.

### 28.2.2 Findings

We found that Whanganui is a Māori word. To the extent that it is a word used in official contexts, as a name of a place used on maps, and for the names of government or local government entities, the spelling of that word is for tangata whenua to determine, and for the Crown to ratify. The right of Māori to make decisions about Māori language and the names of places is part of the cultural property guaranteed in article 2 of the Treaty, under the rubric of te tino rangatiratanga. The Crown cannot prevent the expression of opinion and debate in the public sphere, but it should not engage in it, and should not allow it to influence how the word is spelled or used officially. Official spheres are under the purview of the Crown, and it should use its authority to uphold the right of tangata whenua to make decisions about their own language and thereby maintain its integrity. The Crown breached the Treaty principles of partnership and good government when it sanctioned a process that allowed people who were not tangata whenua of Whanganui to determine that ‘Whanganui’ and ‘Wanganui’ are equally valid spellings.

### 28.2.3 Recommendation

We recommend that as part of the Treaty settlement for this district, the Crown passes into law a measure that requires the official spelling of the name of the city to be consistent with the spelling of the river, the national park and the district: Whanganui.

## 28.3 CHAPTER 2: NGĀ WĀ O MUA: HAPŪ AND THEIR COMMUNITIES UNTIL ABOUT 1845

### 28.3.1 What did this chapter cover?

This chapter comprises a description of all we know and understand about the traditional tribal landscape of our inquiry district, which featured over forty different hapū and iwi.

### 28.3.2 Findings

We made no findings or recommendations. Our jurisdiction involves assessing only the Crown’s actions, and begins with the signing of the Treaty at Waitangi on 6 February 1840.

## 28.4 CHAPTER 3: THE TREATY COMES TO WHANGANUI

### 28.4.1 What did this chapter cover?

In this chapter, we described and analysed:

- ▶ how Henry Williams brought the Treaty to Whanganui;
- ▶ the Treaty signing at Pākaitore on 28 May 1840;
- ▶ who, among Whanganui Māori, signed; and
- ▶ Whanganui Māori understandings of the Treaty.

### 28.4.2 Findings

We made no findings or recommendations.

## 28.5 CHAPTER 4: THE MEANING AND EFFECT OF THE TREATY IN WHANGANUI

### 28.5.1 What did this chapter cover?

In this chapter, we described and analysed:

- ▶ the Treaty of Waitangi in relation to the statutory jurisdiction of the Waitangi Tribunal; and
- ▶ the ambiguities in the key Treaty concepts and Whanganui Māori understandings of them.

### 28.5.2 Findings

We made no findings or recommendations, but set out the conceptual framework of our inquiry and our report in terms of the meaning and effect of the Treaty and the relevant Treaty principles.

We concluded that, for Whanganui Māori, the Treaty was an emblem of their relationship with the incoming Pākehā population, and when they signed it they agreed to embark on that relationship. At the beginning, the Crown, too, would have seen the Treaty as describing an evolving relationship.

We also concluded that the Treaty principles most

relevant to this inquiry are those that speak to the kind of relationship that Māori properly expected to be able to enter into:

- ▶ *Partnership*: the new society would proceed on the basis of partnership between their leaders and the new arrivals;
- ▶ *Duty of good faith*: in order for partnership to work – which involved functioning in the interests of both Treaty partners – it was imperative for the Crown to deal openly and honestly with Māori leaders;
- ▶ *Reciprocity*: the exchanges fundamental to being a partner must provide advantage that is mutual, with benefits flowing in both directions;
- ▶ *Active protection*: the Crown's duty is 'not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practical';<sup>1</sup> and
- ▶ *Autonomy*: the iwi of Whanganui did not agree to forgo their independence and autonomy, whether through signing the Treaty or otherwise.

We also came to the view that the very minimum performance this Tribunal can require of the Crown is observance of standards that, in the years immediately following the Treaty, it would have acknowledged it ought to meet. This extends to standards of conduct that Māori were not in a position to articulate at the time. Probably the most basic and incontrovertible of these was that English legal norms and standards of fair and proper practices in land transactions would apply when dealing with Māori landowners. From this, arises the principle of:

- ▶ *Good government*: We regard as particularly important the aspect of the principle of good government that holds the Crown wholly responsible for complying with its own laws, rules, and standards, and conducting government in ways that were just and fair.

## 28.6 CHAPTER 5: WHANGANUI AND THE NEW ZEALAND COMPANY

### 28.6.1 What did this chapter cover?

In this chapter, we described and analysed:

- ▶ the process by which the New Zealand Company brought its deed to Whanganui, and the immediate consequences of the deed that was signed in May 1840;
- ▶ Land Claims Commissioner William Spain's investigation of the New Zealand Company's claim to land at Whanganui; and
- ▶ the Crown's decision to seek an arbitrated settlement of the company's claims.

### 28.6.2 Findings

We found that rather than upholding its guarantee in article 2 to protect Māori land ownership unless and until they wanted to sell it, the Crown substantially favoured the interests of the company and settlers.

Properly, both in terms of the Treaty and the common law, the Crown should have found the company's Whanganui purchase null and void. It was thus proceeding on an unsound footing when it moved to arbitrate an agreement between Whanganui Māori and the company.

Many Whanganui Māori believed that some kind of arrangement had been reached that allowed for the establishment of a Pākehā settlement near the mouth of the Whanganui River. This settlement was in place by the time the Crown chose to recognise the company's claim at Whanganui and sought to secure land from Māori. To this extent the Crown's approach to settling the company's claim was pragmatic.

We found that, under the rubric of the Treaty – and in terms of plain fairness – the Crown's performance was wanting in that:

- ▶ Māori were not asked if they would participate in the arbitration of the company's claim to their land. Nor were they able to represent themselves and protect their interests, nominate who had rights to which land, or set the price they wanted for their land.
- ▶ Māori were also not adequately protected or represented through the appointment as their referee George Clarke Junior, who had the irreconcilable responsibilities of protecting Māori interests and securing land for the company at a reasonable price.
- ▶ The Crown changed Spain's role from inquiring into

the validity of the company's land claims, to making the arbitration process work on the premise that the company certainly *was* entitled to land. This delivered the message to Māori that they no longer had the right to say no to the offered payment and retain their land.

Because the Crown abandoned the Whanganui land claim settlement process in 1846, it was later that the prejudicial effects of its poor process in this phase were evident.

## 28.7 CHAPTER 6: WAR IN WHANGANUI, 1846–48

### 28.7.1 What did this chapter cover?

In this chapter, we described and analysed:

- ▶ the Crown's extension of martial law to Whanganui on 18 July 1846;
- ▶ the arrest of 10 Whanganui Māori near Porirua, their trials by court martial, the execution of Te Whareaitu, and the transportation of others to a penal colony in Tasmania;
- ▶ Governor Grey's despatch of troops to Whanganui in December 1846;
- ▶ Governor Grey's decision to extend martial law to 1 May 1847;
- ▶ the court martial and execution of those responsible for the attack on the Gilfillan family in late April 1847; and
- ▶ the conflict that subsequently developed between Māori and Crown forces, after the rangatira Te Mamaku led a taua in response to the executions.

### 28.7.2 Findings

Conflict between some Whanganui Māori and the Crown was a direct result of the Crown's actions in the Wellington region during 1846. However, Governor Grey's initial decision to extend martial law north to Whanganui was justified, on account of the fact that he reasonably interpreted the movement of men from Whanganui to the south as a military action. In fact, the taua had a peaceful motivation, but Grey was unaware of that.

The potential threat immediately disappeared, but Grey chose to maintain martial law over Whanganui, and did so even though there were no soldiers there to enforce it.

While it is unclear what Grey intended through the maintenance of martial law, events that occurred later only heightened the tension between Māori and the Crown. The arrest of 10 Whanganui Māori, their trials by court martial, the execution of one, and the transportation of others to Tasmania, led to a taua being brought downriver to attack and plunder the settlers at Petre. No attack eventuated.

The Crown legitimately exercised its *kāwanatanga* role when it sent troops to Whanganui in December 1846 to defend the settlers at the invitation of rangatira at Pūtiki. But the Crown was at fault when it refused to extend its protection to Pūtiki Māori – the Crown's *kāwanatanga* duty extended to defending them.

Grey made the wrong decision when he decided to delay the lifting of martial law after the alarm caused by the arrival of the taua of October 1846 had subsided. The summary court martial and executions of those found guilty of the attack on the Gilfillan family was a consequence of Grey's decision not to lift martial law. Ironically, these events led to a situation that might have justified a declaration of martial law. But martial law is intended to respond to the breakdown of civil order, not cause it.

War broke out in Whanganui as a result of these executions, which incited the return of Te Mamaku and a hostile taua. The war was not especially bloody, and neither side experienced many deaths or injuries. Nevertheless, the conflict hindered the growth of respect and mutual confidence that should have characterised a developing Treaty relationship. Peace was restored in 1848, but trust was not, and this situation was perpetuated when the Crown maintained a military presence at Whanganui in the decades that followed.

We found that the Crown failed in its duty to provide good government when it

- ▶ maintained martial law over Whanganui as a threat when there were no soldiers on hand to enforce it;
- ▶ extended it when all acknowledged that there was no current state of rebellion or civil disorder, simply as a precautionary move pending the completion of the stockade;
- ▶ created the situation (by extending martial law) in

which Captain Laye was able to deal with the Gilfillans' killers by court martial; and

- › executed the Gilfillan murderers without first obtaining the Governor's sanction, which the law of the day required.

We found that the declaration and maintenance of martial law constituted the unwarranted suspension of the civil rights of Māori in the district subject to martial law. The effect on them was the same regardless of whether they supported, opposed, or were indifferent to the Crown, or were at all connected with the events that led to the initial declaration. These acts were inconsistent with the Crown's duty to actively protect Māori, and also breached the principle of good government. Further, in seeking to assert Crown authority and establish substantive sovereignty over the Whanganui district through force of arms, the Crown breached the Treaty guarantee of *te tino rangatiratanga*.

The prejudicial effects on Whanganui Māori were not limited to loss of life and damage to property. They had to live in a climate of fear and suspicion the Crown created and fostered, leading to long-term rifts between settlers and Māori at Whanganui, and also between Māori. The 'rebel' (upper river) versus 'friendly' (lower river) characterisation of *tangata whenua* had its genesis in this war, as Pūtiki Maori were forced to choose between protecting Pākehā at Petre and aligning themselves with their kin.

## 28.8 CHAPTER 7: THE WHANGANUI PURCHASE

### 28.8.1 What did this chapter cover?

In this chapter, we described and analysed:

- › the negotiations for the finalisation of the Whanganui purchase, after Donald McLean's return to Whanganui in May 1848;
- › the signing of a deed by many Whanganui Māori, in late May 1848, by which the Crown purchased over 89,000 acres (minus reserves) for £1,000; and
- › the setting out of 7,400 acres of reserves for Māori.

### 28.8.2 Crown concessions

The Crown made the following concession:

The Crown acknowledges that the Crown's 1848 Whanganui purchase was represented by the Crown to Whanganui Maori as the completion of Commissioner Spain's recommended award. In purchase negotiations, however, the Crown failed to inform Maori that the area they surveyed and purchased greatly exceeded Spain's 40,000 acre award. This did not meet the standard of good faith and fair dealing that found expression in the Treaty of Waitangi, and this was a breach of the Treaty of Waitangi in [*sic*] its principles.<sup>2</sup>

### 28.8.3 Findings

Whanganui Māori saw signing the Whanganui purchase deed as signifying their willingness to engage with Pākehā, resulting in settlement, trade and other benefits. Some understood the relationship that would ensue in terms of a marriage – Pākehā were marrying their land – and, by extension, them. The Crown, though, saw the purchase enshrined in the deed in the usual way that the English conceived sale: as the absolute transfer of property from one to another.

McLean went to some lengths to ensure that all those with interests in the land within the purchase boundaries were party to the negotiations. But he represented the purchase as the implementation of the recommendations of Commissioner Spain – the terms of sale would be £1000 for 40,000 acres; Whanganui Māori would retain a tenth of the area as reserves, plus their *pā*, *urupā*, and cultivations then in use.

McLean and the other officials must have known that the deal with Whanganui Maori was not what Spain recommended. Ultimately the only element that remained unchanged was the purchase price of one thousand pounds. The area transacted grew from 40,000 to 89,000 acres, and McLean did his best – following Governor Grey's specific instructions to this effect – to whittle down the areas to be reserved. A fair purchase price would have been at least double the one thousand pounds paid.

If McLean had implemented Spain's recommendations as regards reserves, many more *pā*, cultivations, and *urupā* would have been set aside. We estimate that the total acreage would have exceeded 10,000 acres by a considerable margin. As it was, the figure was 7,400 acres, which for

800 people was too little to allow for much more than a subsistence lifestyle.

The Whanganui purchase was not an agreement reached through open and honest negotiation. That Whanganui Māori did not complain of these iniquities was the result of the Crown's deception.

The Crown conceded before us that it breached the Treaty when it told Māori that it was implementing Spain's recommendations. We agree, and find that the tactics the Crown employed to obtain title to the Whanganui block were mostly heavy-handed, manipulative, and self-serving. The Crown accepted that it breached the Treaty, but did not specify which Treaty principles it breached. We find that its conduct amounted to a serious failure to act towards Whanganui Māori with the utmost good faith. It also acted inconsistently with the principles of partnership and active protection when it failed to:

- ▶ include in the negotiations all of those with rights and interests in the land and its resources;
- ▶ openly negotiate with Māori a fair purchase price under the changed circumstances of 1848;
- ▶ address the fact that Pūtiki Māori and others involved in the 1846 negotiations received a smaller share of the purchase price in 1848 as a result of the Crown's recognising many more vendors than it did in 1846 without increasing the purchase price; and
- ▶ allow iwi, hapū, or whānau to retain rights in the land despite their opposition to its alienation.

## 28.9 MATAPIHI 2: PĀKAITORE

### 28.9.1 What did this matapihi cover?

In this matapihi, we described and analysed:

- ▶ the background to the occupation of Pākaitore, the name Māori called the place officially known as Moutoa Gardens, for 80 days from 29 February until 18 May 1995;
- ▶ how Pākaitore started life as a fishing kāinga and a gathering place for Māori of the district;
- ▶ why Pākaitore was not reserved to Māori from the Whanganui purchase;

- ▶ the location of Pākaitore;
- ▶ the 2001 tripartite agreement between the Crown, the council, and Whanganui Māori to administer the site; and
- ▶ the 2007 Deed of on-account Settlement, through which the Crown transferred to Māori the local courthouse, which sits at one corner of the gardens.

### 28.9.2 Findings

Moutoa Gardens is private land, and we may not make recommendations about it. We did note in the matapihi that, at the time of our hearings, disagreement continued about whether Moutoa Gardens or Pākaitore is the better name for the reserve. We expect that this topic will be canvassed in the Treaty settlement negotiations. We trust that the parties will take into account the material contained in this matapihi to come to an arrangement that enables expression of both the history and the symbolic character of the land.

## 28.10 CHAPTER 8: POLITICS AND WAR IN WHANGANUI, 1848–65

### 28.10.1 What did this chapter cover?

In this chapter, we described and analysed:

- ▶ the emergence of Māori-initiated rūnanga and komiti in Whanganui during the 1850s;
- ▶ the Crown's introduction to Whanganui of a system for administering justice in Māori communities from the 1840s, through resident magistrates and Māori assessors;
- ▶ the expansion of the roles of resident magistrates and assessors in the 1850s;
- ▶ the emergence of the Kingitanga in the late 1850s, and its importance to Whanganui Māori;
- ▶ Whanganui Māori involvement in the first war in Taranaki and the Kohimārama conference;
- ▶ Governor Grey's 'new institutions' and their implementation in Whanganui;
- ▶ Whanganui Māori involvement in the second Taranaki war;

- › the Crown's purchase of the Waitōtara block;
- › the arrival of Pai Mārire in the district and the battle at Moutoa in May 1864;
- › the battle at Ōhoutahi in February 1865 and the siege of Pipiriki in July 1865; and
- › labels applied to Whanganui Māori during and after conflict.

### 28.10.2 Findings

From 1848 to 1865, Whanganui Māori developed institutions to conduct their own affairs in a non-traditional way, and to engage with the Crown on political and legal matters. This was achieved by refining and expanding traditional modes and structures (like rūnanga and hui), and through appointing Māori judges to administer justice. Many chose to support the Kīngitanga movement in order to safeguard their autonomy, and engage with the Crown on matters of national importance.

At the same time, the Crown attempted to develop institutions through which Māori might be incorporated into the political and legal institutions of the colony. The Crown floated a number of schemes, but rarely sought to incorporate the strategies for self-management that Māori were working on. When it did, it was with the ultimate goal of disabling Maori authority because Māori initiatives were seen as impediments to the Crown's own goal of amalgamating Māori. Local rūnanga and hui were ignored and the authority of the Kīngitanga was challenged. Governor Grey abolished the initiative of annual national hui of rangatira after the Kohimārama conference, as he did not want Māori to develop a unified multi-regional voice, or strengthen their political collectives. Māori were consigned to engage with the Crown at a local level through Crown-designed mechanisms dominated by Crown-appointed officials. The Crown insisted that Māori should be subject to its governance at every level of authority, rather than partners in the governing endeavour.

The predominant theme of Crown–Māori relations in this period was disempowerment of Māori institutions, contrary to the guarantee of te tino rangatiratanga

in article 2 of the Treaty. By 1865, far from being integrated into the political and legal systems of the colony, many Whanganui Māori stood apart from them. Those who supported the Kīngitanga found themselves in conflict with the Crown following clashes in Taranaki and Waikato.

Other reasonable options were available to the Crown that would have been less prejudicial to Māori interests. At the local level, it could have recognised, promoted, and sanctioned the system of rūnanga and hui developed by Whanganui Māori. At the regional level, it could have respected the preference of many Whanganui Māori to be represented by the Māori King. It was their right to join the Kīngitanga, which was not inherently hostile to the Crown or the settler government. At a national level, the Crown could have pursued its initiative to confer annually with rangatira, which actually occurred only once at Kohimārama in 1860.

Ultimately, the Crown's refusal to accept the legitimacy of the Kīngitanga, and its determination to undermine its influence in Whanganui, resulted in war. This brought death, injury, and capture from fighting in which whānau went up against whānau. The Crown put communities into simplistic categories depending on whether it considered them to be for or against the Crown. It also loaded the terms 'upriver' and 'downriver' with connotations of allegiance to the Crown. Labels stigmatised groups and created divisions that endured until very recent times.

We found that the Crown:

- › did not engage creatively with Whanganui Māori to understand their aspirations for self-management in the new colonial environment, and did not seek ways to work with their communities to give those aspirations expression in State-recognised institutions;
- › persisted in the characterisation of Māori initiatives for self-management as an undesirable continuation of old ways that it sought to end by permitting Māori to exercise authority only through Crown structures and processes;
- › refused to engage with and recognise Māori-initiated rūnanga and hui;

- ▶ did not support its own system of rūnanga as a form of Māori self governance;
- ▶ refused to recognise the legitimacy of the Kīngitanga as the political representative of those Whanganui Māori who joined the movement;
- ▶ abandoned annual meetings of rangatira like that at Kohimārama; and
- ▶ attached derogatory and/or divisive labels to groups of Whanganui Māori according to its often simplistic assessment of their allegiance.

This was the period when the Crown, having accumulated power and resources to exercise more or less unfettered authority, chose to do so without reference to the interests of Māori. In so doing, it abandoned partnership and reciprocity as defining characteristics of Crown-Māori relations. These acts and omissions of the Crown breached the Treaty guarantee of te tino rangatiratanga, and the Treaty principles of autonomy and partnership, and led both directly and indirectly to conflict and division.

## 28.11 CHAPTER 9: PROVIDING FOR THE FUTURE NEEDS OF MĀORI

### 28.11.1 What did this chapter cover?

In this chapter, we described and analysed:

- ▶ the question of ‘sufficiency’ – the exercise of ascertaining the nature and extent of the Crown’s obligation to ensure that Māori were left with enough land for their needs, not only at the time, but also for the future;
- ▶ the quality of the land in the Whanganui district;
- ▶ what can be said about sufficiency in an area like Whanganui, where much of the land is unsuited to agriculture;
- ▶ the importance of land in Māori social, cultural, and political life;
- ▶ the development of the Crown’s policies on how much land should be left in Māori ownership in the nineteenth and early twentieth centuries;
- ▶ the economic development of Whanganui Māori by the mid-1860s; and

- ▶ the Crown’s role in promoting economic development in the nineteenth century.

### 28.11.2 Crown concessions

The Crown believed the nineteenth century concept of sufficiency was properly explained as meaning ‘sufficient land and resources to meet [Māori] primary needs, in the sense of having a place of residence and a plot to cultivate’. The Crown accepted that it ‘has a responsibility to ensure that Māori retain sufficient land for present and future needs’; and therefore ‘a responsibility under the Treaty, at some time and regardless of the wishes of individual Maori, to intervene to prevent further alienation of Māori land’; and that this ‘implies a duty and ability to monitor or assess the level of land holdings.’<sup>3</sup> It conceded that

the failure to monitor and assess the ongoing impact of land sales contributed to the position today where many Māori have insufficient land for their present and future needs and is a breach of the Treaty and its principles.<sup>4</sup>

Notwithstanding this principle, however, the Crown submitted that ‘it does not accept that Whanganui Māori are among those groups who have been left with insufficient lands for their present and future needs.’<sup>5</sup>

### 28.11.3 Findings

Because chapter 9 was in the nature of a stage-setting chapter, setting out our thinking on ‘sufficiency’ for the balance of the report, we made no findings of Treaty breach.

However, we concluded that the Crown accepted that it had to ensure that Māori were left with enough land to sustain themselves at the time, and enough also to facilitate their transition to the circumstances of the new colony. Generally, however, it was the officials on the ground who got to determine what was ‘sufficient’ for Māori purposes, and it was not long before that meant only enough land for subsistence. Later, the concern to develop policy to prevent landlessness was motivated not so much by a desire to protect the interests of Māori as to avoid a

situation where indigent Māori would become a burden on settlers.

For so long as the Crown was in the business of purchasing land on the assumption that land was needed to grow the economy and therefore the colony, it was duty bound – as a Treaty partner; because Māori were also citizens; and in the interests of good government – to conduct that business in a way that at the very least did not exclude Māori from participating in those land-related opportunities. The Crown needed to monitor how much land remained in Māori ownership, so that it could properly address the question of how much land they would need to keep so as to participate in the economic activities that were anticipated. It was not beyond the realms of possibility that the Crown might have engaged in this kind of endeavour.

In order for Māori to retain their cultural integrity, rangatira also had to have the authority to determine which ancestral lands their communities needed to retain, and which they could afford to give up. This was implicit in the guarantee in the Treaty of te tino rangatiratanga, and the emphasis on Māori having a choice as to whether and what land they would sell.

We acknowledge that if the Crown had proceeded as we have suggested it should, it would have been swimming against the colonial tide. It was a time when the settler government was empowered to exclude Māori from decision-making, and – in the wake of the New Zealand wars – the settler population had gained both numerical dominance and actual power to determine what happened in most parts of New Zealand. Nevertheless, the Crown had an obligation, when considering ways of encouraging the growth and development of the colony, to ensure that Māori could participate equally in any opportunities it was promoting. It failed to do so.

## 28.12 CHAPTER 10: POLITICS AND MĀORI LAND LAW, 1865–1900

### 28.12.1 What did this chapter cover?

In this chapter, we described and analysed:

- ▶ the development and contents of legislation establishing the Native Land Court in 1862 and 1865;
- ▶ the Crown's immigration and public works policies, and then return to land purchasing after 1869;
- ▶ 1873 reforms to the court's process and titles;
- ▶ the expansion in 1877 of the Crown's powers to purchase, and then reduction in purchasing;
- ▶ the Crown's public works and associated land policies from 1884, and subsequent reversion to free trade in 1887;
- ▶ the further expansion of the Crown's power to purchase from 1892;
- ▶ the beginnings of protest against the operations of the court and Crown purchasing, and development of Māori institutions (rūnanga and komiti); and
- ▶ the land management initiative of Te Keepa Te Rangihiwini – Kemp's Trust.

### 28.12.2 Crown concessions

The Crown made a significant concession on the native land legislation as it was first enacted in 1865. It accepted that the so-called '10 owner rule' failed as an attempt to provide a form of communal title, because it did not allow the community to enforce the trustee role of the 10 specified owners, and subsequent amendments were inadequate.<sup>6</sup> As such, the Crown did not fulfil its duty to actively protect the interests of Māori in their land.

The Crown also noted 'the importance of previous Crown acknowledgements of Treaty breach related to the native land laws and Crown purchasing'<sup>7</sup> by which the Crown accepted that it:<sup>8</sup>

- ▶ did not protect traditional tribal structures by providing communal governance mechanisms before 1894;
- ▶ enabled individuals to deal with land without reference to iwi and hapū, making it more susceptible to partition, fragmentation, and alienation, and contributing to the erosion of tribal structures;
- ▶ enabled legislation that made the Crown a privileged purchaser, a position that imposed on it significant Treaty obligations of good faith and fair dealing;
- ▶ sometimes purchased interests in Māori land using a

combination of aggressive techniques that included the unreasonable and unfair use of monopoly power and advance payments;

- ▶ failed to ensure particular groups retained sufficient land for present and future generations; and, in particular:
  - did not monitor and assess the ongoing impact of land alienation;
  - did not instigate and follow clear procedures to identify and exclude lands to be retained; and
  - did not provide adequate reserves and ensure sufficient protection from alienation for the few reserves that were provided.

Although the Crown acknowledged that the Native Land Court system had ‘significant flaws’, it submitted that ‘the whole system as such, and the Native Land Court as an institution, should not be condemned as breaches of the Treaty.’<sup>9</sup>

### 28.12.3 Findings

The Treaty conferred upon the Crown the right to exercise *kāwanatanga*, from which the Crown assumed power to legislate for dealings in Māori customary land in the early years of the colony. At the same time, the Treaty conferred upon Māori full rights of land ownership, which included the right to keep their land until they wished to sell it. This meant that, when the Crown came to devise how to determine ownership of customary land for the purpose of creating titles, in order to comply with the Treaty it would need to talk with Māori first, and obtain from them some form of consent to any proposed scheme.

#### (1) *Māori input into the title system*

When the Crown came to introduce and then almost immediately revise a comprehensive new system for Māori land that established an independent court to determine titles that could be traded on the free market, it did not seek Māori input or agreement. In the main, successive governments saw no need to put proposed policy changes to Māori for their consideration: the only condition on their exercise of power was parliamentary

support. The main exception – Ballance’s consultation on the Native Land Administration Act 1886 – did not alter colonial politicians’ general view that they did not require Māori support for legislation affecting their land.

The Government disregarded *rangatira* and did not involve them in critical decisions affecting Māori futures, which was disempowering. Engagement between the Crown and Māori was channelled into unconnected interactions about land. Those involved in the *rūnanga* and *komiti* might have had informal influence locally, but they were really always on the sidelines, because politicians concentrated on the Crown’s overall agenda for the country. The only way for Māori to be involved in the legislative process was through the Māori members of Parliament, but these were few, and their influence small. It was not until the end of the century that Māori, frustrated by their exclusion, began to voice more collective opposition through *Te Kotahitanga*.

The most coherent opposition locally was Kemp’s Trust. It sought to work within the system rather than go up against it, but it was rejected by the Government – primarily on the grounds that legislation did not provide for it.

The Crown acquired *de facto* sovereignty in the Whanganui district through use of legislation, which enabled systems that were implemented later on the ground. At no point can it be said that Whanganui Māori stopped trying to deter the Crown from exercising this authority in their territories. Protest was ongoing, because the Crown assumed control without properly accommodating the fundamental entitlement of Māori to decide how their land rights would be brought into the legal framework. This was a breach of article 2 – *te tino rangatiratanga*, and the principles of partnership and active protection.

Having been so thoroughly excluded from deciding how their land interests would be recognised, it was unsurprising that Māori did not like the system imposed on them. Māori everywhere, and particularly in Whanganui, opposed the new system on two grounds: the court did not include provision for Māori communal

decision-making in the titles that were issued; and the form of these titles did not enable communal decision-making about the future disposition of land.

### **(2) *The court's processes***

The court – from the 1865 Act onwards – disabled Māori communal decision making. Right through the period, individual Māori could initiate court proceedings, which meant other interest-holders (both from their own hapū and iwi and from others) had to join in to secure rights. Hapū and iwi could not influence when and how their land would come before the court. And when the court sat, leaders were limited to presenting claims to ownership: Māori participated in formal decision-making only as assessors, who assisted judges presiding in districts outside their own rohe. This was a circumscribed role, and reserved for a select few.

Hapū and iwi were left to exert their collective influence beyond the formal proceedings. Outside of court, they settled boundary disputes, formulated lists of owners, and determined relative interests, in an effort to control what the court was doing, and to lessen the likelihood of its determining their respective interests incorrectly. Māori who advocated alternatives envisaged a system in which they could adjudicate title themselves.

Excluding Māori from the formal aspects of the court's process was a more serious flaw of the system because there was no right of appeal from the court's decisions before 1894. Theoretically, rehearings were available, but in practice the decision to grant them was highly discretionary, and occurred rarely. The fact that it took the Crown three decades from the time the Native Land Court was established – and the better part of two decades from the time the Native Affairs Committee first highlighted the anomaly – to enable appeals as of right, was contrary to its duty to actively protect Māori interests. It was also contrary to its obligation (partly stemming from its undertakings in article 3 of the Treaty) to enable Māori to seek reasonable redress for grievance.

Whanganui Māori rights in land ought to have been determined by their tribal leadership, even if within the

framework of new institutions. The Treaty led them to expect no less, given article 2's confirmation of te tino rangatiratanga combined with guaranteed ownership until they wanted to sell. But the Crown set in place an entirely different system where leaders had no formal role. This breached the principles of partnership and active protection.

### **(3) *The form of title***

At no point did Māori seek or support land titles that favoured the right of the individual over the collective. It is generally accepted that Māori wanted a form of title that was recognisable at law, and we infer from their reaction to the kind of title that the Crown delivered to them that they were looking for something quite different from that. What would probably have worked was a compromise between existing forms of customary rights to land and resources, which were carefully balanced and distributed within and between hapū and iwi, and legal guarantee of exclusive ownership. Title that granted primary ownership to individuals, though, was not that compromise.

Other Tribunals have condemned the ten-owner rule established under the 1865 Act, which disenfranchised customary owners in many districts. However, as only a small fraction of the land in this inquiry district came before the court when that Act was in force, it was the memorial of ownership introduced in 1873 that was to affect Whanganui Māori landowners most.

Memorials of ownership did at least identify all individuals with interests as owners, but it also allowed those individuals to sell their interests without reference to other owners. There was as usual no provision for collective action, and once individuals sold interests, partitioning them out was costly. In fact, memorials of ownership provided a form of title that was useful primarily for the purpose of selling.

Māori in Whanganui, as elsewhere, considered that their land ought to be managed collectively. Kemp's Trust was an attempt to work within the existing system, holding land in trust so as to direct the pace of settlement.

The kind of title that the 1873 Act ushered in ran entirely

counter to Māori preferences, and breached the Crown's obligations in article 2.

#### (4) *Crown motives*

Broadly, the land tenure system that the Crown introduced and developed was intended to advance the economic position of the colony and consolidate its own authority. The court originated from colonial politicians' view that, before land could be safely transacted, it would be necessary to arrive at a sound means of identifying its owners.

This could have involved conferring on tribal groups a legal personality that would enable them to be recognised as corporate landowners. But giving tribes new authority was not the direction in which colonial opinion was heading. The titles that the court produced proved an awkward halfway house between collective and individual title, but they were a step on the way to disabling tribal institutions and progressing Māori towards individualism as early as possible. At no point did those in power see a need to take account of Māori views in any substantive way: to do so would be a concession to Māori authority, which colonial politicians were seeking to erode.

It was not just that the court's process and the titles it issued were intended to enable the transfer of Māori land. In many ways more startling was how the Crown positioned itself at the centre of the land market at several critical points. Legislation enabled it to exclude private parties so as to operate from a near-monopoly position to buy up the land interests of individual owners with scattered interests. The motivation here was to ensure swift passage for its policies of infrastructure development and increased immigration; protecting Māori in their landholdings did not feature on the policy agenda. Some ministries pulled back the level of Crown intervention, but the overwhelming trend during the period was towards more, against a founding principle that the court would enable a free market in land. The combination put the Crown in a powerful position to choose when and how it acquired land from Māori.

We acknowledge that this path mirrored trends

occurring elsewhere in the world at the time: tenure reform was not unique to colonial New Zealand. Nevertheless, the Crown assumed its authority to govern here from a founding agreement that acknowledged Māori rights to land. In that the Crown established a system in which Māori had no influence on how their customary rights would be brought into the legal system, it breached the principles of partnership, autonomy, and active protection. In that the Crown did so to advance its own position, the Crown breached the principle of good government.

### 28.13 CHAPTER 11: THE OPERATION OF THE NATIVE LAND COURT IN THE WHANGANUI DISTRICT, 1866–1900

#### 28.13.1 What did this chapter cover?

In this chapter, we described and analysed:

- ▶ the operation of the Native Land Court in Whanganui between 1866 and 1900, when the court investigated and determined title to 1,820,466 acres – 84 per cent of the inquiry district;
- ▶ how land was brought before the court for title investigation;
- ▶ the extent of Māori involvement in the court's general operations and in its deliberative process;
- ▶ the avenues available to Māori for seeking redress for the decisions of the court that they considered were in error;
- ▶ the costs involved in taking land through the court; and
- ▶ the extent of land fractionation.

#### 28.13.2 Crown concessions

The Crown's concessions set out in relation to chapter 10 also applied to material covered in this chapter.

#### 28.13.3 Findings

##### (1) *Engagement with the court*

Like other Tribunals before us, we were presented with the paradox of heavy Māori use of the Native Land Court often by the same people who called for its reform or even

abolition. Māori wanted legally recognised title to their land, and the Native Land Court was their only option. One to three individuals could apply for title, and there was no requirement to secure community sanction.

We saw how difficult it was for Māori in Whanganui to stay out of the Native Land Court, even when they deliberately boycotted it. Confronted with the reality that land would be awarded to others if they remained absent, they nearly always returned to the court eventually. This was de facto compulsion. The Crown did not convince us that the Native Land Court was a client-driven institution. It was apparent that its ongoing activity in the Whanganui region came despite the wishes of many Whanganui Māori and not in response to them.

The imposition of the court on Whanganui hapū breached Treaty principle embodied in article 2. The Crown undertook to protect Māori in the ownership of their land unless and until they wished to sell. Logically, this should have extended to Māori choosing when and how to transform its title.

### **(2) *Involvement in the court's process***

The timing of hearings, notice, location, and hearing length were all aspects of the court's process that profoundly affected Māori who needed to attend. They had very little influence over how the court went about its business in the Whanganui district.

If the system had been one in which Whanganui Māori had a significant say, it would have calibrated its process to respond to communities' imperatives. It would not have scheduled long hearings in winter, far from the land in question, and at short notice. Instead, it would have contrived shorter hearings involving fewer blocks, held them at more locations nearer the land concerned, and timed them to minimise inconvenience to local hapū.

As it was, Māori participants bore the brunt of inconvenience and hardship. The court's preference for hearings at Wanganui, where the accommodation was considered suitable for European judges and their retinue, almost always trumped any convenience to Māori of hearings at kāinga. Hearings during the coldest part of the year,

or during periods of planting or harvesting; protracted hearings that strained finances, social bonds, and health; and inadequate notice were factors so common that they were rarely considered grounds for a rehearing. The court acknowledged the problems caused by lengthy hearings and took steps to hear blocks in stages, but this produced only a partial solution.

The Crown's failure to ensure that the Native Land Court's operation was procedurally sound breached its duty of active protection, and the principle of good government.

### **(3) *Involvement in the court's deliberations***

The Crown contended that out-of-court settlements and the participation of assessors provided for a high level of Whanganui Māori input into the court's decision-making processes. We have scant evidence about how assessors affected court decisions, but even if they were more influential than the record suggests, theirs was not the influence of Whanganui Māori, because assessors had to come from outside the district in which they sat.

There is no doubt that out-of-court settlements were a feature of Whanganui cases. They usually involved arranging who was to be on the list of owners. This sometimes reduced the court's role to rubberstamping Māori decisions concerning who would be on lists. But it was judges who decided on the lists, in the sense of determining which ancestors had rights in the block, and therefore which groups of descendants should have their names on a list so as to entitle them to interests. This was in many respects the primary decision. In any event, it was plain that for Māori their level of input was insufficient, or was accomplished in a culturally unsatisfactory way, because they continued to demand the right to decide land titles through rūnanga or komiti.

### **(4) *How fair was the share of the costs that fell to Māori?***

While the evidence is not sufficiently extensive or detailed for us to be certain about the impact of the costs on Māori and their communities, the costs of the system could sometimes be a burden for Whanganui Māori.

Court costs were usually lower than survey costs. We have no doubt that survey charges were sometimes excessive. The Crown did not do enough to control, spread, or shift the cost of surveys. Had Māori been supported in community tenure of land, they would have been in a better position to manage debt incurred in the process of transforming title, and it would have figured less in decisions to sell land.

In the 1870s and early 1880s, there was a move to a variety of means of paying for survey costs, even though the legal obligation remained with Māori owners. The Crown appears to have paid for survey costs sometimes, though the extent of its payments is unclear. Any Crown payment would have been entirely more appropriate than Māori shouldering the entire burden of survey costs. It was especially onerous and unfair when non-sellers had to pay for subdivisional surveys as a result of Crown or private purchase activity.

There were other expenses that were usually unavoidable, including travel, food, accommodation, lawyers' and interpreters' fees, and the costs of manaaki (hospitality) to visitors. Māori were also obliged to use the proceeds of sale to host hākari (feasts) as a means of restoring cordial relations after the adversarial engagement of the court.

Social costs were also hefty. Evidence shows that Māori obliged to stay in Wanganui for protracted hearings suffered increased disease, deprivation, drunkenness, and even deaths. While the social costs were experienced variably, some people did suffer, and such human misery should not have been a corollary of reforming land title.

Most unfortunate of all is the fact that the titles that Māori obtained through the land court system usually did not afford them the benefits that they looked for, and which the Crown implicitly promised when it required them to pay most of the costs. The titles, and the rules that created them and determined their use, made it easy for Māori to sell their land, but much harder to use it, or to develop it as an asset for their own long-term prosperity.

The problem of the costs and their consequences was well known in the nineteenth century, and the Crown's failure to work with Māori to ameliorate the process, and

lessen both the costs and their adverse effects, breached the principles of active protection and good government.

#### **(5) Availability of redress for the court's shortcomings**

For those who found themselves excluded from titles as a result of the court's decisions, there was no automatic right of appeal prior to 1894. Rehearing was theoretically available before then, but in practice was rarely available. There were no guidelines as to the basis on which rehearings were granted; applicants were usually not told why their request was accepted or rejected; and the judge in the original decision advised on whether or not a rehearing should be granted. All of this was procedurally flawed. The Native Affairs Committee, overwhelmed with petitions from parties seeking to have their cases reopened, advised the Government of the need for an appeal process.

Although the Crown conceded that the lack of an appellate body reduced Māori options in the nineteenth century, it did not accept that this breached the Treaty principles. We do not agree. The Native Land Court's decisions affected Māori profoundly, and their inability to have those important decisions reconsidered breached their most fundamental rights as citizens under article 3. There remain questions about whether, even after the Native Appellate Court was established, it was too expensive to be an adequate means of seeking recourse.

#### **(6) Extent of fractionation in the Whanganui district**

Succession laws, which resulted in titles that were increasingly crowded with each passing generation, often made Māori land unmanageable and unusable, and diminished its value relative to other land. The signs that this was happening were evident early on, and the Crown should have worked with Māori to make the necessary changes to prevent it. The corporate title offered from 1894 onwards proved, for a number of reasons, not to be an adequate remedy for this situation. The Crown's failure to step in early to amend the succession regime it created was to the detriment of Māori land tenure right up to the present day. This breached the guarantee of te tino rangatiratanga, and the principle of good government.

## 28.14 CHAPTER 12: CROWN PURCHASING IN WHANGANUI, 1870–1900

### 28.14.1 What did this chapter cover?

In this chapter, we described and analysed:

- › the process by which the Crown purchased 1,279,299 acres of Whanganui land between 1870 and 1900, which was just over fifty per cent of the district;
- › how the Crown used monopoly purchasing powers to acquire land;
- › the various means by which Crown purchase officers acquired interests from Māori owners;
- › the prices the Crown paid;
- › the Crown's acquisition of private leasing interests in the Murimotu region, and its subsequent purchase of the land;
- › the effectiveness of land restrictions in preventing alienation and the creation of reserves; and
- › the reasons why Māori sold land.

### 28.14.2 Crown concessions

The Crown's concessions set out in relation to chapter 10 also applied to material covered in this chapter.

### 28.14.3 Findings

Discernible in the Crown's native land laws, and in its policy and practice for buying Māori land, was the consistent objective of buying as much land as possible for the lowest achievable price. Although policies and priorities fluctuated, this was a constant. Governments, convinced of the need to acquire land for economic development, introduced legislation that strengthened the Crown's arm as the sole purchasing power. Each time this occurred, there was a corresponding push to acquire the land remaining in Māori ownership, moving ever further into the interior of the Whanganui district.

#### (1) *Destruction of collective agency*

Traditionally, Māori in Whanganui and elsewhere occupied and used land on the basis of rights shared by the collective. Whānau might have particular rights in a particular area, but it all still belonged to the wider group: no

small groups or individuals could trade it, or give it away. In English law land titles could be in corporate ownership – a concept that could have been adapted to land ownership by hapū. But this would have facilitated the continuation of 'tribalism', which the Crown wanted to eradicate, so it chose instead to impose a system premised on the fiction that individual Māori owned a specific and defined portion of hapū land.

The payment of tāmāna (advance payments) to individuals created division within communities, damaged traditional leadership, and undermined collective decision-making. In Whanganui, during the 1870s, the Crown paid advances before land had been through the Native Land Court, to people whom the court might or might not ultimately recognise as owners. After 1880, the Crown tended to wait until the court had determined title, but it continued the practice of buying interests from individuals. This rendered impossible the communal management of land, because once a few people sold, the owners of the balance were drawn into uncertainty and expense. Piecemeal purchase from individuals made hapū and whānau prey to the whims of the weakest: land agents only had to approach those who had reasons of their own for selling to undermine instantly any well thought out communal arrangement for holding on to land.

When it created such a system, the Crown breached its duty to respect and to give effect to te tino rangatiratanga of Whanganui Māori. Article 2 guaranteed that Māori would be undisturbed in the possession of their land 'so long as it is their wish and desire to retain the same'. As a minimum, then, the Crown should have acceded to any Māori request for land to be reserved from sale. Instead, the thrust of the Native Land Court regime and allied Crown purchase programme was to promote a form of individualisation that undermined any form of hapū control.

#### (2) *Limited choices*

Whanganui Māori sold land for many reasons, but they rarely made the decision freely and collectively. Even those who genuinely wanted to sell land could not usually

do it on an open market. Legislation essentially banned private purchase of Māori land in 1894, but by then about three quarters of our inquiry district was already off limits to private purchasers. These restrictions also prevented Māori from using their land as security for borrowing, and from leasing to any party but the Crown – although in practice the Crown was willing to lease land only in Murimotu. Leasing could have been beneficial to tangata whenua there, but the Crown, intent upon furthering its own ends, purchased the land while the leases to pastoralists still had nearly two decades to run.

The nature of the title that the Native Land Court awarded also restricted choices: a person might own 50 acres of a particular block, but could not say which 50 acres they were; he or she could not fence them off and turn them to use, nor pledge them as security for a mortgage. Selling was relatively easy; developing it was almost impossible given the many barriers. The Crown thus designed and persisted with a form of title that benefited it and not Māori, because it primarily facilitated the purchase of individuals' land interests. This breached the principles of partnership and options.

Owners who did not want to sell were forced to pay to have the sellers' portions cut out of their block; often the only way to pay for this was to sell land, necessitating another survey, another partition, and more expense. In the worst cases, the costs of survey and title were such that they consumed the entire price of the land, and the former owners were left with nothing.

Nor could communities choose to opt out of the system. We found that the Crown's title and purchasing system undermined the collective agency of Māori communities, which were at the mercy of any member who needed money. Sometimes the land could be dragged into a sale by someone who lived outside the community, and was included on the title 'out of aroha'. If the scope for decision-making was limited on the personal level, it was practically impossible at the community level. This was fatal to a communal culture.

The Crown had a right to shut private parties out of the Whanganui Māori land market. Crown pre-emption was,

after all, specifically provided for in the Treaty of Waitangi, and the exclusion of speculators and land sharks was arguably in the interests of both Māori and the nation as a whole. However, because restrictions on private parties affected te tino rangatiratanga and Māori property rights, the Crown had a duty to engage with Māori before implementing these policies and practices and, as Crown counsel conceded in this inquiry, to ensure that the Crown did not use its privileged position against Māori interests.<sup>10</sup> By and large, the Crown did not fulfil this obligation. With private competition partly or completely blocked, Māori still often needed to sell to defray the costs of going through the Native Land Court, but now had little scope to negotiate a better price or more reserves because the Crown was the only buyer.

We find that when the Crown deprived Whanganui Māori of real choices about their land, it negated te tino rangatiratanga, and breached the principles of active protection and good government.

### **(3) Breach of duty to act in good faith**

The obligation to act in good faith is fundamental to any partnership. In its dealings with Whanganui Māori and their land, however, the Crown repeatedly breached it when it acted to undermine te tino rangatiratanga and the ability of communities to act collectively, and when it restricted the options available to Whanganui Māori to the point where they had to sell to the Crown. Good faith was lacking because the Crown abused its position as a monopoly purchaser, paying low prices and using restrictions on private dealing to prevent Māori from entering into arrangements like leases. It exempted itself from most restrictions, so did not limit the quantity of Māori land alienated in the period. Rather, it used money as an enticement to sell, both through tāmana, and through payments to rangatira to enlist their support for sales to the Crown. This subverted traditional leadership. The Crown also made too few reserves.

The costs of survey and partition were unfairly loaded onto Māori who wished to retain their land, rather than allocating them according to benefit. Survey costs should

have been borne by the whole of the community. Māori should have been required to contribute to the cost only where survey was required after communities exercised genuine choice to define and sell their interests in land. Instead, when part-owners sold their interests in a block, usually without reference to the wishes of the wider community of owners, those who elected not to sell bore the costs of the surveys and partitions that selling necessitated. Partition costs should have been borne by the party seeking to buy, sell, or lease. In particular, the Crown alone should have borne the cost of its piecemeal purchase of blocks, and the more frequent surveys and partitions that resulted.

We saw no evidence of a deliberate strategy to load landowners with debt to compel them to sell, but it must have been apparent at least from the time when the Crown sought liens to secure the debts of non-selling landowners, and then took land in lieu of cash, that their situation was inequitable and contrary to their wishes. Even if the Crown did not design the system as a means of forcing non-sellers to release land that they had decided not to sell, this was its effect, and that effect was unfair, unreasonable, and breached the Treaty.

In the Treaty, the Crown took on the obligation to act in the interests of Māori by providing in article 3 that they were British citizens. In Whanganui from 1870 to 1900, virtually every policy and practice concerning Māori land was designed to advance the interests of the Crown and Pākehā – Māori interests featured hardly at all. Waves of purchase activity flowed from changing economic policy. This was perhaps most vividly exemplified by the Stout-Vogel Government's enthusiastic reactivation of Crown interest in acquiring land – for example, in the Murimotu district from 1884. Although earlier Crown ministries had entered into leasing arrangements that would have delivered rental income to Māori landowners in the Murimotu region for 21 years, these commitments were swept aside in favour of fulfilling the new Government's policy objective of large-scale purchase for railway. The Crown was at best indifferent to the consequences of these measures for Whanganui Māori. Such actions, and

such an attitude, breached not only its duty to act with the utmost good faith, but also the principle of partnership.

#### **(4) Good government**

All of these – destruction of collective agency, the failure to provide options, and the failure to act in good faith – return us to fundamental questions about the Crown's obligations to Māori in the process of transferring land to settlers.

Even on the most reductive view of the Crown's obligations to Māori in the nineteenth century, there was a basic set of standards with which any observer would have agreed the Crown was obliged to comply. These standards were founded in the rule of law. This is the idea that the Crown is 'subject to the law and has no power to act outside it.'<sup>11</sup> This was not simply a matter of compliance. Government also had to be just and fair – an idea that was imported to New Zealand in the language of the Treaty.

These basic standards applied particularly in the area of land transactions, which was to be the key point of engagement between Māori and the Crown in the early years of the colony, and indeed for so long as opening up land for settlement was the centrepiece of economic policy. A fair land deal has essential elements apparent to all: clear identification of the land to be sold; identification of all the persons to whom the ownership interests belong; willing buyer(s) and willing seller(s); and agreement on price and other essential terms.

While it can be said that the regime for dealing with Māori land provided for certain aspects of fair process, one obvious flaw was that transactions could be concluded without the full knowledge and consent of all the owners. The Crown created a system that enabled it to purchase ownership interests ahead of the court's determining title, and to purchase individuals' undivided interests before the court determined relative interests and partitioned them out. When Māori entered such transactions, they did not – and could not – know the size and location of the interests they were selling. The Crown conducted many of its land purchases in Whanganui in this way.

Alienation of land – no matter how much – in the

absence of basic elements of just and fair dealing, was in and of itself prejudicial to Māori. Breaching such basic standards renders property rights insecure, which in turn denies essential human rights and a basic level of respect owed to all. Denial of those rights and that respect inevitably causes damage.

In that this was a regime enabled by legislation, we cannot say that the Crown acted outside of the law. Usually, it did not. However, we can say that it was not good government, because it was neither just nor fair.

## 28.15 CHAPTER 13: THE WAIMARINO PURCHASE

### 28.15.1 What did this chapter cover?

In this chapter, we described and analysed:

- ▶ the process by which the Native Land Court determined title to the Waimarino block;
- ▶ the Crown's purchase of most of the block;
- ▶ the Crown's intentions behind purchasing;
- ▶ the process by which the application to determine title was submitted to and accepted by the court;
- ▶ how the court determined ownership interests at its hearing in March 1886;
- ▶ how Crown purchase officers went about acquiring the interests of 821 out of 921 Māori owners, between March 1886 and March 1887;
- ▶ how the court divided the land between the Crown and various groups of Māori owners ('sellers' and 'non-sellers') at a partition hearing in March and April 1887, and the later designation of reserves; and
- ▶ the avenues available to Māori who wished to protest against these events.

### 28.15.2 Crown concessions

The Crown conceded that its Waimarino purchase failed to comply with the high standards expected of it as a privileged purchaser of Māori land – particularly when it:

- ▶ discouraged the partition of the block;
- ▶ purchased ownership shares based on its own determination of relative interests;
- ▶ failed to provide full information about how it determined the price;

- ▶ failed to ensure that it paid a fair price for the land and its resources;
- ▶ failed to allocate the reserves contemplated in the purchase deed; and
- ▶ provided a system that, before 1894, lacked a body to hear appeals from Native Land Court decisions (see section 13.1).<sup>12</sup>

It conceded that its purchase of the Waimarino block failed to meet the standards of reasonableness and fair dealing that found expression in the Treaty of Waitangi and breached the Treaty of Waitangi and its principles.

### 28.15.3 Findings

The Waimarino purchase and the preceding business in the court were distinguished by the fact that so many of the potential shortcomings of the native land laws and the Crown's approach to purchasing came together in one place and time, and were writ large. The 'writ large' aspect arose from the extraordinary size of the block, the correspondingly numerous hapū affected, and from the degree to which the Crown conducted its part in a manner that was rushed, slipshod, and intent on advancing Crown interests at the expense of those of tangata whenua. The Crown's approach reflected the critical part that purchase of the Waimarino block played in the success of the Government's cornerstone economic stimulation policy, which aimed to construct the North Island main trunk railway, and to 'open up' the Rohe Pōtae to settlement and commerce. The Government set itself too many objectives to achieve too quickly. Proper process to determine and respect the land interests of tangata whenua of the expanse of territory comprised in the Waimarino block was a tragic casualty. Indeed, the title determination and partition stages of the court process for the Waimarino block exemplified some of the worst aspects of the court system.

#### (1) *The application*

In order for a proceeding to determine title to land to be fair, affected persons needed to know what land was comprised in the application and when the hearing would take place.

As regards what land was comprised in the application, the process for the Waimarino block failed because:

- ▶ the verbal description of the land in the application was insufficiently clear;
- ▶ the boundaries mistakenly included blocks already sold to the Crown and land justifiably believed to be within the Rohe Pōtae or Aotea block;
- ▶ the law did not require the land to have been surveyed nor boundaries marked on the ground, nor for visual images based on survey to be filed with the application, which would have facilitated interest-holders' grasp of what land was before the court; and
- ▶ key players (including the Crown's purchase agents and the court) seem not to have known about or understood the legal requirements for applications at the time, which led to a muddle that included statements in the application that the boundaries of the block had been marked out, and that a map of the block had been submitted, when the law required neither, and the statements were untrue.

As regards when the hearing would take place, notice of the hearing of the Waimarino title determination was inadequate and ineffective. Non-appearances at court and complaints afterwards indicated that many would have pursued claims in court, but either did not receive notice of the hearing, or the interval between the receipt of notice and the hearing left too little time for them to organise their affairs, prepare their case, travel to Wanganui, and attend.

There is no evidence of impropriety in the role that the Crown's purchase agents played in assisting the application. Nor is there evidence that the Crown interfered with the court's usual practice for arranging hearings to determine title, which was to accumulate applications until the number on hand justified a sitting of the court, and then to proceed to hear all claimants under the mantle of the application that seemed most comprehensive. But neither the court nor the Crown sufficiently prioritised or managed the potential problems of concurrent Native Land Court title hearings of large adjacent land blocks – even though they both recognised and understood the possible prejudice to affected Māori.

The Crown was responsible for these failures of process.

## **(2) *The determination of title***

Our task is to assess the acts and omissions of the Crown against Treaty principles; it is not our job to criticise the work of the Native Land Court, which was not the Crown. However, we do look into the work of the court to ascertain whether the Crown contributed to negative outcomes in ways that breached the principles of the Treaty.

We ascertained that the Native Land Court Act 1880, as amended in 1883, constituted law which, if judicial officers had exercised their powers conscientiously and in accordance with the letter, spirit and intent of the legislation, could have, and should have, gone a long way towards safeguarding the interests of the owners of customary rights in the land comprised in the Waimarino block.

However, in its determination of title to this land, the court conducted a proceeding that failed to protect many interest-holders' rights. This was to some extent due simply to the court's non-compliance with the provisions of the Acts, for which the only remedy was rehearing, review, or appeal.

The Crown was ultimately responsible, however, because the legislation was itself deficient. We find that, in circumstances like these, where

- ▶ the law specified that the parties were not to have legal representation;
  - ▶ the rights the court was determining comprised in many, if not most, cases the chief asset of the parties before the court, and their culturally defining connection with land; and
  - ▶ there was no appeal, no review, and effectively no rehearing,
- the legislation should have prescribed how the requirements for due process and proof were to be met.

It should have spelled out:

- ▶ a requirement for survey and survey-based maps before the hearing commenced, with a reasonable opportunity for affected parties to inspect them, object, and have their objections considered and amendments made where necessary;
- ▶ a process to ensure – or at least to require the court to

make a reasonable effort to ensure – that all relevant parties were present, with adjournment if they were not; and

- ▶ rigorous testing of the assertions of rights made in support of title, in a way that did not give the applicant primacy, but allowed the court to assess fairly all the evidence and all the claims.

This would have gone some way towards ensuring that the Native Land Court – whose decisions were, in effect, final decisions – did a better job. The process for determining title would inevitably have been longer and more exhaustive, as was entirely appropriate given the gravitas of the matters before the court.

### (3) *The purchase*

The factors that made the quick sale of interests to the Crown almost inevitable were:

- ▶ Each Waimarino owner obtained by way of title an undivided and unquantified interest in a vast area of land. In order to find out the size and location of their share, and therefore to use it themselves, or even to ensure ongoing connection to places of cultural importance, they required a partition from the Native Land Court.
- ▶ The Crown blocked the process by which owners could apply to the court to subdivide their interests, fearing that it would delay purchase.
- ▶ The Crown's land purchase officers were relentlessly intent upon buying up every interest they could as quickly as possible, including the interests of minors.
- ▶ The officers concealed the true terms of the deal that was on offer, deliberately making it impossible for interest-holders to compare what the Crown was paying different owners, to assess the size or location of areas that would remain to them, or understand how it was unilaterally (and extra-legally) deciding on owners' relative interests.
- ▶ Many of the interest-holders in the Waimarino block were minors. The Crown rode roughshod over the legal requirements for the appointment of trustees for minors in order to be able to buy up their interests more quickly.

- ▶ The law allowed each individual owner to sell his or her interests without reference to traditional leaders or the community. Chiefs and hapū were disempowered as the Crown bought the land from under them before anyone really had a chance to realise what was happening.
- ▶ The Crown undermined the integrity of tribal responsibility and relationships by paying or otherwise rewarding rangatira to persuade interest-holders to sell.
- ▶ The court did not follow the steps that the legislation laid out for issuing a certificate of title after it determined the owners of the block. After the block was surveyed, it should have advertised the plan, allowed for inspection, heard objections, and amended the plan if necessary, before issuing a certificate of title. If it had been followed, this process would have provided a period of consolidation and clarification before interests were sold or partitioned.
- ▶ The legislation allowed the court too much discretion, denied parties legal representation, and provided no readily-available review or appeal mechanism.

We find that the Crown influenced or contrived these circumstances, or acted directly to bring them about, wrongfully subjugating the interests of owners in the Waimarino block to the Crown's policy objective of purchasing as many of the interests in the block as it could, at prices and on terms most advantageous to it.

### (4) *The partition*

When the court moved to determine and partition out the Crown's interest in the Waimarino block, it had not attended first to the owners' inspection of and response to the survey plan. It heard the Crown's application despite the near total absence of those owners who had not sold their interests to the Crown, and in the face of active opposition of many of those who had sold their interests. Both reflected the high level of frustration and distress that resulted from the Crown's approach to purchasing Waimarino ownership interests.

Most of the sellers present wanted the court to adjourn while they held an out-of-court meeting with the Crown to establish which parts of the block the Crown could fairly claim. The Crown opposed this. The court supported

the Crown's stance, confirming that the Native Land Court regime was intended to advance the Crown's agenda, and not to protect or promote Māori interests. Here, the court took account of Māori disaffection only to the extent of characterising it as a conspiracy to frustrate the Crown's application, and declaring that absent non-sellers had only themselves to blame if they were left with the 'precipices and pinnacles'.

Taking this approach to determining the Crown's interests, the court once more overrode Māori owners' interests. The native land laws allowed the partition case to proceed without the participation of those whose interests the court was really determining by default. The effect of this was exacerbated when the court went beyond its powers to partition the interests of those who had not sold to the Crown and to determine their relative interests, although they did not ask the court to do this, and there was therefore no notice.

This irregular exercise of court power enabled the Crown to move directly to establish reserves for those who had sold their interests.

We find that the native land laws facilitated the court's support of the Crown's interests and the subjugation of the Waimarino owners' interests, and provided no means for affected owners to call the court to account to the extent that its disregard of the legislation went beyond the discretion that the law allowed.

#### **(5) Reserves**

The purchase deed stated that Māori who sold to the Crown would receive up to 50,000 acres of reserves, but when negotiating the purchase the Crown's purchase agents assured Māori that they would get 50,000 acres. The Crown reserved only 33,140 acres. It claimed that this lesser amount reflected the fact that fewer owners sold their interests than the Crown expected, but the Crown did not mention this element in negotiations. Even if it proportionally reduced reserves to take account of it, it would have reserved 44,580 acres.

The Crown's agent, Butler, determined the number, size and location of reserves without Māori agreement or even input. The allocation did not properly or sufficiently take

into account the needs of tangata whenua. Many were allocated fewer than 50 acres. On any view of it, 50 acres should have been an absolute minimum, because that was the standard that the Crown set for itself. In most places, allocation at this level would have been barely enough for subsistence. Waimarino Māori found their interests confined to seven non-seller blocks, and six seller reserves which, against their wishes, did not include a number of places of longstanding occupation and cultural importance.

What the Crown focused on instead was aggregating its own 378,360 acres in one largely contiguous area that rendered them as valuable and as useful as possible.

#### **(6) Remedies**

We find that the avenues available to Māori with interests in the Waimarino block to seek and obtain review and redress of the decisions and processes that illegitimately affected them were few, and ineffective.

Although affected Māori sent letters of protest and petitions to Wellington, and applied to the chief judge for rehearings, these approaches yielded almost nothing of what they asked for. The system's intransigence was in spite of the fact that, as these findings show, the performance of the court and Crown agents left much to be desired. Ironically, the only protest that could be regarded as at all successful was that of Te Kere Ngātaierua and Ngāti Tū, who acted largely outside the law to resist the decisions that deprived them of their property rights, but managed to extract from the Crown many years later two extra reserves.

We find that if the Crown had provided a court system that incorporated an automatic right of appeal when the court, at first instance the Native Land Court, erred either as to process or substance, many of the effects of the court's conduct – which materially facilitated the Crown's actions to the detriment of Māori – might have been averted.

#### **(7) Breaches**

It follows from these findings that the Crown acted inconsistently with the principle of good government when it legislated for a court process to comprehensively

determine Māori rights in land, but reposed in the court so much discretion that it could make decisions that were very poor both as to process and substance in the many ways found in this chapter, and with no right of appeal.

It also engaged in conduct inconsistent with the principle of active protection when it wrongfully subjugated the interests of owners in the Waimarino block to the Crown's policy objective of purchasing as many of the interests in the block as it could, at prices and on terms most advantageous to it. It instructed its agents accordingly, and they embarked on a wrongful exercise of purchasing individual interests at speed before the court determined their relative size, and blocked the process of partition that owners wanted to occur before interests were purchased.

Other particularly egregious aspects of Crown conduct need special focus.

(a) *Minors' interests*: We take a very dim view of the Crown's approach to purchasing minors' interests in the Waimarino block, which happened to have a larger than usual percentage of owners who were minors. One of the salient features of democracy introduced by the Magna Carta, 800 years old this year, was that the Crown too was subject to law. This became a fundamental element of the rule of law, brought to New Zealand along with the English colonists. But here, the Crown enacted, but did not comply with, a process for appointing minors' trustees. Instead, it purchased minors' interests from persons not formally trustees, and who therefore lacked legal capacity to sell on minors' behalf. The Crown knew that it had not followed the law, but specifically requested the Native Land Court to proceed to recognise its purchases from minors regardless. This was poor conduct indeed, and breached not only the law but every Treaty principle in the book.

(b) *Reserves*: The Crown accepted that it did not allocate the area of reserves anticipated in the Waimarino purchase deed. We go further. We find that the Crown's agents misled Waimarino owners when it told them that, following purchase, sellers would be left with 50,000 acres of

reserves, and that the choice of location would be theirs. The Crown's later justification of fewer reserves because it did not purchase the entire block was never prefigured to Māori owners. It was in any event disingenuous because the reserves allocated amounted to significantly fewer acres than would have resulted from calculating reserves based on the acreage of the Crown's actual purchase. Reserves for Māori are always important, but never more so than here, where so much land was alienated so quickly and by questionable means. The Crown's conduct, which reduced the already miserly acreage left to Waimarino Māori, and did not ensure that key significant areas were included in reserves, breached its duty of good faith, and failed to actively protect the interests of its Treaty partner.

(c) *Redress*: We have found that the Crown provided no effective means of redress for Māori adversely affected by the court's processes or the Crown's purchase practices. An automatic right of appeal from the capricious decisions of the court at first instance could alone have averted many of the worst outcomes here.

The Crown's failure to provide an effective, independent reconsideration of the decisions concerning the Waimarino block that adversely affected tangata whenua went to the fundamental guarantees of the Treaty. Article 2 guaranteed Māori ownership of their land, and their ability to choose whether or not to sell it; article 3 guaranteed them the rights of British citizens, which included due process of law. In the case of Waimarino, many Māori were effectively denied the ability to be recognised as owners of the land, to assert their rights as owners, or to decide freely and transparently whether or not to sell. In these circumstances, not providing to Māori effective means to have poor decisions reconsidered and redressed was an egregious breach of the Treaty and its principles.

## 28.16 CHAPTER 14: LAND ISSUES FOR WHANGANUI MĀORI, 1900–52

### 28.16.1 What did this chapter cover?

In this chapter, we described and analysed:

► the agreements made between Whanganui Māori and

the Crown at the end of the nineteenth century concerning future arrangements for land management;

- ▶ the 1900 legislation that set up Māori land councils;
- ▶ the changes that were made to the land councils regime in 1905;
- ▶ what the Stout–Ngata commission said about land in Whanganui; and
- ▶ Māori representation on the land boards in Whanganui.

### 28.16.2 Findings

The Maori Lands Administration Act 1900 could have gone a long way towards giving effect to the Treaty guarantee of te tino rangatiratanga of Whanganui Māori. There is no doubt that a trustee regime independent of the Crown and political vagaries had potential benefits for Māori landowners. Trustees had strict legal duties to their beneficiaries: they were obliged to abide by the terms of the trust, and to act always in beneficiaries' best interests.

Political vagaries ultimately triumphed, however, for it was in response to perceived pre-election imperatives in 1905 that the Government hurriedly introduced changes that robbed the system of the features that were, for Māori, most promising. Māori had no chance, in advance of the 1905 Act, to provide necessary input, much less consent. This was the more disappointing as the system of land councils was the outcome of a lengthy process of engagement. That engagement generated in Whanganui Māori particular confidence and hope, which they exhibited by vesting more land in the council than Māori of any other district. For the Crown to change the system suddenly without so much as a by-your-leave was inevitably disillusioning.

The 1905 changes were contrary to the broad understanding about Māori land administration forged between the Crown and Māori in 1900. By removing the Māori-elected representatives from Māori land boards and reducing Māori representation to just one of three members, the Crown breached the principle of active protection.

We reject the Crown's argument that it did not matter who was on the land board as long as it fulfilled its trustee functions properly, and there was no evidence that it did not.<sup>13</sup> This argument took no account of the Treaty

guarantee to Whanganui Māori of te tino rangatiratanga, the inevitable loss of autonomy when they lost an effective voice in the management of their land, and the consequential loss of the opportunity and experience they would have gained if they had been permitted continued direct involvement in managing leases.<sup>14</sup> There is every reason to think that Whanganui Māori wanted to retain influence in the district land board. Instead, the 1913 Act did away with Māori representation entirely. This change too lacked the necessary Māori input or consent, and breached the Crown's Treaty guarantee of te tino rangatiratanga of Whanganui hapū and iwi.

Māori land councils, land boards, and the Māori Trustee, when acting as trustees for Māori, were not agents of the Crown. However, the Crown was responsible for the design of the regime, and any negative outcomes that flowed from that. It was obliged to monitor the scheme to ensure that it fulfilled its statutory objectives and remained what Māori wanted and had agreed to. It should have been ready to respond if and when things went off course.

In some situations, particularly after the establishment of land boards that had no Māori representation and the introduction of compulsion in the vesting of land in boards, the Crown's Treaty obligations might have required it to intervene in the management of trust lands for the protection of Whanganui Māori interests. Decisions about any such intervention should have been made with the consent of Whanganui Māori.

## 28.17 CHAPTER 15: MĀORI LAND PURCHASING IN THE TWENTIETH CENTURY

### 28.17.1 What did this chapter cover?

In this chapter, we described and analysed:

- ▶ the process by which the Crown and private parties purchased 406,436 acres from Whanganui Māori owners during the twentieth century;
- ▶ Crown purchases that were completed during the 'taihoa' period between 1900 and 1905;
- ▶ how Crown purchasing resumed after 1905;
- ▶ Crown and private purchasing after 1909;

- ▶ developments in purchasing practice after 1930; and
- ▶ prices.

### 28.17.2 Findings

#### (1) *A promising start soon compromised*

At the opening of the twentieth century, the Crown acknowledged as a national concern the potential for Māori to become landless, engaged with Māori on land issues and how to address them, and passed legislation that they supported. Under the legislation passed in 1900, the Crown could complete purchases already underway, but otherwise placed a moratorium on purchasing Māori land that lasted for five years. We saw no clear evidence that the ‘completion’ process was misused in the Whanganui district.

In 1905, in response to settler pressure, the Government scrapped the moratorium and re-introduced Crown pre-emption. We acknowledge that the Crown had to address settlers’ needs as well as those of Māori, but when it resumed the purchase of Māori land so quickly, the Crown was prioritising the wishes of settlers – and seeking their votes in the forthcoming election. This was particularly disappointing for Māori in Whanganui, who entrusted more land to the district Māori land councils for leasing out to settlers than Māori of any other district.

#### (2) *The Crown’s prices for land too low*

For the first decade of the twentieth century, the Crown had a near total monopoly on purchasing Māori land, and there was no system of independent valuation. The Crown and its agents could really dictate price. ‘Absurdly low’ was Stout and Ngata’s 1907 evaluation of the prices paid for Whanganui land. In this respect we find that the Crown acted inconsistently with the principle of mutual benefit, and breached its duty of active protection of Māori interests.

The Crown’s self-conferred position of privilege in the market over the next few years carried with it an extra duty to ensure that, when purchasing Māori land, it complied with a high standard of care for Māori interests. It did not meet that standard. It was good that from 1905 the law required independent valuations of Māori land,

but evidence suggests that closing the market to competition kept prices low. Nor did prices, or later, valuations, have to take account of resources such as millable timber – another situation that attracted adverse comment from commissioners Stout and Ngata.

It was sometimes said that lower prices for Māori land were to be expected, because it was hedged around with restrictions and complications. This argument is fallacious because first, the Crown created the restrictions and complications when it designed the Māori land tenure system so poorly, and it had the power to change it. It should not have paid Māori less for their land on account of negative features it created. Secondly, where the Crown acquired freehold title without restrictions, that is what it should have paid for. If the Crown had a general duty to procure land as efficiently as possible for settlement and the benefit of the country as a whole, it surely cannot follow that Māori should have funded that objective.

We find that the Crown’s payment of lower-than-market prices for Māori land breached its fundamental duty to recognise Māori ownership of land, and to treat them properly when they decided to sell. That involved setting a price in an equitable way, so that there was a true meeting of minds on the bargain in every case. Any other arrangement breached the Crown’s duty to act in the utmost good faith.

#### (3) *Serial partitions detrimental*

The Crown’s piecemeal purchase of individual interests, and its failure then to manage the ensuing rounds of partitioning so as to minimise disruption, uncertainty, and cost for owners, was iniquitous. We accept that the Crown did not set out deliberately to disadvantage Māori by its actions, but disadvantage certainly resulted. Where the Crown took land in lieu of payment for surveys, it amounted to little more than expropriation, and breached article 2.

#### (4) *Stout and Ngata unheeded*

The appointment of Stout and Ngata to carry out an audit of Māori land was a resoundingly positive step – completely undermined by the fact that their report

was substantially ignored. The Crown carried on buying Māori land in our inquiry district – conduct which, in the Hauraki inquiry, the Crown acknowledged was ‘problematic in Treaty terms’.<sup>15</sup> The Crown could helpfully have extended that acknowledgement to Whanganui.

#### **(5) 1909 Act facilitated land loss**

The Native Land Act 1909 and its amendments contributed to the whittling away of the landholdings still in Māori hands. This legislation looked as though it provided for collective decision-making, but in fact the quorum provisions made it possible for a tiny minority, sometimes voting only by proxy, to carry the day. These provisions, coupled with the lack of any avenue for dissenting owners to get decisions reviewed, were in breach of the Crown’s duty to actively protect the interests and authority of Māori over their land.

Some Crown agents, unchecked by the Crown, actively subverted collective decisions against selling by approaching individual owners to persuade them to sell. For the Crown to recognise collective decisions to *alienate* land but not to uphold those to *retain* it, was inconsistent and lacked integrity. Furthermore, the 1913 amending Act left the land boards without Māori representation, and at the same time provided them with mechanisms for selling land without the agreement of all its owners. These acts and omissions breached the Crown’s duty to act reasonably, honourably, and in good faith.

We welcome the Crown’s concession that the broad definition of ‘alienation’ under the 1909 Act prevented the productive use of land under proclamation. Proclamations put unreasonable pressure on owners to sell, and created a market that unreasonably favoured the Crown. The Crown argued that the provision was intended to protect itself and Māori owners from land speculators. However, where it bought at low prices and then on-sold at a significant profit, the Crown itself behaved like a speculator. Proclamations, and conduct that exploited them to the detriment of owners of Māori land, breached the Crown’s responsibility to act reasonably, honourably, and in good faith. This was particularly the case where proclamations were extended, sometimes repeatedly.

There was also the fact that many Whanganui Māori had entrusted land to Māori land councils (which became Māori land boards) for leasing out, to generate income for landowners. Under the 1909 Act, the board could sell that land in certain circumstances. It could also revoke the status of reserves in order that they might be sold. These changes undermined entirely the purpose for which the owners had requested the vesting or reservation of their land – namely, to protect them in the hands of their customary owners. This conduct of the Crown also breached its duty to act towards Māori in the utmost good faith.

#### **(6) Ensuring Māori kept land they could ill afford to lose**

In terms of ensuring that Māori retained sufficient land, the limited evidence we received on this issue suggests the Crown and its agents were generally careful to observe the strict letter of the law with regard to individuals’ ownership of a certain number of acres. What was lacking was any sense of the *overall* extent and effect of land loss on a hapū or iwi basis.

As we discussed in chapter 9, there are many aspects of the Crown’s Treaty duties to Māori that are similar to fiduciary duties at law, but we do not need to frame those duties in terms of trust law because, for us, the Treaty and its principles are a source of obligation. We can also agree – and this is an allied but different point – that, as Stout and Ngata observed, Māori saw themselves as having a fiduciary duty towards their descendants to hold on to ancestral land, and with those commentators’ belief that the State had a role in ensuring that Māori held on to the land that remained to them and their tribe.<sup>16</sup>

Advancing the position that the Crown was not a fiduciary for Māori, the Crown argued that the essence of the Treaty relationship is a ‘respect for the other party’s autonomy’.<sup>17</sup> Treaty partners respecting each other’s autonomy is certainly a noble ideal, but actually the Crown consistently acted to undermine the authority of te iwi Māori in the nineteenth century, so that by the twentieth century their ability to act autonomously was negligible. When it came to selling their land, then, the conduct of Whanganui Māori did not usually look like that of a proud tribal people forging their own economic path into a prosperous

future. Sales were much more often a case of individuals forced into parting with ancestral land because they lacked personal and family resources to do anything else. Sometimes, individuals' interests were bought (or taken) without their knowledge. Selling land in situations like these was not an expression of autonomy.

We find that the Crown, in breach of its duty to actively protect Māori interests, failed to monitor the ongoing effects of its policies, and whether Māori retained sufficient land at a collective and cultural level as well as at an individual and economic level.

Given the widespread alienation of Māori land in the nineteenth century, and the warnings that Māori leaders and the Stout–Ngata commission sounded, we might have expected that, in the twentieth century, the Crown would take more care both when it purchased land in Whanganui itself, and when it allowed others to do so. It was not until the last quarter, though, that the purchase of Māori land in Whanganui fell away and almost ceased. And only upon enactment of Te Ture Whenua Maori/The Maori Land Act 1993 was there explicit recognition that it was desirable for the Crown to actively *promote* the retention of land 'in the hands of its owners, their whanau, and their hapū'.

## 28.18 MATAPIHI 3: THE INTERESTS IN MĀORI LAND OF MERE KŪAO

### 28.18.1 What did this matapihi cover?

In this matapihi we described and analysed:

- ▶ what happened to the landholdings of Mere Kūao;
- ▶ how portions of Murimotu 5B2A came to be sold in the early 1900s;
- ▶ how the Crown acquired portions of Murimotu 3B1A, for the purposes of extending the Karioi Forest; and
- ▶ how the land remaining in the ownership of the non-sellers of Murimotu 3B1A (Murimotu 3B1A2) came to be overrun by *Pinus contorta*, a plant that the Crown introduced for timber, but which was later recognised as a noxious weed.

### 28.18.2 Findings

#### (1) Murimotu 5B2A

The sale of Rangi and Hinurewa Whakapū's shares in Murimotu 5B2A in 1917 and 1918 to a local farmer, and the subsequent location of his partition Murimotu 5B2A1, caused longstanding problems for the owners of the balance block, and for Ngāti Rangi. The balance owners were left with the poorer land and no legal access, and both they and Ngāti Rangi lost to a farmer culturally important land near their maunga tapu.

This is an example of how private purchasers acquired land interests in undivided blocks, and then got the Native Land Court to partition out the proportion of the block that corresponded to the interests they had purchased in a way that advantaged them and disadvantaged the owners of the balance block. These sales and the subsequent partition illustrate the fundamental problems with the Native Land Court's individualised titles and partition process. Those with wider interests in the block – the balance owners, and also the hapū traditionally connected to it – should have been informed and involved. Their exclusion negated whakapapa and customary ownership.

This flawed system was at odds with the article 2 guarantee of te tino rangatiratanga. We recommend that this case should be taken into account in the Treaty settlement negotiations between Ngāti Rangi and the Crown.

#### (2) Murimotu 3B1A

Claimants told us that their kuia Mere Kūao did not want to sell her interests to the Crown. The Crown purchase officer's letter confirms that there were owners in the block who did not want to sell, that Mere Kūao was one of them, and that he was hoping to change her mind. He evidently did, and we do not know how. We think it most unlikely that Mere Kūao would have known what part of the block the Crown would seek to have partitioned out, and without that knowledge she could not secure Ngāti Rangi's access to the wāhi tapu on Wāhianoa Stream.

We consider that the Crown was obliged to consider carefully whether Māori owners had sufficient remaining

land; not pressure owners to sell land; and to make clear where it wanted to locate its partition before buying the interests. However, in the absence of detailed evidence before us as to the circumstances behind the sale of her interests, we cannot definitively state that it did not fulfil those obligations.

This case highlights once more the consequences of individualised titles and the absence of satisfactory mechanisms to enable collective management of land. We also censure the court's willingness to comply with the Crown's request to locate its share of the block where it did without first understanding what the vendors believed they were selling, and eliciting the views of the owners of the balance of the block.

We find that the legislative requirements for partitions were wanting as to process, and this breached the principles of the Treaty. The Crown's duty of active protection obliged it to enact legislation that ensured that, when interests were alienated, the alienor was represented or present in court when the alienee's partition was defined, and that the interests of the owners of the balance of the block were properly assessed and protected. This failure prejudiced the whānau of Mere Kūao and Ngāti Rangī.

We recommend that this breach of the Treaty is taken into account in the Treaty settlement negotiations between Ngāti Rangī and the Crown.

### (3) *Murimotu 3B1A2*

The Crown did not breach the Treaty when it planted *Pinus contorta* for plantation forestry in the Karioi State Forest. There is no evidence to suggest that its trials of plantation species yielded results that should have put it on notice that *Pinus contorta* had characteristics that would enable it to infest land far beyond where it was planted. Those characteristics were, however, observed by the 1950s, and should have been acted on sooner. By then, though, *Pinus contorta* had already colonised Murimotu 3B1A2.

The enthusiastic importation of exotic plants to New Zealand had many disastrous consequences that were

understood too late. We can look back now on the introduction of *Pinus contorta*, and the failure to identify its disastrous potential and control it sooner, and wonder at the folly of our forebears. It is difficult, we think, to view these events in our past as breaches of the Treaty, because the plant introductions were usually motivated by the intention of adding to the beauty or utility of New Zealand's landscape. We find it impossible to distinguish the introduction of *Pinus contorta* from all the other introductions, good and bad.

On the other hand, in our view, for much of the twentieth century, New Zealand's noxious weeds regime prejudiced Māori landowners because it failed to acknowledge that Māori were already at a disadvantage in relation to their land. We have seen how the system designed for Māori land tenure left landowners with a legacy of title difficulties, including fragmentation of title and fractionation of ownership. (These phenomena are discussed in sections 10.6.4(6), 11.9, and 15.4.6.) These were tremendous obstacles to their developing their land to a standard where it would generate sufficient income to cover the cost of a weed control programme. This was the case at Murimotu 3B1A2, as Māori owners could earn nothing from the land, and struggled to arrange meetings of owners or even gain access to their land to address the problem of noxious weeds.

The Crown delegated the control of noxious weeds to the Manawatu-Wanganui Regional Council. The evidence showed that the officers of that authority knew about the very considerable problems that the Murimotu 3B1A2 owners faced, but did not regard themselves as having discretion to take those circumstances into account in administering the noxious weeds regime. The law they administered had no regard at all for the particular difficulties that Māori like the owners of Murimotu 3B1A2 faced, and they were accordingly granted no relief.

The failure of the regime for controlling noxious weeds to engage with, and take into account, the circumstances that were peculiar to the owners of Māori land like Murimotu 3B1A2 breached the Crown's duty of active

protection. The situation as regards Murimotu 3B1A2 was particularly egregious because the problem of wilding *Pinus contorta* was clearly of the Crown's and not the owners' making, and failing to make allowances for that in dealing with its owners was very unfair. It caused them expense, hardship, and stress that was unnecessary and wrong.

We are also alarmed that the current regional council regime for dealing with *Pinus contorta* appears to deprive Māori owners of non-rateable land of financial assistance for eradication. This situation compounds the problems of the owners of Māori land in this region, who are particularly ill-equipped to deal with the wilding pine problem because of the nature of their title and its inherent difficulties. The Crown is liable, as the Treaty partner, for this breach of Treaty principles by its delegate, Horizons Regional Council.

In relation to the noxious weeds regime at Karioi and its impact on the owners of Murimotu 3B1A2, the Crown has failed to fulfil its Treaty obligations to actively protect Whanganui Māori interests and has breached the principle of partnership.

The Crown's use of forest licence rentals, to which Māori become entitled as part of Treaty settlements, to meet its own responsibility to remedy the problem it created is also unfair and breaches the Crown's duty to act towards its Treaty partner with utmost good faith. The Crown should stop using rental reductions as a way of reimbursing licensees for *Pinus contorta* control.

### 28.18.3 Recommendations

We recommend that the Crown:

- ▶ develops a strategy, implemented by regional councils, for funding pest management on Māori land, including non-rateable Māori land, which recognises the problems and difficulties faced by Māori landowners in Whanganui as a result of the inherent weaknesses in the Māori land tenure system it enacted;
- ▶ takes steps forthwith to curtail the practice of reducing Crown forest rentals in return for licensees controlling *Pinus contorta*; and
- ▶ takes into account the amount of money that has been

taken out of Karioi forest rental income for *Pinus contorta* control when negotiating the Treaty settlement with Whanganui iwi.

## 28.19 CHAPTER 16: SCENIC RESERVES ALONG THE WHANGANUI RIVER

### 28.19.1 What did this chapter cover?

In this chapter, we described and analysed:

- ▶ the Crown's acquisition of about 6,675 acres of Māori land for scenic reserves;
- ▶ how the Crown went about acquiring this land; and
- ▶ the administration and management of the scenic reserves.

### 28.19.2 Findings

#### (1) *Compulsory acquisition of Māori land for scenery breached article 2*

The compulsory acquisition of 6,678 acres of Māori land for scenic reserves on the Whanganui River breached article 2 of the Treaty of Waitangi. None of the acquisitions met the test of being necessary in circumstances where the national interest was at stake and there were no other options. All of the Crown's actions on which we make findings here were part of that fundamental breach of the principal guarantee in the Treaty.

#### (2) *Takings advanced a national interest but no exigency*

Scenery preservation was a policy objective that advanced the national interest, but it was not an exigency of the kind that justifies compulsory acquisition of Māori land. Lives were not at risk, and nor was there a state of national emergency such as might arise from a nationwide power shortage.

The level of exigency must be very high where, as here, the riverside land was particularly valuable to tangata whenua for cultural and economic reasons, and where there were other options available for preserving the scenery on the land.

#### (3) *Taking not in the last resort: options were available*

First, the Crown could and should simply have taken less

Māori land, being careful to take only the land absolutely necessary to further its policy objectives. It should also have exercised a preference, wherever possible, for taking other land. Instead, and accepting that much of the remaining bush was on Māori land, it seems likely that the official view was that taking Māori land was easier and generally preferable to taking other land.

Rather than proceeding straight to compulsory acquisition of Māori land on the Whanganui River, the Crown could have:

- negotiated with the Māori owners to purchase scenic land (negotiation was standard when land was wanted from Pākehā owners), or negotiated other arrangements that would allow Māori to continue using the land while protecting its scenery;
- explored the possibility of exchanging the scenic Māori land for Crown land that was comparable in other ways;
- used section 232 of the Native Land Act 1909 to declare a 'Native Reservation' as a 'place of historical or scenic interest' for the common use of its owners, as this provision allowed the imposition of restrictions on its use;
- empowered Māori land councils to have a role in scenery preservation; and
- legislated to facilitate the compulsory acquisition of interests in the land that were less than the freehold interest (leases, licences, covenants).

#### **(4) Taking wāhi tapu particularly reprehensible**

We regard as particularly reprehensible the Crown's conduct in compulsorily acquiring urupā and wāhi tapu, especially in cases where the owners of the land in question had told the Whanganui River Reserves Commission why they needed to retain mana over this land. The sacred places of tangata whenua should never have been compulsorily acquired for scenery. Allowing Māori to access urupā does not retrieve the Crown's position.

The Crown's reluctance to acknowledge its breach in taking the urupā, and to recognise immediately the need to return them as soon as possible, exacerbates its hara (sin, blameworthiness).

We note that the Crown indicated in other submissions that it may be prepared to return urupā if land was lost in

breach of the Treaty. It says, however, that this will depend on the current status of the land.<sup>18</sup> In the case of urupā on land taken for scenery preservation, we think it is unlikely that any will have fallen into private ownership since the whole point of the takings was that the land should come under, and remain under, the control of the Crown.

#### **(5) The Crown's duty to ascertain whether tangata whenua could spare land**

The Crown acknowledged that when acquiring Māori land for public works, it must consider whether affected landowners will retain sufficient land to cater for their foreseeable needs.

The Crown embarked upon its programme of land purchase for scenery protection in 1903, without consideration of whether Whanganui Māori had land to spare. Then, in 1907, the Stout–Ngata Royal Commission gave the Crown the best and most reliable information then obtainable on what land Māori could afford to give up. They told the Crown that while small areas of Whanganui Māori land might still be purchased and preserved, large scale land alienations along the Whanganui River were no longer appropriate. Rather than following this advice, the very next year the Crown authorised taking 19,000 acres of Māori land along the Whanganui River for scenery preservation, including most of the riverside land that remained to Māori. This conduct was a further breach of the Crown's duty of active protection.

For various reasons, the 6,678 acres of Māori land taken for scenic reserves along the Whanganui River was significantly less than the 19,000 acres originally authorised. Nevertheless, Whanganui Māori did not want to sell, had already sold the land that was less important to them, and could not afford to give up these 6,678 acres.

#### **(6) Compulsory acquisition regime monocultural**

The early twentieth century regime for taking scenic land was like taking land for other public works purposes under the public works regime, and was monocultural in the same ways.

In enacting it, the Crown did not take account of the special significance of land to Māori. It also gave no weight

to the important fact that, by the twentieth century, the land remaining in Māori hands was usually significant or strategic for both cultural and economic reasons. By facilitating the easy purchase of Māori land for scenery, the Crown failed to protect Māori from unnecessary cultural, spiritual, and economic loss.

Inherent in the idea that owners can be compensated for loss of land by payment of money is a conception of land as an asset rather than as a taonga. Moreover, the criteria for calculating the value of this riverside land did not recognise its special value to tangata whenua, nor its unique scenic beauty. It was valued only by reference to its potential as farmland, which delivered both cultural insult and a low price.

The Crown's monoculturalism in operating such a regime breached its duty of partnership.

#### **(7) Valuation process**

Māori objected to their land being valued by a Native Land Court judge, whereas general land went through an arbitration process. It is impossible now to ascertain whether the different systems actually produced results that were disadvantageous to Māori, but they certainly thought so at the time, and that view was upheld by an independent Royal Commission. Owners of Māori land who disagreed with a valuation had to contest it in the same forum that produced it, and this was inherently unsound procedurally.

We find that there was no proper basis for the Crown to operate a different valuation system for Māori land. It would have been fairer for Māori to have had available to them the system that was available to owners of general land.

The Crown's failure to allow this breached article 3 of the Treaty.

#### **(8) Poor process**

The Crown enacted procedural safeguards for owners of land to be compulsorily acquired for scenery, but these do not appear to have been applied to owners of Māori

land on the Whanganui River. Such failure breached the Crown's duty of active protection, and article 3.

#### **(9) Cultural harm**

We find that Whanganui Māori all along the river between Taumarunui and Raorikia suffered cultural harm, through the Crown trampling on their mana and presuming to take ownership and control of their taonga. This was a breach of the plain meaning of article 2 of the Treaty, and of the principles of partnership and active protection.

#### **(10) Economic harm**

Although it is not possible to quantify the extent of the economic harm to Whanganui Māori that resulted from the compulsory acquisition of those 6,678 acres that went into scenic reserves, we consider that there is sufficient evidence for us to infer that they suffered adverse economic effects from these factors:

- ▶ several groups already had too little land left, so that their remaining land played a critical economic role;
- ▶ areas suitable for, and previously used for, food cultivation were reduced;
- ▶ reduced acreages made remaining landholdings less viable for farming;
- ▶ because remaining on the land was more marginal economically, settlement patterns were affected;
- ▶ the prices paid for their land were low because of how the valuation criteria operated; and
- ▶ they were excluded from the economic opportunities arising from tourism (although factors other than land ownership were also involved here).

#### **(11) Māori excluded from management and governance of reserves**

Whanganui Māori were excluded from management of and decision-making concerning scenic reserves until 1958. From that time, the provision of one seat on various responsible boards was entirely inadequate. Its inadequacy is demonstrated by the Whanganui River Scenic Board seeking to acquire Māori land for scenery preservation

right up until comparatively recent times. Had a Māori voice been sufficiently strong, that culture would have changed much sooner.

Failure to provide for adequate Whanganui representation in the management and governance of scenic reserves breached the Crown's duty to interfere with tino rangatira-tanga as little as possible when engaging in compulsory acquisition of Māori land, and also breached its duty of partnership.

The modern regime for reserve management has been in place since 1990. Since the role of Whanganui Māori in that regime is inextricably linked to their relationship with the Department of Conservation (DOC), we make those findings in our chapter on the department and its role in managing the Whanganui National Park.

### 28.19.3 Recommendations

We recommend, in addition to general redress that responds to the serious Treaty breaches identified, that the Crown returns to Whanganui Māori title in all urupā and other outstanding wāhi tapu located on land it compulsorily acquired from them for scenic reserves. We list particular sites in appendix VII.

We reserve our recommendations about increased and different involvement of tangata whenua in management and governance of the land they formerly owned for our chapter on the Whanganui National Park, since inclusion in the park was the ultimate fate of most of the land taken for scenery preservation.

## 28.20 CHAPTER 17: NATIVE TOWNSHIPS

### 28.20.1 What did this chapter cover?

In this chapter, we described and analysed:

- › the development of legislation, from the early 1890s to 1910, for establishing and managing native townships;
- › the establishment in 1895 and subsequent management of a native township at Pipiriki; and
- › the establishment in 1903 and subsequent management of a native township at Taumarunui.

### 28.20.2 Findings

The Crown breached the Treaty and its principles both in creating the native townships legislation and applying it in Whanganui.

#### (1) Findings on the legislation

(a) *Consent to the native townships legislation*: Article 2 of the Treaty promised Māori that they could retain their land and exercise te tino rangatiratanga over it for as long as they wished. The first and second native townships regimes involved radical changes in the ownership and management of Māori land, but the Crown did not adequately or sufficiently discuss the legislation with Māori. Owners did not consent to important aspects of the regime contained in the Native Townships Acts of 1895 and 1910. The Crown acted inconsistently with its guarantee of te tino rangatiratanga and its duty of active protection, and did not fulfil the obligations of a good Treaty partner.

(b) *Compulsion*: Compulsory acquisition of Māori land for public works is justified only in exceptional circumstances and as a last resort in the national interest. Public works legislation has its own legislative history and rationale, but there are the same elements of compulsion in the legislation establishing the first and second native townships regimes, and we consider that the same test applies. There was no exigency such as to justify compulsion. Before acquiring land for townships, the Crown should have obtained all the owners' consent, but native townships legislation did not require it to do that. This breached the fundamental guarantee in article 2 of te tino rangatiratanga over Māori land until its owners wanted to sell.

(c) *Ownership and management*: Creating townships in and around Māori kāinga brought together often conflicting objectives of Pākehā settlers paying rent to Māori for the land they were occupying in a new town, and tangata whenua seeking to preserve their tūrangawaewae and traditional culture and also derive a decent income from

rent. The scheme for native townships was fundamentally disempowering for Māori, reposing ownership and management of their land in others. Inevitably, over time, the preferences of those in whom power and ownership was vested prevailed.

If the Crown takes over and manages Māori land on owners' behalf, as it did in native townships, it must include Māori in the development of policy about the administration of their land. The regime at no stage provided an avenue for Māori interests to be expressed and met, even when there was one Māori representative on the Māori land board before 1913 – although that was better than nothing. The Crown undermined te tino rangatiranga, breached its duty of active protection, and acted inconsistently with the principle of partnership.

(d) *Survey costs*: For Māori to have shouldered the whole burden of township survey costs was disproportionate and unfair. Māori were not the only beneficiaries of native townships: the Crown declared their importance for all of New Zealand. The Crown's failure to share expenses in the development phase of townships sabotaged the likelihood of their ever delivering meaningful economic returns to Māori. The Crown should have put this objective to the fore from the outset, and not doing so breached its duty of active protection.

(e) *Rent distribution*: The main benefit of native townships for Māori was supposed to be the rental income. It would have been both practical and culturally appropriate for owners to have the option of rents going into a communal fund, but this was not possible until 1922. The Crown's failure to provide this option was inconsistent with its guarantee of te tino rangatiranga.

(f) *Perpetual leases*: In 1910, the Crown empowered district Māori land boards to issue perpetually renewable leases, partly to address the demands of lessees. Māori had little opportunity to comment on the change before it happened. The failure to consult with beneficiaries about such a fundamental change to the administration of their estate was a serious omission. Both the change and the Crown's

failure to discuss it with Māori constituted a breach of the duty of active protection.

(g) *Land sales*: The Treaty obliged the Crown both to protect Māori ownership of their land for as long as they wished to retain it, and to ensure that they did not divest themselves and their uri (descendants) of too much land. This applied perforce to land they owned in townships, because a strong rationale for townships was facilitating the retention of Māori land in Māori hands.

The Crown acted in breach of its obligations when, in 1910, it introduced provisions allowing Māori owners to sell land in townships through meetings of assembled owners, or by giving their written consent to the Māori land board. This move flouted the recommendations of the Stout–Ngata commission of 1907, and undermined the ability of Māori to hold on to township land. At the very least, the Crown should have sought Māori consent before introducing the 1910 legislation.

We agree with claimants that the 1910 Act breached the Crown's duties to act in good faith, and to uphold te tino rangatiranga.

(h) *Māori occupation of the towns*: In our view, the Crown did not provide adequately for Māori to continue to occupy land in townships, nor for them to hold on to the land they owned and occupied once the townships got underway. The Crown wrongly limited native allotments to 20 per cent of township land in the 1895 Act, and although the later Act removed the cap, this did not address the fundamental failure of the Crown to provide for meaningful expression of mana Māori when it designed the township concept. Not including Māori in the management of their marae, papakāinga, and urupā under the 1895 Act was a harsh and unnecessary aspect of that regime, as was their later transfer to Māori land boards.

The Crown should also have gained Māori consent before opening up native allotments to lease and sale in 1910. The law changes at that stage allowed individuals to sell interests in land that tangata whenua had previously identified as places of vital importance to hapū.

This indifference to the cultural integrity and mana of tangata whenua again found the Crown wanting as a Treaty partner, and breached its guarantee of te tino rangatiratanga.

(i) *Public works provisions*: When the Crown conferred on itself legislative authority to acquire Māori land compulsorily, it breached the Treaty guarantee of te tino rangatiratanga. Treaty jurisprudence leaves open to the Crown the possibility of acquiring land compulsorily consistently with the Treaty in the rare situation of national exigency.

Native townships legislation was even worse than public works legislation: it permitted the Crown to acquire Māori land compulsorily without notice or compensation, *even though* Māori had given over the ownership of their land to the Crown or a trustee body on the basis that *it would be leased and not sold*. These italics express the sense of outrage that this Tribunal feels about the egregious breach of the Treaty that these legislative provisions, and the Crown's implementation of them, entailed. None of the arguments that the Crown tendered in justification – for instance, that the value of Māori land in the town would increase as a result of the public works – is solidly based. If it was to the benefit of Māori for their land to be used for public works, it follows that they would probably have agreed to sell land for that purpose. They should in any event have been paid, because public works would benefit not only Māori but the whole community.

We see no basis whatsoever for using compulsion, much less compulsion without notice or compensation. This was a flagrant breach of article 2.

## (2) Findings on Pipiriki

(a) *Setting up Pipiriki*: We consider that there was an element of compulsion in the negotiations for Pipiriki Native Township. Tangata whenua did want the town, but their consent was conditional. The site of the town was to be within certain boundaries; a particular urupā was to be reserved, with other reserves agreed later; and a Māori committee was to be set up, which the Government would deal with as representing the owners. There was no sign that tangata whenua favoured giving over to the Crown

legal ownership, management, and control of their land at Pipiriki. However, the 1895 legislation provided only one model for a native township, so it was that or nothing.

We saw no evidence of the Crown's forging a relationship with a Māori committee as leading Māori envisaged, so that tangata whenua would retain their mana in the township. The Crown also failed to follow its own legislation and reserve the urupā on Pukehinau. This exposed the urupā to inappropriate use while under the management of the Department of Conservation.

The Crown made no effort to ensure that public works were fairly compensated and offered back when no longer needed. Instead, it leased out land taken for public works, and kept the rents.

Taken together, the Crown's actions in setting up Pipiriki showed an unfortunate lack of regard for its Māori owners that amounted to a breach of the principle of partnership.

(b) *Economic benefits, and managing Pipiriki*: The Crown understood that tangata whenua gave up their control over Pipiriki lands in a manner not entirely of their choosing, in exchange for certain administrative and economic benefits. We find that this and the Treaty obligations inherent to the principle of partnership imposed a duty on the Crown to do its utmost to realise these benefits for Māori. It was in the nature of an exchange, and the Crown should have done everything in its power to deliver.

The Crown, however, largely withdrew from this responsibility. Tangata whenua were effectively excluded from the official administration of the town while it was under Crown management. Even when the township was transferred to the Aotea District Māori Land Board (without Māori consent), the Crown did not make sure that there was adequate Māori representation on the land board or that owners were consulted adequately.

Many economic benefits were never realised – an outcome brought about in no small part by the Crown's decision to make the township's development costs the responsibility of tangata whenua. We agree with the Crown that the wider economic situation played a significant role in the declining income from rents in Pipiriki, but it could

– and should – have limited the amount that owners were expected to pay for development and survey costs. This would have lessened the impact on tangata whenua of Pipiriki's financial collapse.

The way that the Crown implemented the regime at Pipiriki prejudiced tangata whenua. Owners received very little money individually, and until 1922 there was no capacity to manage rental income communally. Tangata whenua had no say in township management, so the Māori land board was able to issue perpetual leases without consultation or consent. Perpetual leases later delayed the return of land to its Māori owners.

The Crown therefore failed to fulfil its obligations as a Treaty partner, and undermined te tino rangatiratanga of Pipiriki Māori. The Crown could have ameliorated the very disappointing results of the townships scheme at Pipiriki – a concept that it promoted and pushed through without properly evaluating its real prospects – if it had helped the Pipiriki Incorporation financially when it took over the land in 1960. The Crown neither acknowledged accountability for any part of what happened, nor demonstrated a sense of responsibility towards tangata whenua, who paid the full price of the township's failure.

### (3) Findings on Taumarunui

(a) *Setting up Taumarunui township*: When it set up the native township at Taumarunui, the Crown went against the express wishes of tangata whenua. It postponed partitioning the land in the township, and deliberately limited input from the Māori land council, simply to avoid delaying its self-imposed timetable. The Crown did not gain the full consent of owners to the town, did not negotiate with them in good faith, and breached its guarantee of te tino rangatiratanga.

Gazetting Taumarunui under the second native townships regime, the Crown identified native allotments under a system that, for the most part, benefited Māori owners. Native allotments were laid out in the original survey plan, and the Māori land council added more sections when tangata whenua applied for them. However, the regime should have obliged it to gain hapū consent for the size and location of native allotments. Nor did the

council have authority to adjust the boundaries after the Crown proclaimed the town, and this meant it could not exclude Mātāpuna land from the township as some owners wanted. There are also questions about whether owners' agreement was sought or given to including a large recreation reserve in the township; reducing the Mōrero marae native allotment; and altering several streets.

In short, the system did not sufficiently respect te tino rangatiratanga of tangata whenua to ensure that the Taumarunui native township was established in a manner that was fair to Māori, or to which they agreed. The Crown should have done more to fulfil its duty of active protection.

(b) *Local government in Taumarunui*: The Crown has a duty that stems from article 3, which conferred on Māori the rights of British citizens, to ensure that Māori were represented on bodies that made decisions affecting them. When it set up local government in Taumarunui on which Māori were not fairly represented, it failed to meet its Treaty obligations. Although the Crown provided for Māori representation on the first native town council, one temporary seat was as far as it would go. After that, tangata whenua had no effective voice in local government. The local authority harmed Māori interests by supporting lessees who lobbied to be able to purchase freehold title in land in the town, and by imposing rates on unoccupied and culturally significant Māori land.

(c) *Lease management and land sales in Taumarunui*: While it was a native township, Taumarunui was beset by problems that negated the financial benefits that Māori were expected to derive from leases, and ultimately made selling their land a financially prudent decision.

Financial management of the town was generally poor, and not in the interests of the beneficial owners of the land. The Crown set up a leasing regime that, in the end, not only allowed perpetual leasing and subletting but meant relatively low rentals due to infrequent rent reviews and a questionable valuation and arbitration system. The Crown refused to partition the township before setting up the town, which delayed the distribution of rent until

1910, and exposed Taumarunui owners to disproportionate rates and levels of land tax. It then expected owners to cover all the costs of town development, survey, and river protection works from rents. Inconsistently with its Treaty duty to actively protect the interests of Māori, the Crown passed the Acts that provided for native townships, taxation, rating, and public works, the compounding effect of which was to the detriment of the beneficial owners of land in the native township.

These factors made it extremely hard for owners to hold on to their land. The Crown argued that it could not be assumed that owners were unwilling sellers. Owners who moved away from Taumarunui might have been less motivated to keep land in the town, but otherwise we saw no evidence that owners who began selling land in the 1910s and 1920s were 'willing sellers.' The Crown was not worried about these sales, nor motivated to support retention of Māori land interests in the town – although it was aware of the problems of rent distribution and increasing costs. Its unconcern about whether or not Māori held on to their land extended in 1913 to facilitating their selling it, because from then individuals could sell their interests with no input from the collective.

The Crown did not ensure that hapū were empowered to make decisions about their land. By neither seeking nor finding remedies for the problems that beset the leases, facilitating the sale of township land, and ignoring the interests of hapū in land retention, the Crown breached its obligation to uphold te tino rangatiratanga of Taumarunui Māori, and to actively protect their interests.

(d) *Māori presence in Taumarunui*: It was reasonable to expect the Crown to protect places in townships that Māori occupied and wanted to keep. This duty resides in the plain meaning of article 2 of the Treaty. We consider that to fulfil its obligations, the Crown had to set up a system that provided for hapū to make decisions about leasing or selling land in native allotments.

The Crown plainly did not safeguard sites of importance to Māori in Taumarunui, and that is why they no longer own them. The Crown stood by when owners partitioned and sold land because of rates debts, as happened

on the native allotments Mōrero and Wharauroa. From the whole township regime, in which they had too little power, Māori derived too little financial benefit, and were left to cope alone with problems that were not of their making. This led first to disconnection from and then to sale of land, and a role for hapū that was ultimately only vestigial.

In the case of Mōrero marae, the Crown contributed to the alienation of land, targeting the marae land for public works takings. It later returned some of this land, but it required Taumarunui Māori to pay \$142,500 for what it would have cost the Crown to remove the buildings on site. We find that, in making this payment a precondition of the return, the Crown did not act fairly or in accordance with Treaty principles. The Crown should have taken into account the impact of the takings on the Mōrero community; the cultural and spiritual significance of the site; and the benefits that the Taumarunui community had gained from the public works. It should have allowed tangata whenua to keep the buildings at nil cost. The Crown was obliged to make provision for surplus public works land to be returned at the earliest possible opportunity and with the least cost and inconvenience to the former Māori owners. Its failure to do so in respect of Mōrero marae was inconsistent with its Treaty obligation under article 2 to actively protect Māori rangatiratanga over their ancestral land.

At Mātāpuna, the Crown took 25.5 acres of Māori land in the Ōhura South G block for railway purposes under the Public Works Acts 1894 and 1903. It took the land without compensation, and almost certainly against the wishes of its owners, who were using it at the time, and for whom it had obvious significance given the location of the wharepuni of the same name, and an urupā. There is a rigorous standard for Treaty-compliant public works takings: the circumstances must be exceptional, and the taking must be necessary after all alternatives have been exhausted, and the national interest requires it.<sup>19</sup> A compulsory acquisition of 25.5 acres of culturally-significant Māori land for a ballast reserve did not meet the test, and the acquisition breached the guarantee of te tino rangatiratanga. The Crown compounded its breach by failing to

offer the land back to its former owners when it was no longer needed for the purpose for which it was taken. It seems to have sold most of it to private purchasers. Even in the 1990s, in the era of Treaty claims and land banks, the Crown proposed to sell the land where the line depot was located when it became surplus. Why it was to be sold rather than land-banked, and why the claimants had to pay to get it back, was not explained.

### 28.20.3 Recommendations

We recommend that the prejudice flowing to Whanganui hapū from the Treaty breaches outlined in our findings should be taken into account when claimants negotiate a settlement with the Crown.

#### (1) *Land taken for public works and other Crown land*

We recommend that the Crown gives back to the relevant body or bodies the \$142,500 plus interest that it inappropriately exacted as a condition of its return to them of Mōrero marae land. Given the prejudice tangata whenua of Mōrero suffered as a result of the wrongful taking from them of land without notice or compensation, the Crown should have gifted the buildings located on Mōrero land to tangata whenua. We also recommend the Crown return the money paid for the Mātāpuna ballast pit land for the same reasons.

Claimants requested the return of other land taken over the years for public works in Taumarunui and Pīpīriki. We recommend that the claimants and the Crown work together to identify and return other Crown land taken for public works as appropriate.

We recommend that the Crown continues the process of returning Crown land in native allotments as cultural redress to representative hapū bodies in Pīpīriki and Taumarunui. The Crown should also take up any opportunities to work with local authorities to encourage them to do the same. Claimants specifically seek the return to a 'collective of interested claimants and co-managed between Maori, the Council and DOC' of the recreation reserve at Ngāhuihuinga that was formerly part of the Taumarunui papakāinga.<sup>20</sup> We recommend that the

Crown works with claimants to establish how that might best be achieved.

#### (2) *Perpetual leases*

We recommend that the Crown takes the necessary steps to ascertain whether there is native townships land in this inquiry district that was perpetually leased, but has not been the subject of compensation under the Maori Reserved Land Amendment Act 1997. If so, owners of that land should receive such compensation, irrespective of whether their land was Māori reserved land in 1997.

## 28.21 CHAPTER 18: THE 'VESTED LANDS' IN WHANGANUI

### 28.21.1 What did this chapter cover?

In this chapter, we described and analysed:

- ▶ the transfer of about 115,000 acres of Māori land to the Aotea District Māori Land Council between 1902 and 1912;
- ▶ how most of that land was leased out to Pākehā farmers;
- ▶ how the vested land was managed, including the sale of some land and compensation for improvements;
- ▶ the process of amalgamation and incorporation in the second half of the twentieth century; and
- ▶ the extent of Māori occupation on vested land.

### 28.21.2 Findings

The Crown initiated the vested lands scheme with good intentions, providing land for settlers while at the same time keeping Māori land in Māori ownership and generating income for its Māori owners. Because Māori land-owners in Whanganui vested more land than elsewhere, more of them stood to be affected by the success or failure of the scheme.

The scheme could have been better thought out and executed in a number of ways, but its Achilles heel was how it compensated lessees for improvements. This put in jeopardy almost immediately the Crown's commitment to Māori ultimately resuming the land.

When it proved difficult to lease the land, the Crown

favoured offering perpetual leases to attract lessees. The Government's commitment to the success of its vested lands scheme was such that Carroll tried hard to influence the land council to agree to perpetual leases. He pulled back once opposition from Māori was clear, but the land council seems to have been pressured into compensating lessees for *all* improvements instead. This was badly flawed. The Crown should have, but did not, impose rules to manage:

- ▶ for what improvements, and for what level of expenditure on improvements, owners were obliged to compensate lessees; or
- ▶ the implementation from the start of a sinking fund to cover the cost.

As the value of improvements soared, the problem escalated and threatened the ability of Whanganui Māori to hold on to their land. We disagree with the Crown that it had no obligation to provide finance to meet the improvements liability. The Crown was responsible for the inadequacy of policy, legislation, and administration that led to the improvements debacle. Although the 1954 Act reduced liability for compensation in percentage terms, and the Māori Trustee assisted with loans, Māori have not derived much financial benefit. A considerable proportion of the Ātihuā-Whanganui Incorporation's income each year was perforce set aside to finance resumption, and shareholders' dividends suffered accordingly. The Crown finally made grants to the Ātihuā-Whanganui Incorporation between 2006 and 2008 – more than a century after the inception of the vested lands scheme. The long delay in responding to the financial problems that the vested lands scheme generated meant that the grants could only address some of the prejudice that the lands' owners experienced over multiple generations. While we are not in a position to put a figure on the financial burden, the evidence we received was that by 2003 the incorporation had spent \$8.46 million to resume land. The opportunity cost would doubtless be greater. The Crown's creation, management, and resolution of the improvements liability situation exhibited, at every stage up to 2006, a startling failure to actively protect the interests of the Māori people affected.

The fall in unimproved land values, on which rents were based, stemmed in part from outside factors such as the Depression, which could not have been foreseen. However, the Crown could have done more to devise fairer methods of valuation. Instead, liability for improvements ballooned, and rents from which to pay for them dwindled. Even if the Crown had insisted on sinking funds from the start (as Māori suggested on multiple occasions), the chances of Māori receiving their land back debt-free and developed within even two lease terms were slim. Nevertheless, the Crown demonstrated a woeful lack of leadership in managing the issue. Letting things slide is not an option for a Crown obliged by its Treaty obligations to actively protect Māori interests and to practise good government.

As to other findings in this chapter, we said:

- ▶ We make no finding of Treaty breach in relation to the initial vesting of the Whanganui lands. Aspects of the process could have been better, but its introduction was not rushed, and owners had time to debate and negotiate.
- ▶ The vesting of land in the Tauakirā block did not breach the Treaty except in the case of Tauakirā 2M, where the vesting was against owners' wishes, and it took far too long for the Crown to return the land. It was a weakness of the regime that vested land could not be returned until the amendment Act of 1912 made it possible. Later, the Crown's purchase of vested lands in Tauakirā breached its duty to act in the utmost good faith, and the principle of active protection because owners signed deeds to vest their land on the understanding that they would not be sold.
- ▶ The Crown breached its duty of active protection when, at the outset, it prioritised haste over assisting with roading, when provision of basic roading and access was recognised as a necessary ingredient for the scheme's success.
- ▶ Provision for papakāinga in the 1900 Act and subsequent legislation was inadequate: they were not defined legally in a way that made them inviolate; and there was no scheme for occupation that was practical and

durable. This breached the tino rangatiratanga of tangata whenua, and the principle of active protection. Although urbanisation would inevitably have resulted in depopulation, if there had been permanent designation of the land as papakāinga, there would have been means for tangata whenua to revive those places today, when better transport and cultural regeneration have made returning to rural tribal roots practicable and desirable.

- ▶ The Crown breached its obligation to act towards its Treaty partner with the utmost good faith when, in this early period, it pressured owners to accept perpetually renewable leases, when most had specifically rejected them in their deeds of vesting, and the Crown had assured them that they would resume possession and ownership of the land.
- ▶ When roading and surveying finally did get underway, the Crown acted responsibly by setting loan repayment terms that were reasonable.
- ▶ We make no finding of Treaty breach in regard to timber reserves on the vested land. Legislation provided for reserves to be made and the Crown did not discourage the Aotea Māori land council or board from doing so. Nor do we hold the Crown responsible for the failure to derive significant income from milled timber on leased land.
- ▶ The Crown breached the principles of partnership and active protection when, after it brought in Māori land boards with greatly reduced Māori representation, it did not assume greater responsibility for monitoring outcomes for Māori on their vested lands to ensure that they were as good for them as they practically could be.
- ▶ We do not hold the the Crown responsible for the land board's mistake in issuing a perpetually renewable lease for Ōtiranui. Its subsequent failure to investigate potential remedies, while disappointing, was not such as to breach the Treaty.
- ▶ It is not clear that there were compelling economic arguments against incorporation. However, after much careful consideration of their needs, Whanganui Māori requested a statutory land trust to manage their vested lands, as being both operationally efficient and

culturally appropriate. The Crown refused even to countenance the idea and instead legislated for incorporations. In doing so, it took too little account of the preferences of its Treaty partner. However, it is not clear that its failure in this regard was necessarily prejudicial to Whanganui Māori, because incorporation was not the only option available to owners of the vested lands. They – or at least, their leaders – chose it over a section 438 trust, even though the Māori Land Court judge urged them to consider that mechanism, and indeed it might well have been a better answer to their cultural preferences. We therefore find no Treaty breach on the part of the Crown.

At the heart of the Whanganui vested lands issue lies the ability of Whanganui Māori to retain and derive benefit from their land. The Crown's poor performance as regards compensation for improvements resulted in very extended leases and a huge financial burden. Because Whanganui Māori embraced the scheme and vested a lot of land, its failure to meet expectations affected many.

But of course the prejudice was not limited to financial loss. The way the vested lands scheme unravelled meant that the whānau of the original owners have had little access to their whenua for a very long time. The challenge for the incorporation of achieving its financial goals, but also meeting shareholders' cultural needs and aspirations as regards their ancestral land, is considerable. It might now be time for Whanganui Māori and the Crown to sit down together, re-examine models of land ownership and management, and see if it is possible to come up with something novel to enable a landholding entity to succeed in all the ways tangata whenua desire.

### 28.21.3 Recommendations

We recommend that the Crown takes into account in settlement negotiations with Whanganui Māori the Treaty breaches in, and the serious consequences that flowed from, the vested land debacle.

We recommend that, if the claimant community of Whanganui supports such a move, the Crown contributes resources to the development of alternative models to incorporation as a repository for Whanganui Māori

land interests. Although the incorporation model has succeeded in keeping Māori land in a corpus, and has become financially successful, its structure means that it does not necessarily meet the raft of spiritual and emotional needs that some have in relation to their whenua. It may be that aspirations for papakāinga could be more easily accommodated in a different kind of structure.

We can make no recommendations concerning papakāinga land now owned by the Ātihau–Whanganui Incorporation, because under our legislation that is privately owned land.

## **28.22 CHAPTER 19: MĀORI FARM DEVELOPMENT IN THE TWENTIETH CENTURY**

### **28.22.1 What did this chapter cover?**

In this chapter, we described and analysed:

- › the economic development of Whanganui Māori in the nineteenth and early twentieth centuries;
- › obstacles to land development in the Whanganui district;
- › the Morikau development scheme, initiated in the early 1900s;
- › other development schemes of the 1930s;
- › post-war rehabilitation assistance; and
- › other Crown assistance after 1945.

### **28.22.2 Findings**

We agree with the Crown that there were considerable obstacles to Māori developing successful farms in this area. Compared with many other parts of New Zealand, the bulk of Whanganui land is unsuited to arable or pastoral farming: it is rugged land that is susceptible to erosion and reversion, and the type of soil copes poorly with the high rainfall. That said, the district is very large, and development possibilities varied across the region, and at various times there was clearly some scope for successful development.

At the beginning of the twentieth century the new ideas for Māori rural development had significant support. Māori leaders and Crown representatives were united in the view that developing Māori land for their future

benefit was a kaupapa that deserved effort, attention, and funding, and the Crown supplied all three to some extent. Certainly with the benefit of hindsight, it must be doubted whether the ideas that gained traction were the best ones. However, Whanganui land development schemes helped the retention and, in some cases, development of Māori land.

Barriers to the development of Māori land included problems associated with multiple ownership, the costs of partition and survey, and a form of title that made it difficult to use the land effectively. Poor title affected Māori access to credit, and this was something that the Crown could most easily have done something about. Certainly, the Crown had to balance its duty of active protection with the risk of foreclosure associated with mortgaging. But it also had to give effect to the guarantee of property in article 2, which included the right for Māori to develop their land. To do that, Māori needed access to loans. The Crown should have tried harder to enable lending for the development of Māori land, at the same time as protecting it from foreclosure.

One approach would have been to provide Māori with more and better access to low cost State lending. The Government Advances to Settlers fund was more or less unavailable to Māori landowners because of the plethora of rules that made almost all of them ineligible. Like other Tribunals before us, we find those rules unfair and unreasonable. The Crown should have directed officials to assess Māori applications on their merits, and could have actuated this approach by amending the Government Advances to Settlers Act 1894. We concur with the Central North Island Tribunal that:

By failing to provide state assistance equivalent to that being offered to other landowners of limited means to enter farming, the Crown was in breach of the Treaty principle of equity and in breach of its obligation to actively protect Māori in their Treaty development right to participate in farming.<sup>21</sup>

Creative solutions should also have been sought to the loss of land upon default: some land could have been made inalienable, ensuring the maintenance of tūrangawaewae

and cultural survival. The Crown could also have tried to make the title system less unwieldy, so that Māori land-owners might have been able to access private lending.

In an effort to solve the acute need for funding and other development assistance for Māori in Whanganui, the Crown turned to compulsory vesting. In Whanganui, not only did the Crown vest Māori land without consent, it also prevented owners from carrying out their own plans for development. Although these actions were unfair, and could be seen as a breach of article 2 of the Treaty, they need to be considered in the circumstances of the time and alongside the benefits of such schemes. In compulsorily vesting Whanganui land, the Crown intended to overcome some of the many problems afflicting Māori agricultural development in Whanganui and elsewhere. In particular, it sought to protect remaining landholdings from further alienation, develop Māori land into profitable farms, and train Māori to become effective farmers. These were all laudable aims, which Whanganui Māori largely shared.

Vesting enabled the Crown to lend on a relatively large scale, on land with multiple owners, and at reasonable rates, while also protecting owners from as much risk as possible. Morikau Station was one of the earliest large successful farming enterprises for Māori in New Zealand, and also provided benefits for communal causes, principally marae rebuilding and education. Morikau suggests what might have been if the Crown had not set about its purchasing programme with so much disregard for Māori development, and had instead fulfilled its obligation to act in partnership with Māori.

On the other hand, we criticise some aspects of both the Morikau and 1930s schemes – principally that the schemes were run in a manner that did not strive to allow owners to retain as much control as possible. The schemes did not employ owners and their whānau at either manager or worker level as much as they would have wanted. The triumvirate of the Māori land board, the farm owners' committees, and the farm manager could have worked to involve owners sufficiently, and in some places and for some periods it did work, and worked well. However, when key players moved on or changed their involvement,

the balance was lost, and the Crown did not set in place mechanisms to ensure that it was maintained.

Moreover, there was a lost opportunity at Morikau for Māori to benefit from more systematic farm training in the 1910s and 1920s. Māori looked to training as an important gain from the Crown's compulsory vesting of their land. The Crown should have, but did not, ensure that training was consistently given, and nor did it address the situation at Morikau that saw relationships deteriorate so that owners became alienated from the scheme in all kinds of ways for some years.

We also agree with claimants, and indeed with some former Crown officials, that the Crown was responsible at least in part for the poor financial state of the Rānana scheme, which by the end was woeful. We accept that the Aotea land board and the Crown made financial decisions in good faith, and that risk is an inherent part of farming and farm development, and that the isolated location and rampant noxious weeds made the land very expensive to develop. It was not possible for the Crown to shield Whanganui Māori from this reality.

The Crown's fault was in the way the debts from abandoned lands at Rānana were merged and spread across the sections in the station area without clarifying who was liable for the debt or its interest. This made it impossible for owners to know for what part of the debt they were responsible, and so they declined to pay. Then the Crown proposed further investment and borrowing in the mid-1960s, which wiped out some hard-won equity and led to ballooning debt. The Crown did not accept any responsibility, though, and its solution – leasing some of the land to the Morikaunui Incorporation – was in our view ungenerous. It removed the land from owners' control for a further 21 years, and prioritised repayment to the Crown. Similar action was undertaken in the Kōpuaruru scheme. Such unwillingness to take responsibility breached the Crown's duty of active protection and its obligations to assist Māori development.

In the latter part of the twentieth century, the Crown gave assistance in the form of development loans and practical advice, but we lack the detailed evidence necessary to make findings for this period.

**28.22.3 Recommendations**

We concur with the Wairarapa Tribunal's approach to twentieth-century land issues and here we set out recommendations for Whanganui that borrow from that report.

In addition to general redress for the breaches committed and the prejudice suffered, we recommend that:

- ▶ the Crown works with Whanganui Māori in light of the significant breaches of the Treaty relating to keeping and using Māori land, to design a means whereby the Crown either:
  - provides a workable system in which it lends money to owners of Māori land on the security of that land; or
  - guarantees lending to owners of Māori land by other institutions unwilling to accept Māori land as security;
- ▶ the Crown engages with Whanganui Māori in a Crown-funded project to assist Māori to engage (if they wish to) in the level of Māori Land Court activity that would be necessary in Whanganui to:
  - effect amalgamations and exchanges to ameliorate the effects of the poor partitioning of titles in the past; and
  - apply for the court to exercise its new jurisdiction to facilitate access to landlocked land;
 (this recommendation, if accepted, would involve the Crown paying for the costs of surveyors and lawyers); and
- ▶ the Crown engages with claimants with a view to facilitating the return to the successors of former owners of Rānana Development Scheme land still in the hands of the Māori Trustee. Claimants seek the land back in reasonable condition and free of encumbrances.

**28.23 CHAPTER 20: WAIMARINO IN THE TWENTIETH CENTURY****28.23.1 What did this chapter cover?**

In this chapter, we described and analysed:

- ▶ the alienation of over 50,000 acres of land retained or set aside for ongoing Māori use from the Crown's purchase of the Waimarino block;

- ▶ the recommendations of the Stout–Ngata commission in respect of the land;
- ▶ Crown and private purchasing in the reserves after 1910; and
- ▶ the history of Whakapapa Island (Moutere).

**28.23.2 Findings****(1) *Proposals for partnership, 1900–10***

The quantity, quality, and location of the blocks the Crown chose for, and the court awarded to, the sellers and non-sellers of Waimarino, meant that it was always going to be difficult for communities to sustain themselves on the land. Stout and Ngata counselled in their report that for Whanganui Māori to prosper on the land remaining to them in Waimarino, the Crown needed to engage with them in partnership, and owners who wished to farm their land would be supported to do so. The Ngāti Uenuku people of Mangānui-a-te-ao called upon the Government to give them the same access as settlers to loans for land development from the Loans to Settlers fund, so that they could succeed 'as ordinary farmers', and take on the 'present day methods' of farming.

Rather than taking active steps to help the Māori land-owners of Waimarino to maintain and develop their land, the Crown chose the radically different option of presiding over its purchase. Over the next seven decades, it facilitated, and participated in, the alienation of between 51,510 and 53,046 acres of the remaining Māori land in Waimarino. This was around 70 per cent of the original area of the seller reserves and non-seller blocks. This conduct was inconsistent with the principle of partnership.

**(2) *A failure of active protection, 1911–30***

Between 1911 and 1930 the Crown actively participated in or facilitated the alienation of 39,451 acres of Māori land within Waimarino. This constituted more than half of the entire original area of the sellers' reserves and non-sellers' blocks combined. Such a wholesale alienation of what was already a much-reduced resource was to have serious consequences for the viability of many Māori communities.

Particularly egregious in Treaty terms was that more than 2,000 acres were taken under public works legislation

for roading, railway, defence, and scenic purposes, mostly before 1920. More than half came from one subdivision: Waimarino 4B2. Even though the Crown never used it for the purpose for which it was taken, the land was never offered back to its original owners. The Crown took further land for a scenic reserve despite the written opposition of some of the owners.

The Crown's compulsory acquisitions did not meet the Treaty standard of exceptional circumstances, where there was no alternative, and the national interest was at stake.<sup>22</sup> From a process point of view, the legislation authorised the Crown to act in breach of its Treaty obligations to Māori, taking their land without proper notice, discussion, or negotiation. When the Crown engaged with owners over its intended taking for a scenic reserve, it did so in a manner that was arrogant, insensitive, and contrary to Treaty principles. When it calculated compensation, the Crown made a narrow assessment of the monetary value of the land and its millable timber that took no account of the importance of the land to the livelihood, or cultural and spiritual wellbeing, of its Māori owners. Once it was apparent that the 1,051 acres it took for the territorial training ground were surplus to defence requirements, the Crown compounded the breach and prejudice that arose from the original compulsory acquisition by not returning the land to its former owners. Instead, and without discussion with them, it added 649 acres to the area of Tongariro National Park in 1922, and converted the balance to Crown land in 1940.

The prejudice occasioned by the Crown's compulsory acquisitions of Waimarino land was exacerbated by the fact that the acres came from a corpus of Māori land already very much reduced by the original Waimarino purchase. This was especially so in the case of Waimarino 4B2, a subdivision allocated to families who opposed the 1886–87 alienation of Waimarino. For these people, the Crown's compulsory taking of more than half of their land was especially painful, and a grievous Treaty breach.

As well as the more than 2,000 acres it acquired compulsorily between 1910 and 1930, the Crown also purchased by negotiation more than 8,000 acres of Māori

land in the Waimarino seller and non-seller blocks. Under the Native Land Act 1909, the Crown was able to acquire the vast majority of this land without first securing the consent of a majority of its owners. Particularly striking in this regard was its March 1914 purchase of Waimarino B3B2 (6,915 acres), which it bought with the agreement of just six of the block's 178 owners. It also purchased Waimarino F and 8 following meetings at which only a minority of owners were represented – and despite Stout and Ngata's recommending that both blocks be set aside as papakāinga land for the 'residence and cultivation' of their owners and their descendants.

In pursuing the purchase of the remaining Māori land in Waimarino, the Crown breached the principles of active protection and partnership. It placed the interests of settlement ahead of the needs of Treaty partners who had already seen most of their land alienated. In their drive to secure land for settlement, Crown officials sometimes acted unfairly and unscrupulously. This is certainly our finding with regard to the treatment of the descendants of Tūtemahurangi who, in order to obtain title to the land where their kāinga was located, were obliged to alienate all of their interests in Waimarino B3B2A before being forced to pay an inflated price for three acres at Kākahi. By deliberately narrowing the options available to the Tūtemahurangi people and then cynically exploiting their lack of options, we find that the Crown acted in bad faith and contrary to the Treaty principle of equal treatment.

Private buyers purchased most of the Māori land alienated from Waimarino between 1911 and 1930. Altogether, private interests acquired 28,200 acres of seller reserves and non-seller blocks during these years, comprising 38 per cent of the total area. We find that the Crown facilitated the large-scale private purchase of Māori land in the block by means of a statutory framework that systematically favoured the sale rather than the retention of Māori land. The Crown designated the Waimarino seller and non-seller blocks as Māori freehold land rather than land in trust or reserves with restrictions on alienation. Individual owners could consequently partition and alienate interests at will. Sale was further facilitated by the

system of meetings of assembled owners, instituted under the Native Land Act 1909, that allowed votes by only a very small quorum of owners present or represented, and regardless of the size of the land or the number of owners, to carry the day. Through this mechanism, small minorities of owners were able to alienate to private buyers almost all of Waimarino 2 as well as substantial portions of Waimarino A, CD, and 5.

Given the circumstances of its 1886–87 purchase, and the relatively small proportion of the original Waimarino block set aside for sellers and non-sellers alike, the Crown had a particular responsibility to ensure that Whanganui Māori were assisted in their retention of their remaining Waimarino land. In fact it did the opposite. By compulsorily acquiring more than 2,000 acres, including more than half of Waimarino 4B2; by purchasing a further 8,000 acres largely through meetings where only a minority of owners were represented; and by facilitating the purchase by private interests of a further 28,200 acres, the Crown between 1911 and 1930 failed in its Treaty duty to actively protect the lands and resources of Whanganui Māori in Waimarino.

The Crown also failed to ensure that Whanganui Māori in the area retained sufficient land even for their subsistence. By providing 1500 acres at Tawatā and 800 acres near Kaitieke to the whānau and followers of Te Kere Ngātaierua, the Crown did take a few, minor steps, to alleviate the problems of landlessness that some tangata whenua of Waimarino faced. The Crown's distribution of 2,300 acres largely to the immediate family of Te Kere, however, did little to mitigate the impact of large-scale alienation of Māori land in the block. Nor was the land granted to the 'landless' followers of Te Kere necessarily sufficient or appropriate for their needs. Rather than allowing them to stay on the flat, fertile riverside land where they had constructed their kāinga and planted their gardens, the Crown put the upper Rētāruke community near Kaitieke on two bush-covered hillside 'small-grazing runs'. The land the community had formerly occupied was leased or sold to European farmers. This was a signal failure of the Crown's duty of active protection.

### (3) *Whakapapa Island*

The Crown also failed to properly recognise and provide for the interests of Ngāti Hikairo and Ngāti Manunui in Whakapapa Island, and then failed to heed their legitimate protests.

The Crown omitted the island from its official survey plan of the Waimarino Block, then its officials, once they became aware of the island's existence, initially refused to consider claims from tangata whenua that the land was not part of the land the Crown bought in the Waimarino purchase, and still belonged to them. When Īnia Ranginui asserted ownership rights over the island and cut timber there, he was threatened with prosecution and his wood was confiscated. When the Crown finally inquired into the circumstances of its acquisition of Whakapapa Island (in response to petitions to Parliament in 1919 and 1924) it limited itself to internal and informal investigations by the commissioner of Crown lands and Under-Secretary of the Native Department. Such investigations, apparently carried out without discussion with the interested Māori groups, were inadequate and partial.

We find that the Crown failed in its Treaty obligation to inform itself as to, and to recognise, te tino rangatiranga of Ngāti Hikairo and Ngāti Manunui in Whakapapa Island. The Crown wrongly annexed the island to its purchase of the Waimarino block, when it was not mentioned in the gazetted boundaries of the block, nor depicted in the 1886 sketch map or 1887 survey plan. The Crown did not give proper weight to the protests and petitions of Ngāti Hikairo and Ngāti Manunui. Unwilling to accept the groups' claims to ownership of the island at face value, the Crown should have at least initiated an independent investigation of the sort carried out by the Royal Commission that in 1905 investigated 21 distinct claims against adjudications of the Native Land Court.

Finally, the Crown violated te tino rangatiranga of Ngāti Hikairo and Ngāti Manunui, and failed to act in the spirit of Treaty partnership, when it declared Whakapapa Island to be a scenic reserve, without directly notifying or seeking the opinion of tangata whenua who had long asserted their rights and interest in the land. We were

alarmed and saddened by John Manunui's testimony that Ngāti Manunui only learned of the island's scenic reserve status when a sign was nailed to a tōtara tree in 1964 or 1965.

#### **(4) Fewer purchases but other problems, 1931–50**

After two decades of wholesale alienation, the period from 1931 to 1950 saw a relatively modest 1,113 acres bought in mainly private purchases. The lull was a result mainly of the Great Depression. Private purchasers were also discouraged by the difficulty of gaining access to much of the land still in Māori hands. Indeed, it could be argued cynically that the Crown's most important contribution to continuing Māori land ownership in Waimarino during these years was its decision in 1942 to abandon its upkeep of Mangatī Road – the sole means of access to much of Waimarino 5.

If no road access helped protect remote Māori-owned subdivisions from purchase, it also made it very difficult for owners to develop this land, and for it to sustain more than a few occupants. This was the case for the rugged and remote areas of Waimarino A, 3, and 5. Problems of access also bedevilled Māori owners whose holdings had become 'landlocked' through the alienation of neighbouring pieces of land.

As a Treaty partner the Crown should have paid more attention to the need for Māori owners to have proper access to their lands, especially since it promoted the purchases and partitions that led to problems like landlocking and lack of access to a road.

#### **(5) Sales by meetings of assembled owners, 1951–75**

The relative hiatus of the 1930s and 1950s notwithstanding, Crown policy remained weighted in favour of alienation rather than retention of Māori land. The Māori Affairs Act 1953 perpetuated the mechanism of alienation through meetings of assembled owners, reducing the minimum number of owners necessary to take a decision to sell from five to three. In the years that followed, both the Crown and private buyers used this mechanism to secure the ownership of land through the consent of a minority of owners. The Crown, for example, purchased

Waimarino 4A1, 2, and 4 following the agreement of meetings attended by only four owners, even though the subdivisions were owned by 30, 15, and 10 owners respectively.

The vesting of land in lists of individual owners that proliferated from generation to generation, along with successive partitions, combined to make much of Waimarino's remaining Māori land increasingly unviable as economic units and vulnerable to alienation.

Until 1974, the Crown continued to legislate various versions of 'meeting of assembled owners' mechanisms that allowed a minority of owners to alienate Māori land. Both the Crown and private purchasers – although between 1951 and 1975, private purchases accounted for 89 per cent of the 9,395 acres bought – continued to purchase land from many Māori owners with the agreement of only a few. When the decision to sell a particular piece of land was taken, it could be (as was the case with Waimarino 6A3B) without the agreement or even the knowledge of many owners.

By creating mechanisms that allowed land to be sold by a minority, and by exploiting those mechanisms to secure ownership of Māori land, the Crown breached the guarantee in article 2 that Māori were protected in the ownership of their land until they chose to sell, and acted inconsistently with the principle of active protection.

#### **(6) Generally**

Of the 74,140 acres originally set aside in seller reserves and non-seller blocks in Waimarino, somewhere between 23,272 and 21,079 acres remain as Māori land. The Pēhi whānau retains a further 824 acres as general land. This amounts to between 28 and 31 per cent of the area of the original seller reserves and non-seller blocks, and just 5 per cent of the 1886 Waimarino block as a whole. Much of this land is remote, rugged, and inaccessible. Other portions, such as Waimarino 6C2B2 and 6F2C2, are too small, with too many fragmented interests, to provide economic benefit to their owners.

It is clear that over the course of the first three-quarters of the twentieth century, the Crown failed in its Treaty duty to actively protect the lands and resources of Whanganui Māori in Waimarino. Instead of fostering and

developing Māori ownership and use of their land, the Crown made the considered choice to facilitate its alienation. As a result, many Whanganui Māori were denied the option of living on and deriving a living from their lands, or even retaining a presence there for cultural purposes. Some became entirely or almost entirely landless. Spiritual and cultural and emotional harm has resulted, as whakapapa connections were lost and communities became disempowered and depopulated.

The magnitude of the Crown's Treaty breach is rendered all the more striking if one remembers that the six blocks reserved for sellers and the seven set aside for non-sellers were a relatively small remnant of the enormous Waimarino block, which the Crown acquired in highly questionable circumstances in 1886 and 1887.

Given this, and perhaps especially as regards those who explicitly stood apart from selling their land to the Crown in the Waimarino purchase, the Crown had a particular responsibility to ensure that Whanganui Māori could keep the land that remained to them until they explicitly and fairly resolved, as a group of owners, to sell it. The Crown's compulsory acquisition of land for public works and scenery preservation was therefore particularly reprehensible. We find that, by participating in and enabling the wholesale alienation of what was left of Māori land in Waimarino, the Crown acted irresponsibly, arbitrarily, and in bad faith.

### 28.23.3 Recommendations

In addition to general redress for the breaches and prejudice recorded in our findings above, we recommend as follows.

#### (1) *Land taken for defence purposes from Waimarino 4B2*

The National Park Tribunal has already recommended that the 401 acres of Waimarino 4B2 taken for defence purposes in 1911, and not incorporated into Tongariro National Park in 1922, should be returned to its beneficial owners. We make the same recommendation.

We also recommend that the Crown provides access for the Pēhi whānau to their property near National Park, which is currently 'landlocked' by Crown land.

#### (2) *The five acres at Paitenehau*

We recommend that the Crown now acts on the chief surveyor's 1986 recommendation that the five acres surveyed as 'Paitenehau Kāinga' should be designated as Māori freehold land. Its ownership and designation (as a reserve, for instance) should be the subject of discussion between the Crown and the descendants of the Rētāruke community displaced from Paitenehau when the five acres were incorrectly included in section 2, block 1X of the Kaitieke survey district and leased to a European settler.

#### (3) *Whakapapa Island (Moutere)*

We recommend that the Crown returns Whakapapa Island to the ownership of tangata whenua.

## 28.24 MATAPIHI 4: WAIKUNE PRISON

### 28.24.1 What did this matapihi cover?

In this matapihi, we described and analysed:

- ▶ the Crown's disposal of land upon the closure of Waikune Prison, which was established on 79 acres acquired in the purchase of the Waimarino 1 block in 1886–1887;
- ▶ negotiations around the closure, and the offer-back process between 1986 and 1988; and
- ▶ the agreement reached between Whanganui Māori and the Crown in 2002, under which the Office of Treaty Settlements purchased the entire prison site, and placed it in the Whanganui Claim Specific Landbank.

### 28.24.2 Findings

#### (1) *The establishment and disestablishment of the prison*

Waikune Prison was established on Waimarino 1, land purchased by the Crown in 1886 and 1887 in ways and by methods that breached the Treaty of Waitangi, and seriously prejudiced the Māori owners of the Waimarino block, whether or not they were included on the list of owners for the purposes of determining title.

Between 1960 and 1967, the Crown extended Waikune Prison to include Waimarino 4A1, 4A2, 4A3, and 4A4, the Crown's purchase of which we found was contrary to Treaty principles.

The Crown did not discuss with affected Māori its plans for either the establishment or the disestablishment of the prison. Both events affected tangata whenua negatively, not least because of the way the Crown went about them.

### (2) *The offer-back process*

The Public Works Act 1981, and its 1982 amendment, gave the Crown excessive discretionary power over the offer-back process. There was no obligation to take into account the special circumstances of Māori land under the Treaty, nor to consult with former owners and their successors on whether or how land would be offered back.

The offer-back process for Waikune Prison was managed and conducted poorly, in effect drawn out over 17 years.

### (3) *The destruction of the prison*

The decision to raze or remove the prison's buildings might have made sense in the narrow accounting terms of the Department of Justice, but there was no Crown-wide analysis to justify it. Nor did we find any good reason for the preemptory and unilateral manner in which officials made the decision to destroy parts of the prison, nor for how the demolition came to be carried out suddenly and without notice. When it deliberately excluded tangata whenua from playing any part (notwithstanding the earlier discussions, and their ongoing discussions with Māori Affairs), the Crown in the person of the Justice Department acted in a way that was disrespectful of their rights and interests, and violated the Treaty principles of active protection, good government, good faith, and the obligation to consult.

The removal or destruction of many of the prison's buildings and much of its infrastructure prejudiced the Wānanga Trust, other local Māori who had been working to establish a whare wānanga, and tangata whenua generally, who stood to benefit from the establishment of a centre for cultural education and enrichment at Waikune.

#### 28.24.3 Recommendations

We have no means of properly assessing the viability of using what remains of the prison to fulfil the aspirations of

tangata whenua for the establishment of a whare wānanga in their rohe. We leave to the Crown and the claimants the task of exploring the possibilities there, in the light of our findings, and these recommendations:

- ▶ the Crown should include in its settlement package all the former prison land, excluding areas now part of the North Island main trunk railway, State Highway 4 or Tongariro National Park;
- ▶ because the Crown recently and flagrantly exacerbated its earlier serious breaches concerning the Waimarino Block by its mishandling of negotiations about the former prison site, it should – if the former owners of the areas where the Crown is legally bound to offer land back under Public Works legislation consent – return the land to tangata whenua as cultural redress;
- ▶ if tangata whenua still want it, and if an independent study funded by the Crown recommends that it is feasible on an ongoing basis, the Crown should work with tangata whenua to establish and help to fund an inclusive cultural and educational hub either at Waikune or at a preferred site locally; and
- ▶ in any event, the Crown should fund the necessary work to clear the prison site of debris, including the safe extraction of asbestos.

## 28.25 CHAPTER 21: SOCIO-ECONOMIC ISSUES

### 28.25.1 What did this chapter cover?

In this chapter, we described and analysed:

- ▶ the education that the State provided to Whanganui Māori from 1840 to the present;
- ▶ health services that the State provided to Whanganui Māori from 1840 to the present;
- ▶ other State assistance, such as housing and social welfare; and
- ▶ the extent to which the provision was appropriate and equitable.

### 28.25.2 Findings

#### (1) Education

(a) *Access to schooling*: The Crown's first attempt to provide education to Whanganui Māori was through support

for church schools, including the endowed school that became Wanganui Collegiate. Rather than step in to ensure that the institution fulfilled its founding principles, the Crown took a hands-off approach, and allowed it to transmute into a private school that played a negligible role in Māori education. Had there been other secondary schools in the region, this might have mattered less, but until the late nineteenth century, Wanganui Collegiate was the only provider of secondary education in the district.

The few Whanganui Māori who received a European education in the nineteenth century usually received it from mission schools that functioned independently of the Crown.

The Crown did open native schools in the 1870s, but then closed them because the rolls were unstable. We do not consider that the failure of Māori children to attend school regularly was because they or their communities did not seek Pākehā education. Rather, it was because communities were distracted by the demands of dealing with their land through the Native Land Court, and coping with the changing circumstances of their lives. Also, it seems likely that the pedagogical style of the teachers did not adapt sufficiently to the needs of Māori children. Given the importance of Māori children learning to read and write in order for them to participate in the new society – an importance that was appreciated at the time – the Crown should have done more to find other ways of making education work for them. We find that the Crown did not sufficiently focus on how it could provide effective education to the children of Whanganui pre-1890. We find that this was inequitable, because even though the State was then embryonic compared with the State of today, we are confident that if the education services provided to Pākehā children had been failing in the same way, the authorities would have taken measures to ensure that the problem was addressed. The Crown breached the Treaty principles of good government and active protection.

Māori communities increasingly wanted their children to receive a formal education as the nineteenth century neared its end, but there were sometimes many years between the first request for a school and the school's opening. Some communities did not get a school at all,

and some got one only very briefly. Secondary education was practically out of the reach of many Whanganui Māori children well into the twentieth century, and whānau moved to town partly to procure access to schooling. This should not have been necessary.

The Crown should have done considerably more to ensure that Whanganui Māori children had continuous access to good schooling. It should have built schools sooner, if not on its own initiative then as soon as Māori communities sought them. It should have taken steps to manage fluctuating rolls – including ensuring that teachers were equipped to respond to the pedagogical needs of their pupils by understanding and accommodating their language and culture. It should have ensured that children could actually access transport to attend primary and secondary school, prioritising funding for all purposes that ensured that Māori children of this district were reliably able to access education even if their communities were not close to town. It might sometimes have been necessary to improve the roads for this purpose. Where required, the Crown should also have offered better subsidies for attending boarding schools.

On the whole we consider that the Crown was insufficiently concerned about how difficult it was for rural Māori children to gain education at both primary and secondary levels for significant periods and in many parts of this district. In a significant number of instances, moving to town was the only way for them to guarantee ready access. We discern in the Crown's approach a different attitude to that which we think would have applied to a similarly low level of provision to Pākehā children in the same period. This observation applies to the tardy response to some Māori communities' requests for schools, and the low subsidies paid to children who had to attend boarding school to receive secondary school education. The Crown should consistently have regarded education for Māori children as a high priority, and on every occasion that it did not, it failed to provide for them as it should have under article 3, and acted inconsistently with the principle of active protection.

(b) *Te reo Māori*: It is difficult to know how much the

English-only policy in schools contributed to the decline of te reo Māori. The policy was certainly wrong-headed and regrettable in all sorts of ways, not least because of how it made Māori children feel about themselves and the experience of learning in school. However, the policy did not operate alone. It occurred in a context where the dominant society's messages to Māori consistently lacked respect for their language and culture. Parents imbibed these messages, and lost confidence themselves in the ability of mātauranga Māori (Māori knowledge) to enrich and advance their children's lives.

Certainly, the suppression of te reo Māori in schools was a factor in the decline of the language, and we reiterate the findings of the Te Reo Māori Tribunal, that 'the education system [was] being operated in breach of the Treaty.'<sup>23</sup>

Even before the Te Reo Māori Tribunal issued its report in 1986, many changes occurred in the education system. There is now a network of early childhood centres and schools (kōhanga reo and kura kaupapa), and tertiary institutions too, that teach te reo Māori and teach in te reo Māori. The Crown and Te Puna Mātauranga o Whanganui entered into a formal relationship that has as its focus providing high quality and appropriate education to the Māori people of this region. All of these were moves in the right direction. However, there is still much work to be done. We support the findings of the Kōhanga Reo Tribunal that the funding of kōhanga reo was inequitable at the time of our hearings, and that kōhanga were not sufficiently autonomous. We did not have enough information to make findings about the relationships between the Crown and other organisations such as kura kaupapa and Te Puna. We did observe, though, that the claimants' complaints about the Crown's processes, attitudes, and structures were common to a range of organisations in both the education and health sectors. We think that in order for Māori education providers to maximise their success with Māori students, it will be important for the Crown to increase its efforts to create constructive and supportive partnerships in which there is a positive interchange about pedagogy and culture. Funding for Māori

organisations that enables them to plan properly will be an important aspect of this partnership. We strongly encourage the Crown to continue its progress in these directions.

Crown support for local dialect and mita is a complex matter in a period when the numbers of competent speakers of Māori continue to decline, and emphasis has understandably gone on creating fluency in standard Māori. At the same time, part of the vibrancy and mauri (essential life force) of te reo Māori is its diversity and tribal variation. In the context of the many years when the Crown failed to comply with its Treaty duty to foster Māori language and culture, and in light of its complicity in their decline, we recommend that the Crown takes positive steps to work with tangata whenua of this region to find and develop ways of building into education ways of maintaining and promoting te reo o Whanganui, iwi culture, and te tino rangatiratanga.

## (2) Health

In all the periods we covered, access to health care was difficult for people living in rural parts of the inquiry district, and often in the small towns as well. Around the middle of the twentieth century, some communities had reasonable access to district nurse services, but we received no evidence that doctors were ever regularly available outside Wanganui and the larger towns. The lack of medical professionals in small towns and rural areas was exacerbated by poor and expensive transport links in many areas, especially before the mid-twentieth century.

We accept that people living in rural areas will never enjoy the same access to health care as city dwellers, particularly if they cannot afford to run a car. While this causes significant hardship for such people, the costs of providing medical services are such that it is not practical to provide hospitals or even clinics in every community. There can be legitimate disagreement over the level of service which the Crown should provide, but it is entitled to concentrate its health funding in large centres of population, where it will be most effective. However, Māori people have a right to live in their traditional tribal areas, and it should not be impossible to obtain good health services

in places where there is an otherwise viable and functioning community of reasonable size. Ways to improve access could include free or easily affordable ambulances and other medical transport, more and better trained district nurses and paramedics, and mobile medical clinics.

Another barrier between Whanganui Māori and effective health care, especially in the nineteenth and early twentieth centuries, was the monocultural nature of the health care system. We have seen that Māori ceased to use Wanganui Hospital by about the 1870s, from which we surmise that it did not meet their needs, and it is likely that cultural factors played a part. We saw no evidence that the Crown was concerned about this. It neither investigated nor ameliorated the situation. We accept that in some cases conformity with tikanga Māori would have been impractical, or incompatible with western concepts of clinical safety. However, we endorse the approach of the Napier Hospital Tribunal, which found that the Crown should have encouraged Wanganui Hospital to adapt its procedures to Māori tikanga where it was practical and safe to do so, and explain those procedures where it was not.<sup>24</sup> From the 1980s health professionals were trained in tikanga, which should have improved their ability to provide services in a way that was culturally appropriate and therefore more efficacious.

As we have noted, the causes of ill health and of health disparities are many and complex. Some, such as lack of immunity and genetic factors, were and are beyond the Crown's control, while others, such as personal decisions to smoke or to abuse alcohol, are difficult, though not impossible, for the State to influence. We also acknowledge that the Crown at times provided health services to Whanganui Māori that were not available to non-Māori, such as the native medical officers and the free medicines distributed by native school teachers. We do think, however, that the Crown had a duty over the whole period to provide for Māori citizens by doing what it reasonably could to ensure that their health was on par with that of non-Māori.<sup>25</sup> In the early colonial period, and taking into account the limited activities of the State at that time, its health initiatives were for the most part reasonable. Later,

though, it should have done more to increase the number and range of services that were accessible locally to people whose access to transport has consistently been limited. Overall, the Crown did not fulfil its duty of active protection. It remains a challenge but an imperative for the Crown to continue to work creatively and respectfully with Māori health providers to deploy their experience, knowledge, and connections to devise programmes that will, over time, close the gap between Māori and non-Māori health status in this region.

### **(3) Housing and social welfare**

The evidence we heard on housing and social welfare was fragmentary, limited to the early twentieth century for welfare, and the mid-twentieth century and later for housing.

We heard that, under the pension system in operation between 1898 and 1935, pensions were often denied to elderly Māori who owned land, even if they did not get any income from it. We also heard that Māori were, as a matter of policy, given less money than non-Māori, even if circumstances were identical. Similarly, Māori on relief work were paid less than non-Māori doing the same work, and Māori were ineligible for maintenance payments. We find that these policies were in breach of the principle of equity.

With regard to housing, it is not clear to us that there is a general Treaty duty for the Crown to help improve Māori housing. There is, however, a clear duty to provide housing assistance to Māori at least equal to that provided to non-Māori. If (as was generally the case) Māori housing was worse than non-Māori housing, fairness would usually oblige the Crown to spend more assisting Māori. The twentieth century saw significant improvements in Māori housing, but not enough to fix a very serious problem, especially in rural areas.

In the latter half of the twentieth century, the Crown used policy incentives to motivate people to move from far-flung locations that Māori traditionally occupied to towns where they could more reliably access jobs and services. On balance, we find this approach difficult to

criticise. If Māori remained in out-of-the-way kāinga where they could not support themselves and had to rely on benefits, there would be a real danger of rural ghettos where children grew up without access to the services they needed. At the same time, though, Māori need to retain their presence in, and connections with, papakāinga, and that involves renewing the housing stock over time. We find that the network of rules around this has impeded Māori from building or living on their tūrangawaewae, and the Crown has breached its duty of active protection by allowing this to happen.

### 28.25.3 Recommendations

In addition to general redress for the breaches and prejudice reported in our findings, we recommend as follows:

- ▶ We encourage the Crown to ensure that its relationships with all Whanganui Māori organisations are fair and equitable, that these organisations have sufficient autonomy, and that funding is both adequate and equitable with comparable non-Māori organisations. This encouragement applies, but is not limited to, Te Puna Mātauranga o Whanganui and kura kaupapa. As regards kōhanga reo and Māori health organisations, it is a formal recommendation.
- ▶ We recommend that the Crown continues to work creatively and respectfully with Māori health providers to deploy their experience, knowledge, and connections to devise programmes that will, over time, close the gap between Māori and non-Māori health status in this region.
- ▶ We recommend that the Crown reviews the Resource Management Act and other planning legislation, policy, and practice, to ensure that Whanganui Māori are not unduly prevented from building houses on, or developing, their own land. It should work with local authorities to ensure that they have proper regard to the importance of Māori being able to maintain their papakāinga. It should also engage with iwi Māori on the kaupapa of regional development, with a view to creating opportunities for people to participate in economic

ventures that make it viable for them to occupy their ancestral kāinga.

## 28.26 CHAPTER 22: WHANGANUI NATIONAL PARK

### 28.26.1 What did this chapter cover?

In this chapter, we described and analysed:

- ▶ the creation of the Whanganui National Park, comprising 183,000 acres, in 1987;
- ▶ negotiations between Whanganui Māori and the Crown over the creation of the park; and
- ▶ park management, and the extent of Māori involvement.

### 28.26.2 Findings

We find that the Crown acquired the land in Whanganui National Park in breach of the Treaty of Waitangi.

Most of the park came from three blocks: Waimarino, Taumatamāhoe, and Whakaihuwaka. This report details how the Crown breached Treaty principles in the acquisition of land in these blocks. In the Waimarino block and its reserves, the Crown's purchase practices were among the worst in the country (see chapters 13, 20). The owners of the Taumatamāhoe block sought to have it set aside from sale, but their wishes were overridden. Crown purchases in the block aroused considerable protest in the nineteenth century. In both Taumatamāhoe and Whakaihuwaka, the Crown determinedly purchased land after 1905, flouting the Stout–Ngata commission's recommendation that the Crown should stop buying in those two blocks. Tens of thousands of acres that the Crown bought from Taumatamāhoe and Whakaihuwaka in this period ended up in the park.

The Crown also took almost 7,000 acres of Māori land for scenic reserves, and many of these also became part of the park. We found in chapter 13 that these takings breached the Treaty.

Whanganui Māori have struggled to accept the legitimacy of the park because of the unjust acquisition of the land. This means that here, just as in Te Urewera, the national park 'rests on a defective foundation.'<sup>26</sup> The

Crown breached articles 2 and 3 of the Treaty, and also breached the Treaty principles of good faith, active protection, partnership, equity, and equal treatment.

Although they lost ownership of the land, Whanganui Māori retain their customary associations with the land, and remain its kaitiaki.

In the 1980s, when the Crown conceived the park, Whanganui Māori clearly laid out their case for partnership. They did so at the same time that the courts and the Waitangi Tribunal were articulating why partnership was a principle of the Treaty of Waitangi. The Crown's enacting section 4 of the Conservation Act 1987 can be seen as an expression of that 'partnership' zeitgeist of the late 1980s. In the context of Whanganui National Park, however, the Crown was not prepared to embrace the concept of a Māori national park, nor to share management or governance with Whanganui Māori. Given the zeitgeist, the history of the land in the park, and the close relationship of the people with that land that continued into the 1980s and to this day, this was a genuine opportunity sadly missed. The dashed hopes of tangata whenua gave rise to anger and resentment that underpinned the fraught relationship between them and DOC that subsisted until recently.

The evidence before us does not support the claimants' contentions about a Minister of the Crown promising them a Māori national park. However, Minister of Lands and Māori Affairs Koro Wētere did undertake in writing that the creation of the national park would in no way prejudice the people's Treaty claims. The Crown is bound by the Minister's undertaking, and the claimants' access by way of settlement to the Crown land that went into the park should not be affected in any way by its status as a national park.

The relationship between DOC and tangata whenua has certainly improved. Whanganui Māori have a real role in planning park management, and are now preferentially employed in the park. There is an open-door consultation policy. These are good and important developments, but the role of tangata whenua in park governance and

management remains at a level that is below what our findings indicate is appropriate.

We find that the Treaty, the history of the park, and the strength of the traditional and ongoing relationship between Whanganui Māori and the land in the park, combine to dictate a full partnership between Whanganui Māori and the Crown in governing and managing the park. This has not occurred, the Crown has breached the Treaty, and Whanganui Māori have suffered prejudice as a result.

### 28.26.3 Recommendations

We recommend that:

- ▶ Title to the land in the Whanganui National Park is transferred to iwi for the purpose of a national park.
- ▶ A plan is developed under which Whanganui National Park transitions over a period of several years to joint governance and management by the Crown and Whanganui iwi, with tangata whenua as at least equal partners.
- ▶ Title to certain sites of special significance passes from the Crown to their traditional owners, with ancillary agreements and arrangements (including Crown funding) to secure environmental protection as necessary and appropriate. Particular sites of significance that fall into this category are: Waiora Spring,<sup>27</sup> Tieke Kāinga (kāinga and urupā),<sup>28</sup> Mangapāpapa (wāhi tapu and several urupā),<sup>29</sup> urupā on Ahuahu A and B,<sup>30</sup> Puketapu maunga (and urupā),<sup>31</sup> and Kirikiriroa (kāinga and pā site).<sup>32</sup> We do not consider this list to be comprehensive, and Whanganui iwi and the Crown should augment it as appropriate.
- ▶ Legislative change occurs as required to facilitate the new arrangements.

There are issues concerning iwi capacity at the present time to take on the kind of expanded governance and management role envisaged here.<sup>33</sup> We foresee the need for:

- ▶ tangata whenua to assess honestly their current capacity to manage the park;

- ▶ DOC to provide support and training;
- ▶ tangata whenua to engage in acquiring training and qualifications;
- ▶ DOC to be open to acquisition of Māori knowledge; and
- ▶ funding to support the transfer of skills/mātauranga over time, employing pedagogy and tikanga from both Pākehā and Māori cultures.

We recommend accordingly.

We give the late Sir Archie Taiaroa the last word:

If the National Park can be jointly managed and this other land returned, and the earlier promises regarding work opportunities and development thereby fulfilled, it is my hope that opportunities will be created in tourism and other matters that will enable Maori communities up the River to be revitalised. These are the benefits that should properly be available to Whanganui iwi in return for the commitment of land to the National Park.<sup>34</sup>

## 28.27 CHAPTER 23: INTRODUCTION TO LOCAL ISSUES

### 28.27.1 What did this chapter cover?

In this chapter, we provided an overview of the legislation that underpins our inquiry in the local issues chapters.

### 28.27.2 Findings

We made no findings or recommendations.

## 28.28 CHAPTER 24: NORTHERN WHANGANUI LOCAL ISSUES

### 28.28.1 What did this chapter cover?

In this chapter, we described and analysed:

- ▶ the compulsory acquisition of a marae block and another 20-acre block at Tūwhenua (Taumarunui Aerodrome);
- ▶ the alienation of land at Te Anapungapunga;
- ▶ landbanking issues concerning Taringamotu School;
- ▶ a hospital board's compulsory acquisition of land that became Taumarunui Hospital;
- ▶ the alienation of Te Peka marae land to pay rates;

- ▶ the compulsory acquisition of Ōhura South N2E3G3 for the King Country Electric Power Board depot;
- ▶ the compulsory acquisition of Ōhura South G4E2 for the main trunk railway;
- ▶ the compulsory acquisition of Rangaroa Domain and land in Ōhura South G4;
- ▶ the local council's sale of land gifted for a landing reserve at Taumarunui;
- ▶ the compulsory acquisition of Ōhura South M2A for river control purposes;
- ▶ the Crown's compulsory acquisition of land for railway purposes, which was later sold back to Māori and became the Piriaka Puna;
- ▶ the Crown's landbanking process for the Piriaka School site; and
- ▶ the environmental effects of the Pukehou Road Quarry.

### 28.28.2 Findings and recommendations

#### (1) Tūwhenua (Taumarunui Aerodrome)

(a) *Finding*: The compulsory acquisition of both the marae block and the 20-acre block breached the guarantee in article 2 of te tino rangatiratanga, and the principle of active protection. The Crown is responsible because it enacted legislation that allowed this to happen, and did not monitor the council's exercise of the authority delegated to it.

(b) *Recommendation*: We recommend that the Crown provides an alternative marae site and enables access to the Tūwhenua urupā, and compensates the owners of the 20-acre block for their loss.

#### (2) Te Anapungapunga

(a) *Finding*: The relevant legislation, and the relevant processes, failed when tangata whenua were left with an urupā at Te Anapungapunga to which they have no legal access. The Crown did not give effect to te tino rangatiratanga of Ngāti Urunumia, Ngāti Hari, and Ngāti Hira, and did not actively protect their interests, as the Treaty and its principles require.

(b) *Recommendation*: We recommend that the Crown

does what it can to ameliorate the claimants' situation as regards the urupā. This includes, if the claimants seek it, funding any application for orders implementing legal access to Te Anapungapunga urupā that the claimants make to the Māori Land Court, including both legal and survey costs and disbursements.

### (3) *Taringamotu School*

(a) *Findings:* We considered that the Crown's handling of these claimants' expression of interest in Taringamotu School was overly bureaucratic, and lacked respect and sympathy for their position. It also lacked transparency. We find this inconsistent with the principle of partnership.

We do not know how the Crown manages the inputs of information in the process of determining whether there is the requisite degree of Māori interest in a site to justify its being land-banked. We consider that, in order for the system to work fairly:

- applicants should compile and submit all the information they have;
- applicants' statements about oral tradition should be accepted as valid until such time as there is an opportunity to test the evidence in a hearing or otherwise;
- the Crown should supplement applicants' information from its own resources to the extent reasonably possible; and
- the relatively low level of access that most applicants have to documentary sources should be implicit in any weighing of evidence in support of the proposition that a site is significant.

(b) *Recommendation:* If the practice described above is not current practice, then we recommend that the Crown amends it.

### (4) *Taumarunui Hospital*

(a) *Finding – 'in the national interest as a last resort . . . ?'* Like all such purchases, this acquisition for Taumarunui Hospital was justified in Treaty terms only if it was in the national interest, and was a last resort. Although land was needed to build a hospital at Taumarunui, the need was

not one that resonated at a national level, and requiring a site for a bigger, better hospital is not an exigency of a kind that justifies compulsory acquisition of Māori land. Thus, the compulsory purchase breached the fundamental Treaty guarantee of te tino rangatiratanga.

(b) *Finding – too much land:* It is plain, and the Crown has conceded, that 38 acres was far more than required as a site for a hospital in a provincial town. Even at a period in history when taking Māori land for public works was routine, various players in the process took the clear view that 38 acres was too much land – especially as the Māori owners objected to the sale. The 38-acre purchase proceeded nonetheless.

The excessive acreage taken exacerbates the Crown's Treaty breach in purchasing this land compulsorily.

(c) *Finding – why is it the Crown's Treaty breach when the hospital board took the land?* In cases where Māori rights are abrogated by a compulsory acquisition, it is a mere technicality whether a taking authority was the Crown or a local authority, particularly when the Crown and local authorities collaborated to effect the compulsory acquisition.

The Crown accepts responsibility for monitoring local authorities' exercise of powers of compulsory acquisition, but in this case the Public Works Department and others did not query the hospital board's decision to acquire this land compulsorily, and achieved no reduction of the amount of land taken, even though it plainly exceeded what was required.

The Crown is responsible for the prejudice to Māori that arises whenever takings by local authorities fail to meet the 'as a last resort in the national interest' test. This is such a case, and the Crown is responsible for negative consequences for Ngāti Hekeāwai.

(d) *Finding – important land:* The Crown breached its guarantee of te tino rangatiratanga in article 2 of the Treaty when it constructed a system that allowed local authorities to take Māori land unilaterally for public works without proper consideration of Māori wishes, concerns, and

needs. That breach is exacerbated here by the failure to find out about, and properly take into account, the special importance of this land to Ngāti Hekeāwai.

Moreover, even though the Crown correctly identified preserving access to the urupā as an important aspect of the compulsory acquisition, its means of securing Ngāti Hekeāwai's access failed. These many decades later, Ngāti Hekeāwai still lack satisfactory access to Titipa urupā.

(e) *Finding – valuation and compensation*: We find that:

- ▶ There was no proper basis for the Crown to operate a different valuation system for Māori land, and it would have been fairer for Māori to have had available to them the system that was available to owners of general land. This Crown failure breached article 3 of the Treaty.
- ▶ In enacting its regime for compensation for land taken for public works, the Crown took account of neither the special significance of land in Māori culture, nor the cultural significance of particular land.
- ▶ Valuation criteria had no regard to the fact that, by the twentieth century, land remaining in Māori hands was usually significant or strategic for both cultural and economic reasons.
- ▶ By facilitating the easy purchase of Māori land for public works, the Crown failed to protect Māori from unnecessary cultural, spiritual, and economic loss.
- ▶ Inherent in the idea that owners can be compensated for loss of land by payment of money is a conception of land as an asset rather than as a taonga.
- ▶ The Crown's monoculturalism in operating such a regime breached its duty of partnership.

Whether the compensation assessed for this land was fair in terms of orthodox valuation methodology of the time, we do not know.

(f) *Recommendations*: We recommend (because we are limited by the fact that the land taken for the hospital is private land) that the Crown negotiates with Ngāti Hekeāwai appropriate means of recognising the loss to them of the 38 acres that the hospital board wrongly compulsorily acquired, including compensation for the Treaty breaches identified here. We also recommend that the

Crown works with the Waikato District Health Board to create permanent and appropriate legal access to Titipa urupā.

#### (5) *Te Peka marae*

(a) *Findings*: The Crown allowed the local authority to impose rates on Te Peka marae, which led to the sale of the land.

The Crown particularly owed a duty to protect Māori in the ownership of land of special significance. Marae are places of significance. All marae should have Māori reservation status or something like it – a mechanism that puts them outside the ordinary category of land so that their maintenance in the hands of their traditional owners is assured. That status should not be able to be lifted without the acquiescence of the whole community whose marae it is or was. It should not be able to be lifted by an entity like a local authority, nor sold by absentee owners. As regards the Māori reservation status over Te Peka marae, the system failed to ensure that it was properly effected in 1951.

While the local authority's approach to the land, and its involvement in imposing and lifting reservation status, was inappropriate and unfortunate, our focus is on the responsibility of the Crown as Treaty partner. Its job was to ensure that there was a mechanism easily available to tangata whenua – perhaps even automatic – such that, once this land became a marae, it was protected from external threats like the vagaries of council policy and practice as regards levying rates, seeking to apply or lift reservation status, and buying 'unused' Māori land.

The reimposition of rates on the marae block led to its sale to the council, because in order for the owners to be able to pay the mounting rates debt, the land either had to produce an income, or be sold. Once the land was carrying debt, developing it was the only means of avoiding sale, and the owners tried their best. Incorporation was the best mechanism available, but obstacles defeated them. By creating a system that was so intractable and ineffective, the Crown breached its guarantee of te tino rangatiratanga. These were people who wanted to keep their marae land, but external forces – the council, and the Māori land tenure system – were too hard to combat.

We find that the Crown's Māori land tenure system did not secure protection for this land as a marae, affording it neither permanent reservation nor immunity from rates. Nor was there a viable option for these owners to develop their land, as there should have been. This was inconsistent with the principle of good government, and did not fulfil the guarantee of te tino rangatiratanga.

(b) *Recommendation*: We recommend that the particular prejudice to tangata whenua of Te Peka marae of losing their land, including their marae and wāhi tapu, is taken into consideration in settlement negotiations between the Crown and northern Whanganui iwi.

### (6) *The King Country Electric Power Board depot*

(a) *Finding*: The principles outlined in relation to the taking of land for Taumarunui Hospital apply equally here. All of our comments and analysis are applicable, except that arguably the land taken for Taumarunui Hospital was more culturally significant because of its history as a pā, and its proximity to Titipa urupā. Nevertheless, this was land that was significant to its owners. At least some of them had specific other uses in mind for their land, and were as a result quite opposed to sale.

(b) *Finding* – ‘in the national interest as a last resort . . .’? In summary, then, the taking of land for the King Country Electric Power Board depot was another case where:

- ▶ the land was taken neither in the national interest, nor as a last resort;
- ▶ the Crown is liable for any prejudice suffered as a result of the taking, because in Treaty terms the delegation to the electric power board of authority to take land was improper because it was unilateral;
- ▶ no efforts were made to negotiate with the owners of the land, and their unwillingness to sell was disregarded; and
- ▶ the valuation and compensation regime was monocultural and discriminatory.

The taking therefore breached the guarantee of te tino rangatiratanga in article 2, and the Treaty principles of equity and active protection.

(c) *Finding* – *procedural fairness*: An aspect of procedural unfairness that was legal but not Treaty-compliant was the Crown's having its own expert valuer present at the court hearing, while the Māori landowners had no professional valuation to rely on, nor a valuer present to give evidence on their behalf. This put them at a disadvantage.

(d) *Finding* – *compensation*: We are satisfied that the process for setting compensation of Māori land was inadequate and breached the Treaty. However, as regards the fairness of this particular valuation exercise, we are as usual unable to make a definitive finding on the price arrived at, because of our imperfect knowledge of the background and surrounding circumstances.

The compensation assessment paid scant regard to these important factors: the owners' unwillingness to sell; their proposed use of the land themselves; and the spiritual and emotional value of the land. Also, we saw no sign of inquiry into whether the owners had interests in Māori land other than their interests in Ōhura South N2E3G3.

(e) *Recommendation*: We recommend that the wrongful acquisition of Ōhura South N2E3G3 is taken into account in future settlement negotiations.

### (7) *Ōhura South G4E2*

(a) *Finding* – ‘in the national interest as a last resort . . .’? We found when we applied the ‘in the national interest as a last resort’ test that:

- ▶ The main trunk railway line was an important public work that was arguably in the national interest. We had no submissions on the point, but we accept at a level of principle that taking Māori land to enable completion of the main trunk might be justified.
- ▶ However, in order for the Crown to meet the standard in the test, it would also need to show that this land was only taken as a last resort. The Crown would have to show that:
  - this was the only land that would have served the purpose, because no other routes for the railway were suitable;
  - other forms of tenure (lease, licence, easement) were

considered, but would not have met the Crown's need;

- purchase by negotiation was tried, but failed, and it was only then that the Crown resorted to compulsory acquisition; and
- it was not possible to effect the taking in a way that made the balance of the block more useable such that the owners would not have felt driven to sell that too.

The Crown has furnished no evidence to show that its conduct met the 'last resort' aspects of the test, and our understanding based on evidence of how takings for railway were conducted leads us to the view that it is most unlikely that it did. The purchase therefore breached the Treaty, for the Crown did not fulfil its guarantee of *te tino rangatiratanga*.

(b) *Finding – offer-back*: The Crown has obligations to restore to its former owners land that was compulsorily taken for public works in circumstances that breached the Treaty of Waitangi.

We are satisfied that the price at which Ōhura South G4E2 was offered back made its re-purchase unfeasible for the descendants of the former owners. Market price was not appropriate here because:

- ▶ the number of successors to title in this land means that it would come back to multiple owners, bringing with it the usual problems of communal ownership;
- ▶ the utility of the land was decreased when its size was reduced by the railway taking, and it is now affected by a road, and a greater rates liability;
- ▶ it is unlikely to be a profitable asset; and
- ▶ the original taking breached the Treaty, and was conducted without regard for the owners' rights, and without trying to ensure that the balance of the block was useable.

We do not understand why the offer-back provisions in the New Zealand Railways Corporation Restructuring Act 1990 are still in force, especially as the equivalent sections contained in the Public Works Act 1981 were amended over 30 years ago.<sup>35</sup> Had Ōhura South G4E2 been taken for anything other than railway purposes, the land would have been offered back under the Public Works Act,

and the offer-back price could have been less than market value. This disparity is arbitrary and inequitable, and exacerbates the Treaty breach for those Māori whose land was taken for railway purposes.

(c) *Recommendations*: We recommend that the Crown:

- ▶ Amends the New Zealand Railways Corporation Restructuring Act 1990 at least to the extent of removing the offer-back provisions that constrain the ability to return land to its former Māori owners at less than market price. In fact, we endorse the recommendations in chapter 8 of *The Wairarapa ki Tararua Report*, which call for immediate and wholesale amendment of the public works regime.
- ▶ Offers Ōhura South G4E2 back to the successors of Rīngi Tānoa and Tānga Taitua at no cost.

### (8) *Rangaroa Domain and Ōhura South G4 land*

(a) *Crown concession*: In this inquiry, the Crown conceded that it did not meet the Treaty standards of good faith and fair dealing when it took Whanganui land for the railway without compensating owners.<sup>36</sup>

(b) *Findings*: There is no evidence that the Public Works Department spoke with the Māori owners of Ōhura South G4C and G4D before taking several acres of their land for railway purposes in 1907 and 1915. Indeed, the owners probably had no notice at all of the compulsory acquisition before it happened. Nor is there evidence to suggest that the owners of the Ōhura South G4 sections were offered any alternatives to their land being compulsorily acquired, or that other sites or forms of tenure were considered.

The Crown apparently did not compensate the owners of Ōhura South G4 for the five acres taken in 1907. Cleaver told us that this suggested that the land was taken under the five per cent rule, the legislative mechanism that allowed the Crown to take five per cent of Māori land for road and railway purposes without paying compensation.<sup>37</sup> In 1916, however, £25 compensation was paid for just over an acre that the Crown took from Ōhura South G4C in 1915.<sup>38</sup> The Native Land Court minute books do not

record payment for the one rood taken from Ōhura South G4D the same year.

Beyond the Crown's concession about railway purchases, we add that failure to provide notice before the taking was another serious defect. But these are failures of procedural fairness. In fact, the Crown's *hara* (fault, sin) here is more fundamental. The taking itself was completely unjustified. It has none of the hallmarks required to meet the standards of the 'national interest as a last resort' test, and accordingly breached article 2 of the Treaty.

This land served no vital railway purpose, because the main trunk remains, and this land is no longer required. Then, when the Crown determined in 1970 that the land was not required for the purpose for which it was taken, it did not allow its former owners the opportunity to regain ownership of it. Instead, it kept the land, and then decided to put it into a recreation reserve.

At the time when the land became surplus to the Crown's requirements, the Crown was not under a legal obligation to offer the land back to its former owners. Before 1981, public works legislation allowed the Crown to apply land acquired for one purpose to another purpose. However, although this practice was legal, it was not right. It was unpardonable in cases where land was taken under the five per cent rule, and no compensation was paid – as here, where the Crown did not pay the owners for the five acres it took from Ōhura South G4C and G4D in 1907, nor for the one rood it took from G4D in 1915. That land should have gone back to its former owners simply on fairness grounds. When the Treaty is brought into the equation, the Crown's breach of duty is stark.

(c) *Recommendation*: We recommend that the Crown transfers to the successors of the former owners the title to the land now in Rangaroa Reserve that it compulsorily acquired for railway purposes from Ōhura South G4C and G4D. This is an area of just over 6 acres, only one of which the Crown paid for. There will now be many successors to the former owners of the land, and we consider it appropriate for the land to remain in the reserve after the Crown transfers title to the relevant area. We recommend that the Crown negotiates with the new

title-holders an appropriate way forward for joint governance of the reserve. Claimants talked to us about creation of walkways and sightseeing facilities for the hapū and for the Taumarunui community, and also about developing an area where the hapū could grow and source herbal remedies.<sup>39</sup>

#### (9) *Taumarunui landing reserve*

(a) *Findings*: The Crown no longer owns the land Te Waihānea gave for the landing reserve land; it vested it in the Taumarunui Borough Council in 1932, and at some time after 1937, when the site became a reserve for municipal purposes, the local authority sold it. A local power company, The Lines Company Limited, is now the owner. It is private land, and we have no jurisdiction to recommend its return.

However, we are satisfied that the Crown's conduct here was not that of a good Treaty partner. It should have made provision for the land to return to the donor if at any point it was no longer required for the purpose for which it was given, and in not doing so it breached its Treaty duty to act towards its Treaty partner with utmost good faith.

(b) *Recommendation*: We recommend that the Crown compensate Te Waihānea's successors for the value of the land at the time when it ceased to be used as a landing reserve, plus interest. It seems that the relevant year was 1937, when the reserve's purpose changed to 'municipal'.

#### (10) *River control takings*

(a) *Findings*: The compulsory purchase of Ōhura South M2A did not meet the criteria for a compulsory purchase that is justified in terms of the Treaty of Waitangi. Its purchase therefore breached the Treaty. The owners were prejudicially affected because the land comprised a significant proportion of the block. The balance block was sufficiently reduced in size to make farming there a less viable option for the whānau.

Alternative sites for the river diversion were probably not considered, and the Crown dismissed alternative means of preventing erosion that would have obviated the need to take this Māori land. Once the land was no longer

required for the purpose for which it was taken, it should have gone back to its former owners.

We find that the takings in Ōhura South M2A for the diversion of the Whanganui River did not meet Treaty standards for public works; the diversion was not in the national interest; there were alternatives to compulsory acquisition; taking this land was not the only available means of preventing erosion; and the owners were not consulted about the taking. As such, the takings breached the plain meaning of article 2 of the Treaty.

(b) *Recommendation*: We recommend that the Crown takes these findings into account and negotiates with the regional council and those Māori who have an interest in the site about its future management, with the aim of involving the descendants of the original owners in decisions about the site.

#### (11) *The Piriaka Puna*

(a) *Crown concession*: The Crown conceded that it did not meet the Treaty standards of good faith and fair dealing when it took Whanganui land for the railway without compensating the owners.<sup>40</sup>

(b) *Findings*: As with other railway takings in our inquiry district, it is unlikely that Māori were consulted before the taking of the land containing the puna in 1905. The land is of significance to the claimants' whānau and hapū, and as Michael Le Gros, on behalf of the uri of Tānoa and Te Whiutahi, told us: 'I can't see that Maori would agree to give up this land, when that is where they used to bathe their sick.'<sup>41</sup>

We support the Crown's steps to offer back to the claimants the land where the puna is located. We do not know whether claimants were ultimately obliged to pay \$500 plus GST or not, but if they were we consider that requiring payment of even a modest sum breaches the Treaty. The Crown had the use of the land for many, many years, and did not pay the owners for the land in the first place. As the *Wairarapa ki Tararua Report* stated, the 'purchase back at a market price' model used by Crown agencies in

returning land is not appropriate for Māori land taken for public works,<sup>42</sup> especially where the land was taken without compensation or agreement.

(c) *Recommendation*: We recommend that the Crown returns to the successors of Taitua Te Uhi, Tānoa Te Uhi, and Tūao any payment they made, plus interest.

#### (12) *The Piriaka School site*

(a) *Findings*: This is a case that calls into question the robustness of the Crown's process for holding surplus Crown land in advance of Treaty settlements. In this case, the criticism is not only of the holding process, but also of the decision-making that lay behind choosing to transfer Piriaka School land and buildings to the Hinengākau Development Trust before all claims and interests in the property were fully ventilated and assessed.

The Crown's process for holding surplus land is complex, and has changed over time. The claimants in this particular case told us that they felt uninformed and bypassed. They knew nothing about the 'Whanganui claim specific land bank', and did not understand its implications for their application to have Piriaka School land-banked for their claim. The Office of Treaty Settlements did not communicate effectively with the claimants about their application to land-bank the school.

The Tānoa whānau, however, did communicate to the Office of Treaty Settlements their clear view that neither the Whanganui River Māori Trust Board nor the Hinengākau Development Trust represented them.<sup>43</sup> The Office of Treaty Settlements took no steps to address that situation, even though one of its policy analysts advised that it would be inappropriate to vest the land in the Hinengākau Development Trust while the interests of the claimants from the uri of Tānoa Te Uhi and Te Whiutahi were yet to be determined. She recommended that discussions with both parties take place to consider vesting the site in a wider iwi grouping or eponymous ancestor.<sup>44</sup> The Crown did nothing to facilitate such discussions. Officials basically left it to Mr Tānoa: a letter to Cedric Tānoa in July 1998 acknowledged his concerns about the

Whanganui River Māori Trust Board representing his interests, but said that the Crown accepted the validity of the board's rohe and mandate to represent Whanganui Māori. The letter advised Mr Tānoa to contact the trust board.<sup>45</sup>

Many claimants have well-founded claims concerning land in the Waimarino purchase – including Piriaka township land. We approve the Crown's intentions in returning the Piriaka School site to Whanganui Māori. However, we are concerned that:

- ▶ the community of Whanganui Māori claimants neither understood nor approved the Crown's process for holding land pending Treaty settlements;
- ▶ the Crown did not manage its process in a way that was flexible and responsive to situations as they arose;
- ▶ it was not appropriate for the Whanganui River Māori Trust Board to be the sole conduit for putting land in the land bank;
- ▶ the Crown did not ensure that it understood the tribal history of the area sufficiently to adjudicate whose interests were strongest, and whose Treaty rights were most infringed, in the area where Piriaka School was situated;
- ▶ the Crown did not, but should have, convened a hui at which it would have been possible to ventilate the representation issues raised by Mr Tānoa and Mrs Le Gros, facilitate community understanding about the whole situation, and assist the interested parties to agree on a way forward;
- ▶ before transferring the property to the Hinengākau Development Trust, the Crown did not ensure that it would operate in a way that reflected the various interests in the land and buildings of Piriaka School, and that the interest-holders were happy with the arrangements; and
- ▶ the Crown did not properly evaluate the risk of choosing to return Piriaka School – a place with both rich and complex tribal history, and strong community ties – before full inquiry into all the claims.

It is very important that the Crown does not economise on process in settling Treaty claims. Conspicuous

fairness is a vital attribute, without which the Crown runs a serious risk of creating a situation where – as here – the return of the school has not allayed the sense of grievance in part of the claimant community.

We consider that the Crown's dealings with Piriaka School were flawed in Treaty terms, and in ways that invoke its duty to uphold te tino rangatiratanga and the related value of whanaungatanga (kinship).

Because the Crown did not take the time to ensure good communication about what it was doing, and to engage fully with the genuine interests of those who opposed the transfer of the school to the Hinengākau Development Trust, there are members of the Whanganui claimant community for whom the return of Piriaka School made matters worse rather than better. Furthermore, their relationships with whanaunga (kin) were made more difficult. We think these outcomes were avoidable, and in failing to take the necessary steps to avoid them the Crown breached the Treaty principle of active protection.

(b) *Recommendation*: In order to effect settlement in the true sense, we recommend that the Crown ensures that all its processes are transparent, well communicated, and fair. The Crown has already amended its processes for returning Crown assets to entitled claimants, but we recommend that it spare no effort to ensure that good communication, and conspicuous fairness and openness, attend any such exercises in the future.

### (13) *Ōhura South B2B2C2 and the Pukehou Road quarry*

(a) *Findings*: Pukehou quarry should never have been permitted, given the dynamic river environment with pre-existing flooding issues for landowners, plus an engineer's report that clearly highlighted the risks the quarry would bring to the river environment, and to Ōhura South B2B2C2. Perhaps the risks could have been mitigated if the council had managed and monitored the conditions it imposed on the consent. It did not. Over the years, the level of the quarry land has gradually lowered with the extraction of thousands of tons of metal. The result is acceleration of the river flow when it is in flood;

accompanying vortex effects and scouring of Ōhura South B2B2C2; and much slower drainage of floodwater than when floods occurred in the days before the quarry.

Raising the level of the quarry land to where it was previously is not feasible, so other remedial measures have been explored. Horizons has accepted responsibility for improving the situation, but not at any cost. Its first attempt to seek resource consent to ameliorate the erosion and flooding problems failed because there was no consensus among those with an interest in the matter. Horizons withdrew its application. It has since tried again to initiate a resource consent process, but this time wants parties to sign a memorandum of agreement before making the application. It does not want the process derailed by disagreement after it is initiated, because that would be too expensive. Some of the relevant parties have yet to sign, for a plethora of personal and political reasons. Meanwhile, the flooding and erosion continue, and farming efforts on Ōhura South B2B2C2, and its ancestral burial mounds, remain in jeopardy.

The claimants are in an invidious position, deriving little economic benefit from their land, and unable to exercise kaitiakitanga as they would wish.

The Crown meanwhile, with its Treaty duty of active protection of the land and interests of tangata whenua, is nowhere to be seen. It delegated environmental management to local authorities, and did not monitor their performance in protecting Māori landowners' interests. If the Crown had fulfilled its Treaty duty, and ensured that Māori interests were protected, the quarry would not have happened. At the very least, the conditions would have been enforced. The Whanganui River would today be taking its natural course, and the owners of Ōhura South B2B2C2 would have had to put up with floods and changes in the river's course as they always had. They would, though, have been spared the exacerbating effects of the new land levels that increase water speed and encourage erosion and flooding.

As regards the part the Māori Trustee played in managing Ōhura South B2B2C2 for more than a decade, we acknowledge the claimants' genuine sense of grievance

about his poor oversight. Unfortunately, though, the case against the Māori Trustee here is too sketchy to enable us to make findings about precisely what happened, and where fault lay.

(b) *Recommendation:* We recommend that the Crown works with Horizons and the other interested parties, and helps to fund both the process for bringing about the remedial works, and the remedial works themselves.

## 28.29 CHAPTER 25: CENTRAL WHANGANUI LOCAL ISSUES

### 28.29.1 What did this chapter cover?

In this chapter, we described and analysed:

- ▶ a series of compulsory takings for public works from land of the Pāuro Marino whānau, at Ōhākune;
- ▶ the Crown's scoria takings from Raetihi 4B and subsequent compulsory taking of the same land;
- ▶ the changing of te reo Māori place names in the Ōhākune area;
- ▶ the Crown's management of the Rangataua lakes;
- ▶ the compulsory taking of land at Mangamingi Marae;
- ▶ the Crown's attempt to return the former Parinui Native School site to its former Māori owners;
- ▶ the Crown's return of land at the Pipiriki School site;
- ▶ the compulsory taking of land from Waimarino 3;
- ▶ the taking of land from Waimarino 3L1 for the Mākākahi Road School;
- ▶ the Waimarino 3M5 gravel pit;
- ▶ the compulsory taking of land for the Tūrangerere Railway Reserve; and
- ▶ the environmental management of the Whangaehu River and its tributaries.

### 28.29.2 Findings and recommendations

#### (1) Pāuro Marino whānau lands

(a) *Findings:* Statutes authorising compulsory acquisition for public works allowed Māori land blocks conveniently located near towns to be targeted for unsavoury public amenities.<sup>46</sup> The takings from the Pāuro Marino whānau

land at Ōhākune are a prime example. Whether the targeting was intentional or not, the facts here are undeniable. Quite simply, the local authority and the Crown used land in Raetihi 3B2A2B far too much, compulsorily acquiring sites for three major municipal projects, and six other public works. This whānau gave up more land than was at all fair and reasonable, and the balance of their landholdings has been adversely affected in multiple ways.

Little thought or consideration for the interests of the Māori landowners attended the various acquisitions, even though the evidence shows that the owners talked about the impacts at meetings of owners, and brought them to the attention of the borough council in the 1970s.<sup>47</sup> Crown officials knew about the takings, because routinely, the borough council went to the Māori Affairs Department first about potential public works takings, establishing contact details for owners, or inquiring whether the department would act on the owners' behalf. The district officer for the Māori Affairs Department regularly represented landowners in compensation claims against the Ōhākune Borough Council. On one occasion, the district officer saw the owners' plight, and brought it forcibly to the borough council's attention, but he was a lone voice in the wilderness. Such officers had no institutional support to protect the Treaty interests of tangata whenua, and were powerless to effect any change of direction in either local or central government that might have helped the descendants of Pāuro Marino to keep and enjoy their ancestral land.

Consequently, we find that the Crown facilitated its own and the local authority's compulsory acquisition of the Pāuro Marino land both legislatively and administratively. It failed to protect the Pāuro Marino whānau and the Maungārongo Marae community from unnecessary cultural, spiritual, and financial loss, and breached the article 2 guarantee of te tino rangatiratanga o ō rātou whenua (the full chieftainship over their lands). Significant prejudice to the whānau of Pāuro Marino and of Maungārongo Marae resulted.

Because the local authority now owns this land, the land is private land for the purposes of our legislation. We

may not make recommendations about what the current owner of that land should do.

(b) *Recommendations*: As far as the Crown is concerned, we recommend that it takes into account the prejudice suffered by the Pāuro Marino whānau and the Maungārongo Marae community in settlement negotiations with Ngāti Rangi.

On the issue of asbestos, we note that the chief executive of the Ruapehu District Council indicated to claimants after the Whanganui inquiry hearings that the council would welcome further information on asbestos dumping in the Tohunga Road landfill.<sup>48</sup> Given the proximity of the landfill site to the Maungārongo Marae and its kōhanga reo, and our finding of the site's significance to the Marino whānau, we recommend that the Crown works with the Ruapehu District Council to ensure that any asbestos or other hazardous materials have been handled correctly.<sup>49</sup>

## (2) Ōhākune scoria pit

(a) *Findings*: The story of the Ōhākune scoria pit is a good illustration of how Māori landowners end up getting nothing out of their land, even when that land has resources on it for which there is a market – in this case, scoria. Instead, the Crown repeatedly took scoria from Raetihi 4B without consultation or compensation.

Raetihi 4B is one of those blocks where the owners run into many hundreds, and many of the shareholdings have not been succeeded to. Such blocks are very difficult to run. No one has a sufficiently large interest to make it worthwhile for anyone to invest time and effort in managing the land, and the problem of bringing the list of owners up to date becomes insuperable. The Māori Trustee's longstanding involvement is a common response to such difficulties, but seldom provides a solution.

As we have discussed earlier in this report, the Crown enacted a Māori land tenure system that was designed to operate for its own, rather than for Māori landowners', convenience. It has many unfortunate characteristics, of which the fragmentation of title is but one. Highly fragmented titles are especially unworkable, though, and what

happened on Raetihi 4B is typical. Many owners with few shares become distanced from the land, and are therefore vulnerable to exploitation. The Māori Trustee was supposed to be a mechanism for ensuring the protection of landowners' interests, but in practice the office was often inefficient, overly bureaucratic, and easily overridden. All those characteristics are evident in this case.

Once the Crown became directly involved with the Raetihi 4B block and began deriving benefit from it, it was incumbent upon it to ensure that the owners also derived benefit. The Crown, in the guise of the Ministry of Works, did not regard itself as being under such a duty, and it instead in:

- ▶ 1963: used section 17 of the Public Works Act 1928 to gain access to the land, and to the scoria, without arranging payment;
- ▶ 1968: compulsorily acquired the land for the scoria pit as a means of circumnavigating any necessity to deal with the owners or the Māori Trustee over royalties – and again, made no payment;
- ▶ 1968 to the late 1980s: continued to use the land and its resources without payment, then once it had no further use for the land, sought to quit the situation in a way that minimised cost and effort;
- ▶ 1998: finally exited the situation by using section 54 of the Public Works Act 1981 to revoke its earlier compulsory acquisition and re-vest the land in the Māori Trustee; and by gaining the agreement of the Māori Trustee to an all-up payment of \$1,500 (plus owners' solicitors' costs) for the use of the land and its resources since 1963.

In the 1990s, when the Crown was finally sorting out a resolution to this fiasco, one might have expected to see a different attitude from the one that prevailed in the earlier period – in particular, an acceptance of responsibility for the unwieldy nature of Māori land tenure, rather than shifting the problem elsewhere. Returning title and paying compensation to the Māori Trustee did not resolve the problem – the owners of Raetihi 4B cannot benefit until they are defined. In this present era, the Crown should be prepared to help sort out the problem of actually delivering benefits to those entitled, by materially

assisting in the huge task of updating the owners' list. The Crown should try to alleviate the problems with the Māori land tenure system where it can – and especially in situations like this one, where the Crown's own conduct was poor over many years, and where it derived benefit from land and the owners did not. For the Crown to approach the matter otherwise is to engage in a particularly reprehensible kind of Treaty breach: creating a tenure system that makes it difficult for Māori landowners to protect their interests; exploiting that vulnerability to use their resources and take their land; then fix the situation by taking the necessary legal steps, but doing nothing to ensure that those entitled actually derive benefit from the use the Crown has had of their land.

As regards the role of the Māori Trustee in this case, we agree with the Tauranga Moana Tribunal. It found that in establishing the Māori Trustee, the Crown was obliged to ensure that it carried out its role in the best interests of Māori landowners.<sup>50</sup> Here, the Māori Trustee allowed itself to be bureaucratically bullied, did not insist on royalties, and then, after more than three decades of non-payment, accepted meagre compensation.

Before closing on this topic, we should briefly say what is so obvious as almost to go without saying: the Crown's compulsory acquisition of Raetihi 4B was not one that was in the national interest as a last resort. It therefore breached the Treaty – the more so as in fact it was probably a purchase in bad faith: the Ministry of Works saw buying the land as a cheaper and more convenient option than paying the owners royalties for the scoria extracted from their land.

The Crown also breached the Treaty by bureaucratically bungling the task of paying the owners proper compensation and royalties over a period of more than three decades. This was a flagrant failure to actively protect the interests of the scoria pit's Māori owners.

(b) *Recommendations:* We recommend that the Crown:

- ▶ Assists with the rehabilitation of the land used for the former scoria pit.
- ▶ Reviews the compensation paid to the owners of Raetihi 4B, including inquiry into:

- whether there was payment for injurious affection arising from the scoria pit; and
  - where interest was, or should have been, accounted for.
- Makes further payment to those entitled if the compensation was as inadequate as it appears to have been.
- Embarks on, and funds, a project of working with the owners, claimants, and hapū to update the list of owners of Raetihi 4B so that those entitled can receive benefit from the use that the Crown derived from their land from 1963 to 1998.

### (3) *The Crown and te reo Māori place names*

If anyone ever wondered whether names are potent, the Wanganui/Whanganui debate should have put the matter beyond doubt.

We agree with these observations of the Wairarapa ki Tararua Tribunal:

When settlers came to this country, they soon began renaming the landscape. It is an aspect of the assumption of power inherent in colonisation. . . . Somehow, settlers felt able to approach the places they were newly occupying as though nothing and no one had gone before: they were the people who counted, and their language and their names were more important. Misspelling and mispronouncing Māori names is simply another manifestation of this attitude.<sup>51</sup>

It is not hard to see why streets named after British rivers and important Europeans had resonance for Pākehā settlers. More difficult is understanding why those Pākehā did not understand, and respect, that places in Ōhākune already had names – names that Ōhākune Māori had known for a long time, and were meaningful to them because they evoked their whakapapa and history.

In our view it was not acceptable for the authorities to allow Pākehā nomenclature to override pre-existing Māori choices. It certainly is not acceptable now. The Crown and local authorities today routinely discuss with Māori any proposed changes to Māori place names. Recognition of te reo Māori as an important aspect of our national identity has also grown over time. As the Tribunal for the Wai

262 claim reported, New Zealanders now see te reo Māori as shaping our collective identity at the same time as it sustains Māori cultural identity.<sup>52</sup>

The correction of place names in the Ōhākune area has been slow in coming, but it has occurred in some areas, as evidenced by the restoration of the rightful names of Maungārongo Marae and Rotokura Lake. We hope that this will continue, including consideration of returning street names in Ōhākune to their pre-1914 names. More broadly, we trust that these days, the role of tangata whenua in Ōhākune is sufficiently understood and respected that they can work together with the Crown and local authorities responsible for the management of significant places, to explore how tangata whenua history can be better represented in the place names of Ōhākune.

The evidence about the name changes and how they came about is insufficiently detailed for us to make findings about Crown Treaty breach. However, we concur with the Wai 262 Tribunal's view that the promotion of te reo Māori in New Zealand is the responsibility of both the Crown and te iwi Māori.<sup>53</sup> We consider that it would enhance Treaty relationships if the Crown were to formally require local and regional authorities to advance this aspect of partnership when naming new places, and in restoring the correct Māori names for places that have Māori names already, or had them previously.

### (4) *The Department of Conservation and Environmental Management*

(a) *Findings:* The Rangataua lakes are wāhi tapu of significance to Ngāti Rangī and Te Uri o Tamakana, and possibly also to other iwi groups in the Ōhākune area. In the decades since the land went into a reserve under the control of first local authorities and then the Crown, tangata whenua have been unable to exercise their cultural norms for wāhi tapu.

Ōhākune Lakes Reserve is Crown land, but before it came into public ownership, iwi of this district lived there, gathered there, hunted there, fought there, and died there, mai rā anō (from time immemorial). It became wāhi tapu because of events now two centuries ago. That past was not obliterated when the land came into Crown hands.

Recognising and respecting Māori history and culture is an integral part of the concept of partnership between the Crown and Māori. When the Crown owns land like this, it must honour the special nature of what happened there. That involves working closely and respectfully with those whose forebears owned it, and were its kaitiaki. They remain its kaitiaki, despite its Crown title. The Crown must be creative and open in order to construct a partnership that allows that kaitiaki role to be fully and meaningfully expressed.

The lack of partnership in its dealings with the Ōhākune Lakes Reserve in the past leads us to a finding that the Crown breached this Treaty principle in its management of this land and the two lakes.

We make no findings on the display panels at the ranger station. We regard the incident as a hurdle DOC faced in its journey to better relationships with tangata whenua of the region. We considered its approach to resolving the issue was generally sound, and we encourage it to continue to work with the different iwi groups to find solutions that honour the mana of them all.

(b) *Recommendation:* We understand that DOC has, since our inquiry ended, made structural changes that involve new policy, practice, and personnel. We cannot comment on the Treaty compliance or otherwise of the new regime, but as regards Ōhākune Lakes Reserve, we recommend that our findings about partnership, history, and culture are factored into arrangements for management of the reserve arrived at through discussion between DOC and tangata whenua.

#### (5) *Mangamingi marae lands*

(a) *Findings:* A dearth of evidence limits our ability to make findings on some aspects of the Mangamingi claims.

Here is a brief summary of what we know about land taken from the marae block (Raetihi 2B2B) for the railway:

- ▶ the Mangamingi community objected to the railway branch line going through their land;
- ▶ their objection was not heeded;
- ▶ their land was compulsorily acquired for the Raetihi-Ōhākune branch line in 1914 and 1918;

- ▶ the railway track ran a stone's throw from the whare tūpuna;
- ▶ in December 1922, the owners of the Raetihi 2B2B3 blocks were awarded compensation of just over £25, which was supposed to have been deducted from a lump sum of just over £624 which the Native Land Court ordered the Native Trustee to pay to the Aotea District Māori Land Board for distribution;
- ▶ the Aotea District Māori Land Board may or may not have received the funds from the Native Trustee, may or may not have distributed the funds in the amounts determined by the court, and may or may not have deducted commission for distributing the money;
- ▶ the railway closed in 1968, the tracks were lifted, and the former railway land was returned to its former Māori owners; and
- ▶ the marae subsequently paid to fill in the cutting so that it could use the land.

On the basis of these facts, we find that:

- ▶ This was not a compulsory purchase where the national interest was at stake, and where the land in Raetihi 2B2B3 was taken as a last resort.
- ▶ The railway branch line did benefit the local Māori community by improving transport for people and goods, and supporting local industry. However, the loss of amenity to the Mangamingi whānau arising from the line passing through the pā could have been avoided if the route had been changed even slightly – so that it ran on the other side of the road, for instance.
- ▶ In general – and the more so in circumstances like this, where the Māori community objected, and went so far as to take their protest to Wellington – the Crown was under an obligation to take all possible steps to minimise the negative impacts of compulsory purchases on the owners of the land. There is no evidence to suggest that the Crown did anything to mitigate the loss of amenity at Mangamingi pā arising from the railway track running through the marae land. Having visited the site, we consider that relocating the line so that it was further distant from the marae would not have been difficult or expensive. Even 50 metres further away would have made a difference. The Crown's decision

to lay the track where it did was culturally insensitive and unnecessary, and showed disregard for any duty of partnership.

- ▶ The Crown acquired four acres and 14.25 perches from Raetihi 2B2B3. Whether or not the owners actually received the compensation of £25 that they were awarded, the award was low. Using the Reserve Bank inflation calculator, the buying power of one New Zealand dollar in 2014 is equivalent to £0.01 in 1922. On that basis, £25 had a similar buying power in 1922 to about \$2,500 in today's money.
- ▶ No account was taken of the special value to the owners of land that was effectively part of the pā. The Native Land Court awarded the compensation as a lump sum, so clearly did not attribute value to the unique characteristics of individual blocks.
- ▶ Other poor aspects of the compensation process were that:
  - it took too long (the compensation award did not come through until nearly five years after the purchase);
  - the owners' solicitors' costs were deducted from the compensation, whereas the Crown should have borne the costs of the process – which included legal representation for those whose land it compulsorily acquired against their wishes; and
  - the Aotea District Māori Land Board was allowed to claim commission for distributing the compensation, which potentially reduced the compensation further.
- ▶ Once the railway was closed, and the former owners got their land back, the Crown should have ensured that it was restored to its original condition. At least, it should have made sure that that land was in a usable state.

Thus, the Crown did not honour its guarantee of te tino rangatiratanga in article 2 of the Treaty, and breached its duty of active protection.

On the claim about Pākihi Road, we make no findings. The parties did not present evidence on the formation or realignment of the road, and our additional research shed no light. As a result, we cannot say when the road was realigned, how much land was taken for the realignment, which legislation was (or was not) used, or any

other material details that would enable us to analyse what happened.

(b) *Recommendation*: We recommend that the Crown takes into account the findings and breaches reported here in its settlement negotiations with the claimants.

#### (6) **Parinui Native School site**

(a) *Findings*: We find that, in this case, the Crown attempted to return the former Parinui Native School site to its former Māori owners. We do not know why it took over 13 years to apply for the re-vesting order, but it is likely that the Second World War gave rise to administrative delays.

There appears to have been a failure of process where staff did not implement the Māori Land Court's order to re-vest the land. While the fault seems to have lain principally with the bureaucratic processes of the Māori Land Court, we also consider that, as a first step, the Crown should have notified the owners that the future of the Parinui Native School site was being determined. This communication failure resulted in the descendants of the former owners believing for more than half a century that the Crown still owned the land. In fact, the formal position concerning the school site's ownership remains unclear, because of the state of the title documents to which we have referred.

Not monitoring the process of re-vesting, and not telling the successors of the land's former owners about what was happening, constituted Crown failure to actively protect these Māori interests.

(b) *Recommendation*: We recommend that the Crown supports and funds the owners of Taumatamāhoe 2B2B15A2 and 2B2B15A3 to apply to the Māori Land Court for an investigation into the 1954 re-vesting of the Parinui School site, and to effect whatever rectification is required.

#### (7) **Pipiriki School site**

(a) *Findings*: At the heart of Ms Whitu, Mr Cribb, and the Tamahaki claimants' complaint about the return of the Pipiriki School site to the Pipiriki Incorporation lies a simple proposition: the land should have gone back to

successors of the former owners of the gifted land, but it did not. That is because, they say, their tupuna was one of the donors, and at least some of her successors – for example, Ms Whitu and Mr Cribb – are not beneficiaries of the Pipiriki Incorporation.

Determining whether, and to what extent, the Crown's process for return of the land fell short involves (1) tracing the interests of Uenuku Tūwharetoa, Taurerewa Tūwharetoa, and Mokopuna Tirakoroheke in land gifted for the school in 1953; and (2) determining whether those entitled to succeed to those interests derive benefits from the Pipiriki Incorporation, to which the Crown transferred the land. We do not have the expert and detailed evidence that would enable us to make that determination.

We are in no doubt that this matter is important to Ms Whitu, Mr Cribb, and the Tamahaki claimants, but the Crown did not engage with their claims with respect to the school land in any meaningful way. For example, it did not provide copies of the stage 2 DTZ report that might reveal the extent to which the Crown explored the questions posed in the previous paragraph, or uncovered answers to them.

We are satisfied both that the successors of the donors of the school land are entitled to derive benefit from the interests in the land that the Crown has returned, and that the Crown did not manage its re-vesting process with any intention to exclude any of those successors from benefiting from the return of the school site. However, it seems on the evidence before us that it may unwittingly have done so.

We find that the Crown's failure to fully explore the succession rights to the site of Pipiriki School, or to engage sufficiently with the contentions of Ms Whitu and Mr Cribb, constitutes a failure to actively protect the rights of Māori in their land.

(b) *Recommendations*: We recommend that the Crown work with Ms Whitu, Mr Cribb, and Tamahaki claimants (that is, claimants in Wai 555, Wai 1224, and Wai 2204) to commission research that will enable an informed view to be reached on:

- ▶ the interests of Uenuku Tūwharetoa, Taurerewa Tūwharetoa, and Mokopuna Tirakoroheke in land gifted for the school in 1953; and
- ▶ whether those entitled to succeed to those interests derive benefits from the Pipiriki Incorporation.

If, as a result of the investigation, it appears that successors to interests of donors of the land are excluded from benefiting from the return of the land to the Pipiriki Incorporation, the Crown will have breached both:

- ▶ the agreement with the donors on the basis of which the school land was gifted to the Crown; and
- ▶ the principles of the Treaty, in failing to actively protect the interests of those who are entitled to derive benefit from the return of the school land, but in fact do not.

If this is the situation, the Crown should negotiate with those entitled an alternative means for them to derive benefit.

### (8) *Waimarino 3 roads*

(a) *Finding – compensation for private road lines on Waimarino 3 that became public roads*: Māori actively sought the advantages that would come with roads, and needed road access to newly created partitions. When the Native Land Court created road lines on Waimarino 3 as part of the partition process, it was setting up the potential for owners of Māori land to create roads to access their land. The road lines were on land that continued in Māori title. But what happened on the ground was that when roads were formed on Waimarino 3, they began to be used – and maintained by the local authority – as if they were public roads.

When this situation was brought to the attention of the Māori Land Court in 1966, it referred to section 422(2) of the Maori Affairs Act 1953, which was drafted for this very situation. It empowered the Māori Land Court to recommend to the Minister of Works and Development that land used as a road 'be declared to be a road'. It left it to the judge to decide whether or not to make the recommendation subject to the payment of compensation to those whose land interests were affected.

As regards these roads on Waimarino 3, the Māori

Land Court seems to have regarded the task as a kind of administrative clean up, since everyone had proceeded previously on the basis that the roads were already public roads – including the owners of the Māori land on which they had been formed. As a result, it did not see the transfer of the road, and the land, out of private and into public hands as a moment when compensation was owed to those who owned the land.

The court also had a practical reason for not awarding compensation. Without specifying how much compensation was likely to be payable, it considered that it was likely to be too little to justify the effort and expense of finding the possibly many hundreds of beneficial owners.

It falls outside our jurisdiction to comment on the conduct of the Māori Land Court judge in this case. The Waitangi Tribunal's job is to assess the conduct of the Crown against the standards implied in the Treaty of Waitangi. Constitutionally, the conduct of the judiciary is not the conduct of the Crown.

However, the legislation was at fault here: the Crown constructed the legal context within which the judge was operating. It should not have been possible for the Māori Land Court to recommend that the land be declared a road without giving all whose land interests were affected the right to be heard on the matter, and especially on whether compensation was payable.

Section 422(2) of the Maori Affairs Act 1953 gave the Māori Land Court discretion whether to recommend that land used as a road should be declared to be a road, and whether compensation should be paid to those whose land interests were affected. In this arrangement, there is no agency at all for the owners of the Māori land in question – not even a requirement that they be notified after the fact. This creates the possibility that the fate of Māori owners' land is determined as between the court and the Minister of Works and Development, without those owners being informed that it might happen, is happening, or has happened.

As to payment, the provision creates no expectation that landowners whose land has been used for a road will be paid; simply, the Māori Land Court's recommendation

that the road is declared a road 'may' be subject to compensation. Although the five per cent rule, discussed in chapter 23, created a legal environment in this country where using Māori land for a road without paying owners was commonplace for some decades, that era was long gone by the mid-twentieth century. As the *Ngati Rangiteaorere Claim Report* found, the taking of land without compensation amounts to confiscation: 'Whatever the merits of compulsory acquisition, as a last resort, there can be no justification of the failure to pay compensation.'<sup>54</sup> For a provision like section 422(2), redolent of colonial high-handedness, to be entering the statute books in 1953 was surely an anachronism.

This provision, which authorised expropriation without notice or compensation, breached the guarantee in article 2 of te tino rangatiratanga.

(b) *Finding – the return of land in Waimarino 3 no longer required for roads:* Treatment of land no longer required for roads has been inconsistent. While the unused road lines attached to Waimarino 3G and 3H were returned to the owners of the surrounding Māori land, other road lines were not.

All owners of land in the Waimarino 3 block should have been treated the same as owners of land in Waimarino 3G and 3H. There is no reason that we can see for unused road lines to remain in limbo – that is, as Māori freehold land, but not vested in any particular owners. We encourage the Crown and council to work with those landowners who wish to have road lines on their partitions removed to take the necessary steps to restore the land to their ownership.

(c) *Finding – the road line bisecting the kāinga:* The only good thing to be said about the road line bisecting Waitahupārae Marae and kāinga, for which the Crown, on behalf of Waimarino County Council, compulsorily acquired land, is that the road was never constructed. It was intended for an approach to a bridge that was never built.

Compensation seems to have been awarded in the Waitahupārae Marae case (£30), but every other aspect of

this acquisition was flawed, and breached the guarantee of te tino rangatiratanga:

- ▶ It was a minor, local public work for which any compulsory acquisition was unjustified, but to take land for a planned road through a marae was a flagrant disregard of te tino rangatiratanga.
- ▶ The Manganui-a-te-ao runs through a long river valley. It is hard to imagine that there were no other places to locate a bridge and an access road. If the Crown or council had considered alternatives, or taken into account at all the cultural implications of running a road through a marae, or tried to negotiate the matter with tangata whenua, their culpability might have been less. There is no evidence that any such steps were taken here.
- ▶ It must have been apparent a long time ago that the bridge was not going to be built, and that the land taken for the road would not be needed for that purpose. The land should have gone back to its former owners, or their successors. The Ruapehu District Council's lack of action once the issue was brought to its attention in about 1990 was particularly negligent.

(d) *Recommendations*: We recommend that the Crown works with the Ruapehu District Council to investigate all unused road lines across Māori land in the Waimarino 3 block taken under the provisions of the Public Works Act, and determine whether they are able to be returned to their parent blocks under the relevant legislative provisions. We recommend that the Crown funds any necessary applications to the Māori Land Court.

#### (9) *Mākākahi Road School*

(a) *Findings*: Mr Pike donated the land for Mākākahi Road School, but because the partitioning of the Waimarino 3L1 block was not done properly, the school site came out of the whole block rather than out of Mr Pike's portion of the block. The Māori Land Court's error made the school site effectively a gift from Mr Pike as to half its area, and an expropriation from the Māori owners of Waimarino 3L1 as to the other half – which amounted to just over an acre.

Having decided to use compulsory acquisition as

the best means of effecting Mr Pike's gift of land for the school, it was incumbent on the Crown to make sure that the process was undertaken properly. There are two respects in which the Crown failed: officials working in the Māori Land Court failed to give effect to the court's order by subtracting the land for the school site only from Mr Pike's partition (Waimarino 3L1B) rather than from the parent block (Waimarino 3L1); and officials working in the Public Works Department failed to ensure that the school land came only from the donor's land rather than from all the owners' land. Officials were slipshod, not attending to the job of getting sound title for the school until 1953, 20 years after the land was gifted.

We find that the Crown's failure to ensure that the land transferred matched the terms of the gift prejudiced the Māori owners of Waimarino 3L1: they unwittingly gave up more than an acre of their land to the school site. There was both an error of Māori Land Court staff in subtracting land from both 3L1A and 3L1B rather than from 3L1B only; and failure by officials in either the Public Works Department or the Education Department to ensure that title for the school site reflected the land interests that Mr Pike gifted.

(b) *Recommendation*: As the school site is now in private ownership, we cannot recommend its return. However, we can and do recommend that the Crown compensates the successors of the Māori owners of Waimarino 3L1 in 1934 for the expropriation from them of one acre one rood 13.02 perches, including interest.

#### (10) *Waimarino 3M5 gravel pit*

We made no findings or recommendations.

#### (11) *Tūrangarere railway reserve land*

(a) *Findings*: The Tūrangarere Railway Reserve was taken under section 167 of the Public Works Act 1894. This legislative regime and actions taken under it prejudiced the Pohe whānau: Ropoama Pohe was not properly notified of the taking, and as a result believed he continued to own the section where he lived.

The Crown discovered its failure to notify and pay

compensation to the Pohe whānau in 1935 as a result of Whatarangi Pohe's meeting with the Prime Minister. In our view the peppercorn lease arrangement entered into was an inadequate response. The Crown should have done its utmost to return to the whānau at least the three acres where Ropoama Pohe lived in 1935: by then, the Crown had already had 30 years' ownership of the Pohe land without payment. A small amount of administrative cost and inconvenience was a small price to pay for setting matters to rights. Acceding to Whatarangi Pohe's request might have set a precedent, as officials feared – but, in situations of this kind, a good one. Returning small areas of land important to whānau Māori was precisely the kind of step a good Treaty partner should have been taking. It is apparent that these three acres are not vital to the railway. No doubt having land that acts as a buffer around the railway is optimal for operational reasons, but in particular circumstances like this, those operational reasons should prevail only where the railway absolutely cannot do without them. The longstanding lease of this land, interrupted it appears by only one operational requirement in about 1993, is a strong indication that such circumstances do not apply here. If it were considered imperative to retain the ability to access the land for such eventualities as the work that occurred in 1993, retention of an easement over the subject land would probably suffice. We saw no evidence of the Crown's at any time looking into alternatives to owning the freehold of this land.

At the time of the taking, Raketāpāuma 2B1 was not in the sole ownership of the Pohe whānau. However, it is apparent that Ropoama Pohe, and Whatarangi Pohe after him, occupied and cultivated the land in question in the belief that they owned it. Then, once they learned that ownership had passed to the Crown, Whatarangi Pohe and his uri (descendants) after him, sought the return of the land on behalf of this whānau who have leased the land on a peppercorn rental for the best part of a century. We thus have evidence of this whānau occupying the land for about 150 years. Although the Pohe whānau had no partition of these three acres, the evidence is strong that their interests in that small area predominated.

We find that the failure to notify Ropoama Pohe about

the compulsory acquisition, the failure to pay compensation, and the failure to give back the land in the 1930s when Whatarangi Pohe travelled to Wellington to resolve the matter, meant that the Crown breached the principles of the Treaty of Waitangi. We find the Pohe whānau claim to be well founded.

(b) *Recommendation*: We recommend that the Crown returns to the Pohe whānau the land that, as far as we are aware, remains the subject of a peppercorn lease arrangement between the New Zealand Railways Corporation and the Pohe whānau (whether or not that peppercorn lease arrangement has remained in place).

### (12) *Whangaehu River*

(a) *Findings*: The Whangaehu River and its tributaries are taonga of Ngāti Rangī, and vital to their way of life. The waterways have always sustained them economically, socially, spiritually, and culturally. This awa tupuna has a unique adaptive ecosystem, and characterising it as 'dead' (due to acidity from periodic volcanic discharges) demeaned and devalued Ngāti Rangī mātauranga and mana, and disrespected the ancestral relationship between the people and the river. To them, polluting the water is polluting the people.<sup>55</sup> Agriculture, market gardening, water diversion for hydroelectricity, and wood processing have all harmed the environment, and in so doing have harmed them.

As a Treaty partner, the Crown must have regard to Māori spiritual values.<sup>56</sup> In the past, Ngāti Rangī's spiritual relationship with the Whangaehu River seems not to have influenced local authorities' resource management decisions. For instance, we are unaware of Ngāti Rangī's playing any part at all in decision-making processes about the pulp mill's rights to take and discharge waste into the river, or the water rights allocated to vegetable growers. Witnesses from Horizons Regional Council appeared before us, but we heard little about its current process for allocating water rights, or how it engages with Ngāti Rangī. However, we do know that Ngāti Rangī has made progress on its resource management plans, and this will foster early and appropriate engagement between the iwi

and those charged with making environmental decisions. We gained the impression that the relationship between the mill, Horizons, and Ngāti Rangī has improved over time.

We agree with the National Park Tribunal's finding that the Tongariro Power Development adversely affected the Whangaehu River and its tributaries. Although the Whangaehu River was not part of the scheme, the tributaries that diluted its acidic waters were diverted, affecting the migration of tuna and changing the way Ngāti Rangī use the river.<sup>57</sup> We note that the resource consent process for the Tongariro Power Development gave scope for changes that are in Ngāti Rangī's interests.

More broadly, we find that the Crown did not ensure Ngāti Rangī's and other Māori interests were taken into account in the care, use, and management of the Whangaehu River, and did not actively protect their interests in their taonga, contrary to the principles of the Treaty.

(b) *Recommendation*: We recommend that the Crown takes these findings into account in settlement negotiations, and ensures that the management regime for the river provides for decision-making that better recognises Māori interests, and supports the restoration of the river to its natural state.

## 28.30 CHAPTER 26: SOUTHERN WHANGANUI LOCAL ISSUES

### 28.30.1 What did this chapter cover?

In this chapter, we described and analysed:

- ▶ the compulsory taking of land for the Parapara Road;
- ▶ the management of the Ōtoko Scenic Reserve;
- ▶ the management of Taukoro Bush;
- ▶ the cause of flooding at Ōhotu 6F2;
- ▶ the Crown's sale of land that Māori gifted for Koriniti Native School;
- ▶ the Crown's planning for the Ātene dam;
- ▶ the Crown's disposal of land from Parikino School sites;
- ▶ the compulsory taking of land from Puketarata 4G1;
- ▶ the Wanganui Harbour Board's compulsory acquisition of land at Kaiwhaiki;

- ▶ the management of taonga tūturu;
- ▶ the management of Kaitoke Lake and Lake Wiritoa;
- ▶ the designation of Taipakē as a public reserve; and
- ▶ the taking of land at Kai Iwi for the Wanganui water supply.

### 28.30.2 Findings and recommendations

#### (1) Parapara Road

(a) *Findings*: The Central North Island Tribunal found that the 'five per cent rule' was in breach of the Treaty because it treated Māori land differently from general land, to the disadvantage of Māori.<sup>58</sup> We concur, and we consider that the Parapara Road takings constitute acts of the Crown inconsistent with the principles of the Treaty. While the land for the first and second routes was returned quickly in 1913, the taking for what is now State Highway 4 clearly prejudiced the claimants and no compensation was paid. A road was driven through their papakāinga, threatened the stability of significant wāhi tapu, and led to the relocation of kōiwi from the urupā in Kākātahi.

(b) *Recommendation*: We recommend that the Crown compensate the claimants for the taking of their land and for damage to their papakāinga and urupā.

#### (2) Ōtoko Scenic Reserve

(a) *Findings*: In our consideration of the conservation estate in this report, we have found that Māori retain a kaitiakitanga interest in taonga in the conservation estate, even if the land was purchased – as in the case of Ōtoko Scenic Reserve. We concluded that the extent of Māori involvement in any part of the conservation estate must be decided on a case-by-case basis, by reference to three factors (see section 22.6.5).

In Ōtoko's case, we do not know the environmental status of the reserve. We do know, however, that Māori have a strong relationship with it: Ōtoko Marae is nearby; Māori have expressed interest in regaining ownership of the land since at least the early 1940s; and most of the other blocks in the area are Māori land administered by the Ngāpukewhakapū Trust. The public cannot access the reserve, and few probably even know that it exists. It is

safe to say that the public interest in Ōtoko Scenic Reserve is low.

Māori influence in the management of scenic reserves was usually small or non-existent. We have no evidence that tangata whenua were involved in the management of this reserve, and consider it probable that they were not.

(b) *Recommendation*: We were encouraged that the Crown offered, as part of the discrete remedies process, to transfer the management of the reserve to an entity established by the claimants. We agree with the claimants, however, that the circumstances here are such that it would probably be more appropriate for the Crown to return ownership of Ōtoko Scenic Reserve to them. Depending on the significance of the reserve from an environmental point of view – about which we have no information – it may be necessary for covenants to be entered into to maintain a conservation management regime. We recommend that this issue is addressed during settlement negotiations.

### (3) *Taukoro Bush*

Because of insufficient evidence, we made no findings of Treaty breach and therefore no recommendations. We were unable to draw any conclusions about the history of Taukoro Bush before 1987. It seems odd that over 100 years passed before the claimants were aware that the bush was in Crown ownership, but we know too little to understand why or how that came about.

On the other hand, we concluded that the modern access issues that prevent Ngāti Rūwai, Ngāti Hine-o-te-rā, and Ngāti Waikārapu from undertaking customary harvesting and hunting in Taukoro Bush are the result of the decision to grant a lease over the Taukoro Conservation Area in 1959. DOC wants the lessee to surrender part of the lease, and is negotiating to that end. We hope that this will solve the access problem.

The principle and practice of partnership is important in balancing Crown and Māori interests in the management of conservation land. In Taukoro Bush, the scales are not adequately weighted in favour of Māori interests. It is telling that DOC could identify only one occasion when Ōtoko Māori were invited to participate in the

management of Taukoro, while the claimants spoke vividly of their frustration at DOC's continued disregard for their rangatiratanga and kaitiakitanga. Taukoro Bush is important to the Ōtoko community as the last significant stand of forest in their rohe.

The Crown should actively engage with the claimants in the day-to-day management of Taukoro Bush. During our hearings, DOC officials indicated willingness to work with Ōtoko people in the future management of Taukoro. We trust that this is already underway, and that, before too much longer, tangata whenua and DOC manage Taukoro Bush in true partnership.<sup>59</sup>

We note that there is at least one other iwi with interests in these conservation areas whom we did not hear from.<sup>60</sup> DOC needs to make necessary inquiries to ensure that all those with legitimate interests are included in their processes.

### (4) *Ōhotu 6F1*

Because of insufficient evidence, we made no findings of Treaty breach and therefore no recommendations. We were able to conclude that those owners who voted to sell Ōhotu 6F2 held only a small minority of the shares. On the other hand, there was considerable discussion among owners as to what to do with the land, with prominent local men taking an active part in the decision. It seems likely that they consulted with other owners. We do not know why, in the end, they agreed to sell, although we can say with some certainty that they were not in a position to farm it themselves. The lump-sum purchase price was presumably simply more desirable to most than drip-fed rent on a long-term lease.<sup>61</sup>

The remnant partitioned out as Ōhotu 6F1 is bisected by Parapara Road, but Rāhera Tīweta no doubt had her own reasons for choosing these particular six acres. However, proximity to the road has brought problems over the years. Water piped away from the road and onto Ōhotu 6F1 has led to flooding, and now land is sought to re-route the road.

Parapara Road is a state highway, so its management is in the hands of Crown agencies. Those responsible for the road must have laid the pipes that have damaged Ōhotu

6F1 and caused flooding. It appears that this occurred without permission or compensation for the adverse effects. There are also pipes directing run-off from other farmland onto Ōhotu 6F1. They may be on private land, although it is not clear from the evidence presented who owns them.<sup>62</sup>

The lack of definitive evidence about past or present processes concerning the land and the maintenance of the road precludes our making findings of Treaty breach or recommendations. However, we do encourage the Crown to facilitate meetings between the claimants and agencies working in Ōhotu to discuss rehabilitation of the damage to the block. It is also critical that any purchase of Ōhotu 6F1 land to re-route Parapara Road occurs only if the owners are willing, and suitable land is made available by way of exchange.

#### (5) *Koriniti Native School*

(a) *Findings*: The means that the Crown deployed to transfer from Māori to the Crown the land in the Tauakirā block identified as the school site masked its nature as gifted land. It would have been preferable, and tidier, had the school site land been separately transferred in a manner that marked it out for what it was: a gift. Probably, though, officials in the 1890s were not sufficiently prescient to foresee a day when the school would close and the school site would need to be returned to its donors.

Even though the transfer was not labelled as a 'gift', it is arguable that such labels were not necessary when the legislation of the day required Māori communities to donate land for native schools. This made it obvious that native school land was donated land, and the Crown should have known when it came to dispose of the school site that it was *extremely* likely that a Māori community would have donated the land for a rural native school set up in the 1890s.

In this case, though, the Crown officials concerned apparently did not know the legislative history of native schools, and did not inquire into the matter in any depth.

But then we have evidence that the Crown was *told* on two separate occasions before transferring the land

to private purchasers that it had been gifted. This should have triggered an in-depth inquiry into the situation. We agree that some records suggest the possibility of a purchase, but further steps, including inspection of Native Land Court minutes, could and should have been undertaken to establish what actually happened.

The mistake was discovered after the land had been sold to a private buyer, and the Crown tried to remedy the situation, seeking but failing to repurchase the land, and offering the proceeds of the sale to Ngāti Pāmoana, which they refused. Things stalled in 1983, and have not progressed since.

Almost five decades since Koriniti Native School closed, Ngāti Pāmoana remain in the situation where the Crown sold the land they gifted for the school. They have received neither compensation nor land in lieu of the land sold.

The Crown failed in its duty to actively protect the interests of Ngāti Pāmoana by:

- ▶ poorly documenting the transfer of the gift of the school land to the Crown;
- ▶ inadequately investigating the history of the land when the school closed, and selling it on the false premise that it purchased the land for the school; and
- ▶ letting the matter languish since 1983, rather than continuing to work with Ngāti Pāmoana to resolve their legitimate grievance.

(b) *Recommendation*: Redress is now well overdue, and we recommend that the Crown promptly enters into discussions with the successors of the donors of the school land with a view to resolving this regrettable situation.

#### (6) *The proposed Ātene Dam*

(a) *Findings*: The proposed Ātene Dam and its exploratory works caused *mamae* (hurt) that endures to this day. The only reason that Māori did not lose their homes, marae, and ancestral lands was the instability of the land. Crown concern for tangata whenua interests did not come into it at all.

The Crown's authority for the works at Ātene was the order in council of 1958, of which the National Park

Tribunal (considering the document in the context of the Tongariro Power Development Scheme) said:

The issuing of the OIC was done without consultation or consideration to the adherence of the Crown's Treaty obligations. It was as if the Treaty did not exist. The policies of consent and cooperation from the Crown's side were either ignored or set aside. The Crown exercised its *kāwanatanga* rights without regard for Māori *rangatiratanga*: the project was in the national interest, the lands and waters it would need were important for Māori but there was no attempt at consultation.<sup>63</sup>

In considering what the Crown's duty was in this situation, we think it appropriate to apply the Treaty standards for compulsory land acquisitions for public works.

The Tribunal has acknowledged that there are public works purposes of such importance to the whole nation that the Crown may be justified in infringing the guarantee of *te tino rangatiratanga* in article 2. The need to generate hydroelectricity for the country in a time of electricity shortage might be just such an exigency. But in such circumstances the Crown must nevertheless undertake the exercise so as to minimise the adverse effects on its Treaty partner. Engagement with Whanganui Māori about what was going on and why, both before and during the *Ātene* project, was a necessary starting point. The Crown should, for example, have discussed the whole situation with Whanganui Māori before it issued the order in council that empowered it to undertake the exploratory work at *Ātene*. It did not do so, and thereby breached the Treaty principle of active protection.

We were told that the dam project and potential flooding caused people to leave the area, but we had too little evidence to make a finding to this effect. Other factors were influencing urban migration in the 1960s – and, in fact, had the dam gone ahead it would have provided local employment that might have made it possible for *tangata whenua* to remain living on the Whanganui.

It remains unclear whether drilling carried out as part of exploratory investigations increased the risk

of subsidence, or contaminated water bores and the Whanganui River by drawing sulphuric artesian water to the surface, but we note the claimants' concern about these issues and Aqualinc Research's call for further investigation into the impacts of the exploratory work.

(b) *Recommendations*: We recommend that the Crown apologises to claimants for its failure to actively protect their *tino rangatiratanga* in the investigative phase of the proposed *Ātene* dam; and that it assists claimants to ascertain whether there is in fact cause for concern about environmental damage, and if there is, undertakes remedial work.

#### **(7) *Parikino Native School site***

(a) *Findings – the first Parikino School*: Because of insufficient evidence we made no findings of Treaty breach and therefore no recommendations. When Māori communities gifted their land to the Crown for the establishment of a native school, and later the land was no longer required for educational purposes, the Crown was then obliged both in terms of the Treaty and fairness to return it to the donors or their successors. In the case of the land that Hōri Pukehika donated for the first Parikino Native School, we do not know whether the Crown offered it to his descendants before selling it.

(b) *Findings – the second Parikino School*: The second Parikino School site was general land at the time that it was compulsorily acquired, and the Crown was obliged to follow the requirements of the Public Works Act in offering it back to the successors of the original owners. It did so. As far as the second Parikino School is concerned, therefore, the claim was not well-founded.

#### **(8) *The Puketarata 4G1 taking***

(a) *Findings*: Taking 10 acres of Māori land for a worker's dwelling is not a valid infringement of the guarantee of *te tino rangatiratanga* in article 2 of the Treaty. This was a trivial public work that does not even begin to meet the standard required: the land was not required in the

national interest or as a last resort, and there were no exceptional circumstances. Moreover, even if it was thought necessary to provide horse-grazing, 10 acres is a huge amount of land for a worker's dwelling.

Unusually, the owners were represented at the compensation hearing. The process appears to have been as fair as it ever was in these situations, and Hōtene Hōkena apparently agreed on behalf of the owners to accept £90 for their land. It is not entirely clear why the lessee received so much more, but presumably he had improved the property at his own cost. The valuation methodology was always monocultural, and had no regard to the spiritual or cultural value of Māori land.

The compulsory acquisition has ultimately caused access problems at Puketarata, which the 1997 roadway order has apparently not resolved.

Not only should this Māori land not have been compulsorily acquired for a worker's dwelling, the taking of 10 acres for this purpose was excessive. The purchase breached the Treaty and its principles – irrespective of the adequacy of the compensation which, without expert evidence on values of the day, we find difficult to assess.

(b) *Recommendations*: We recommend that the Crown works with claimants and the relevant agencies to ascertain exactly why there are still problems of access to Māori land at Puketarata. If such issues do still remain, we recommend that the Crown assists the claimants to take whatever steps may be required to ameliorate the situation.

### (9) *Kaiwhaiki Quarry*

(a) *Findings*: The Wanganui Harbour Board's compulsory acquisition of land at Kaiwhaiki for a quarry is an example of how public works legislation could be wielded for commercial ends rather than for public purposes. The Māori owners at Kaiwhaiki controlled a resource that the harbour board wanted and needed – stone. Initially, the harbour board was prepared to pay for it, but when the owners sought a higher price, the harbour board thwarted

market forces by compulsorily acquiring the land where the resource was located. This was not how compulsory powers of acquisition are supposed to work, and if the owners of Kaiwhaiki had been citizens with more political power, no public authority would have moved against them in this way.

This is one of the many problems with the Crown's delegation to local authorities of power to take land for public works. This is a clear case where the Crown should have supervised the harbour board's exercise of the power to ensure (1) that the compulsory acquisition was necessary for a legitimate public purpose; and (2) that the compulsory acquisition did not breach the guarantee of *te tino rangatiratanga* in article 2. The early involvement of a Government Minister in promoting the arrangements between the harbour board and the Kaiwhaiki landowners emphasised an obligation to ensure that the arrangements were proper ones, entered into in good faith. If such monitoring had been in place, this acquisition would not have proceeded. It was apparent from the arrangements that preceded the land purchase that the harbour board could have continued to purchase the stone without owning the land.

We identify these egregious features of this case:

- ▶ negotiations about the royalties for the stone were carried out under threat of the land being taken compulsorily;
- ▶ when the landowners sought a higher royalty, the land was taken compulsorily;
- ▶ the land was not required for a public purpose, but was bought to circumvent the need for a public authority to engage in the market for a resource;
- ▶ the taking fulfilled none of the criteria for a legitimate compulsory acquisition of Māori land (that is, that it was a last resort in the national interest where there were no alternatives);
- ▶ although the Crown was involved at the outset, it did not monitor the delegated power of compulsory acquisition to ensure that it was used properly and in accordance with the Treaty;

- › at no stage in the process of taking or compensating for the land were wāhi tapu taken into account; and
- › the compensation methodology does not appear to have taken into account the owners' lost future income from royalties for the stone.

Happily, the land was later returned, but the owners did not have the use and benefit of their land for 50 years.

We find that in this case, the Crown did not fulfil its Treaty duties. It breached the guarantee of te tino rangatiratanga in article 2 by delegating and failing to monitor the power of compulsory acquisition, in so doing failing to actively protect Māori interests in this land.

(b) *Recommendation:* We recommend that the Crown compensate the owners of the land taken at Kaiwhaiki for the quarry by paying them the royalties for the stone (plus interest) that they forwent as a result of the wrongful compulsory acquisition of their land.

#### (10) *Taonga Tūturu*

Because of insufficient evidence we made no findings of Treaty breach and therefore no recommendations. However, several Tribunals have considered the place of taonga tūturu in the Treaty relationship.<sup>64</sup> In *The Hauraki Report*, the Tribunal found that the Crown was obliged to provide 'robust protection' for taonga tūturu, primarily because of the guarantees made in article 2 and article 3 of the Treaty:

Article 2 explicitly promised, in the Maori version, 'te tino rangatiratanga o ratou wenua o o ratou kainga me o ratou taonga katoa', that is, in the English version 'the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties'. Clearly, wahi tapu and taonga are covered by article 2. Article 3 promises to Maori the rights and privileges of all British citizens. A basic tenet of citizenship is the right to protect property and chattels, including items of great personal or cultural significance.<sup>65</sup>

The Wai 262 Tribunal opined most fully on this topic.

It said there is a clear, ongoing Treaty interest in taonga as the products of mātauranga Māori, and the embodiment of mana, tapu, and mauri. How taonga were removed from Māori possession determines the type of Treaty interest in particular taonga. In cases where taonga were taken without the consent of iwi, their ongoing interest is in the nature of rangatiratanga. Where Te Papa Tongarewa holds taonga in which iwi have a rangatiratanga interest, those taonga should be returned to iwi in a way that ensures their preservation.<sup>66</sup> In cases where objects passed from Māori hands by gift or sale, iwi have a kaitiakitanga interest, and this should afford them continued association with those taonga.<sup>67</sup> Whether iwi retain an interest in the nature of rangatiratanga or kaitiakitanga can be ascertained by assessing (1) whether those who, according to tikanga, had an interest in the taonga consented to the transfer; and (2) whether the recipients of the gift or transfer have honoured any conditions that the donor or transferor stipulated.<sup>68</sup>

We think this is a helpful approach, and adopt it.

With respect to the taonga tūturu raised in this district inquiry, it is yet to be determined whether the interests that tangata whenua retain are in the nature of rangatiratanga interests or kaitiakitanga interests.

None of the taonga tūturu was removed from Māori possession without the active participation of at least one interest-holder. Ema Hipango presented *Teremoe* and *Te Mata o Hoturoa* to the Whanganui Museum, and Te Keepa Te Rangihwinui transferred *Te Koanga o Rehua* from Māori ownership to Sir Walter Buller. Similarly, *Te Wehi o Te Rangī* was placed in the care of the Alexander Museum (known afterwards as the Whanganui Regional Museum) following discussion with Ngāti Pāmoana and their ultimate agreement.

Questions remain as to whether all those with interests under tikanga Māori were properly involved or consented, and answers to those questions will have a bearing on whether the ongoing interests are in the nature of rangatiratanga or kaitiakitanga. Should it emerge that any of the taonga tūturu were wrongfully acquired then the right

course might well be for them to be offered back to their traditional kaitiaki or owners. These matters should be the subject of either hui or wānanga (or both) involving relevant museums and iwi.

We are satisfied that Te Papa Tongarewa and the Whanganui Regional Museum have consultation processes in place. We therefore encourage claimants who wish to pursue these kaupapa to approach the relevant museum.

In particular, we acknowledge claimants' concerns about the display of *Te Koanga o Rehua* in Tokyo without their consent, although we have insufficient evidence to make findings of Treaty breach. Perhaps, in this instance, Te Papa Tongarewa's processes did not accurately gauge the feelings of the local community. The Crown and Te Papa Tongarewa must recognise that the claimants' distress about this is a vivid reminder that bicultural policies must be constantly attended to and upheld.

#### (11) *Kaitoke Lake and Lake Wiritoa*

Waterways and fisheries are taonga over which Māori have te tino rangatiratanga, guaranteed in article 2 of the Treaty.<sup>69</sup> This obliges the Crown to actively protect the customary rights of the hapū of the lower Whanganui River in their waters and fisheries.

The circumstances of these two lakes are different, and we set out below our findings for each.

(a) *Findings – Lake Wiritoa*: Ownership of the bed of this lake passed out of Māori ownership at the time of the Whanganui Purchase in 1848. But at that time, the Crown reserved for Māori all the tuna and inanga cuts in many bodies of water, including Lake Wiritoa. There was mention in a report to Parliament in 1862 that the eel fishing rights in this lake (among others) had been sold, but we have seen no other documents that give substance to this. We saw no sign that tangata whenua of Lake Wiritoa relinquished te tino rangatiratanga over their taonga there.

Because their rights in Lake Wiritoa were not absolute, tangata whenua could expect that others would also seek to exercise rights there. There was nothing wrong in principle with the development of the lake and adjacent

land as a recreation area, but the Crown should have been careful to ensure that any such development was compatible with the exercise of tangata whenua rights. In fact, though, hapū of the lower Whanganui River have had little say in decisions about Lake Wiritoa, and their continued exercise of fishing and eeling rights has been in spite of, rather than because of, the various authorities that were in charge over time. This breached the Crown's guarantee of te tino rangatiratanga in article 2, and the Crown's duties of active protection and partnership.

(b) *Findings – Lake Kaitoke*: Tangata whenua maintained their legal title to Lake Kaitoke, and should have been able to exercise the full panoply of their rangatiratanga. But in 1914, the Crown declared Kaitoke Lake a sanctuary under the Animals Protection Act 1908 without communicating with the owners. The Department of Internal Affairs accepted the assurance of the secretary of the Wanganui Acclimatisation Society that all the owners agreed. This assurance was either mistaken or false. Māori disagreement was evident immediately after the sanctuary was declared.

While the Treaty allows the Crown to exercise its kāwanatanga to conserve, control, and manage the environment, the Treaty guarantee of te tino rangatiratanga must be weighed in the balance, and the conservation interest should prevail only when natural resources are so endangered that they require protection.<sup>70</sup> It was not the depletion of an important species that inspired the decision to make Kaitoke Lake a wildlife sanctuary, but rather the desire to produce better recreational hunting in the Whanganui region. This is not an interest that the Treaty protects, and the Crown had no proper basis for infringing the full exercise of te tino rangatiratanga of the traditional owners of Kaitoke Lake. We saw neither word nor action signifying that tangata whenua relinquished any part of that rangatiratanga.

The Māori owners have been allowed far too little influence in the use and management of their lake, and have suffered prejudice as a result. They ought to have been able to develop it in accordance with their preferences, whether for customary purposes, or as a commercial

fishery, or both. The Crown's actions breached the principle of partnership and the duty of active protection.

(c) *Recommendation*: We recommend that the governance of these lakes changes in order to recognise fully the rights and interests of Whanganui hapū and iwi, while maintaining any necessary protection of the lakes for conservation purposes.

#### (12) *Boat landing reserve at Taipakē*

(a) *Findings*: The Crown did recognise that it was important to ensure that Ngāti Tamareheroto and other Māori could continue to use Taipakē as a base for their fishing activities even after the land passed into Crown ownership. The steps it took did give tangata whenua a foothold beside the ocean that afforded them access to fishing grounds, and a place where they could stay, and process their kaimoana.

Unfortunately, though:

- ▶ The Crown did not take the definite and permanent step of making Taipakē a Māori reserve when it bought the land.
- ▶ Although the Department of Lands and Survey later recognised the importance of properly designating Taipakē as a reserve for Māori fishing and occupation, after consideration it was unwilling to risk the displeasure of the European population at Mōwhānau and so backed off its original intention. The actual designation instead made it a public reservation for the landing and storage of boats.
- ▶ In the 1950s officials in the Department of Māori Affairs took the view that because Taipakē was no longer much used for the annual Māori kaimoana harvest, the purpose of the reserve could be changed.
- ▶ At this point the views of the local Māori population were not sought, and the long historical and cultural ties of tangata whenua to Taipakē were not taken into consideration. Officials did not recall assurances made previously to Ngāti Tamareheroto that this place would be permanently reserved for them. Section 71 was reclassified as a recreation reserve.

This is a situation where the Crown did engage with

Māori interests and concerns, and did provide for them to some extent. But ultimately it did not rank them highly enough, or understand them sufficiently, to act to preserve this important site of Māori occupation and cultural endeavour. This failure breached the principles of active protection and partnership.

(b) *Recommendation*: As the Crown no longer owns the land we cannot make recommendations for its return. We recommend that the Crown now works with claimants and the local authority to find appropriate ways to recognise the traditional importance of this site, and to take into account in settlement negotiations the failure to reserve it permanently for Māori purposes. We also note that traditional interests in Taipakē may involve other southern Whanganui hapū.<sup>71</sup>

#### (13) *Kai Iwi water supply takings*

(a) *Findings*: Concerning the taking of Kai Iwi land for the Wanganui water supply during the twentieth century, we find that:

- ▶ The compulsory acquisitions were not as a last resort in the national interest, and therefore do not meet the Treaty standard.
- ▶ Although the Crown was in a monitoring role, it does not appear to have taken any steps that ameliorated the approach of the local authority.
- ▶ It does appear that Wanganui City Council, before taking the land or having any formal basis for being there, entered Kai Iwi 5E2, sank a well, and built a shed. In the event that the owners did not give permission for the council to enter their land and undertake activities there, it violated the owners' property rights, and the Crown took no steps to intervene.
- ▶ The Crown did not pay compensation to the owners of Kai Iwi 5C and 5E, even though it compulsorily acquired ownership of their land and laid pipes under it. The argument that the owners could continue to use the land does not provide a fair basis for not compensating them at all: they lost the freehold title to their land, and the control over it that ownership connotes.

These failings constitute breaches of the Crown's duties

of active protection and partnership, and prejudicially affected the claimants.

(b) *Recommendation*: We recommend that the findings and breaches recorded here are taken into account in future settlement negotiations with Ngāti Tamareheroto and with other Whanganui groups with interests in Kai Iwi lands.

## 28.31 CHAPTER 27: PREJUDICE, CAUSATION, AND CULPABILITY

### 28.31.1 What did this chapter cover?

In this chapter, we described our analytical approach in this report to prejudice, causation, and liability in light of our jurisdiction.

### 28.31.2 Findings

It is our finding that, applying a common sense analysis to the totality of the evidence about the Crown's many acts and omissions over time and their prejudicial effects, and weighing also the factors over which the Crown exercised relatively little control, we can infer that more likely than not – or probably, rather than possibly – the Crown caused an accumulation of negative effects that led ultimately to the relative deprivation of present-day Whanganui Māori.

### 28.31.3 Recommendation

We recommend that the Crown takes into account this significant finding when it works with claimants in settlement negotiations to craft appropriate redress, including generous compensation.

### Notes

1. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 664 (CA)
2. Submission 3.3.118, p 1
3. Submission 3.3.130, pp 17–18
4. *Ibid*, p 19
5. Submission, 3.3.127, p 2
6. Submission 3.3.130, pp 2–3, 15–16
7. *Ibid*, p 3

8. *Ibid*, pp 2–3, 13–16
9. *Ibid*, p 5
10. *Ibid*, p 3
11. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 736
12. Submission 3.3.43, p 5; submission 3.3.122, pp 1–2
13. Submission 3.3.117, pp 27–28
14. Submission 3.3.53, p 17
15. Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 2, p 891
16. Stout and Ngata, 'Native Lands and Native-Land Tenure (Report on)'; AJHR, 1908, G-1F, p 2
17. Submission 3.3.125, p 3
18. Submission 3.3.120, pp 32–33
19. Waitangi Tribunal, *Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995) p 285; Waitangi Tribunal, *The Ngai Tahu Ancillary Claims Report 1995* (Wellington: Brooker's Ltd, 1995) p 21
20. Submission 3.3.84, p 39
21. Waitangi Tribunal, *He Maunga Rongo: Report on the Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 3, p 964
22. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010), vol 2, p 743
23. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 3rd ed (Wellington: Brooker's Ltd, 1993), p 38
24. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 57
25. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 680
26. Waitangi Tribunal, *Te Urewera Pre-Publication Part III: From Self-Governing Native Reserve to National Park* (Wellington: Waitangi Tribunal, 2012), p 560
27. Document E16 (Pucher), pp 9–10
28. Document E1 (Dixon), pp 9–10; doc E4 (Cribb), p 10; doc E6 (Haitana), pp 3–4; doc E7 (Bristol), pp 5–7; doc E8 (Ponga), pp 5–11; submission 3.3.85, p 19
29. Submission 3.3.85 p 19; doc B14 (Tangaroa), pp 5–6; doc E6 (Haitana), p 4; doc E9 (Haitana and Haitana), pp 4–5
30. Submission 3.3.75, p 25
31. Document C21 (Site Visit Booklet), p [34]; doc E6 (Haitana), pp 2–3; submission 3.3.111, p 11
32. Document E6 (Haitana), p 4; submission 3.3.85, p 19
33. Document E12 (Southern), p 15
34. Document C17 (Taiaroa), p 29
35. Russell Davies, *History of Public Works Acts in New Zealand, Including Compensation and Offer-Back Provisions* (Wellington: Land Information New Zealand, 2000), p 58; Public Works Amendment Act 1982
36. Submission 3.3.126, p 5
37. Document A57 (Cleaver), p 193. The railway component was enacted through section 106 of the Native Land Act 1873.

38. Document A57 (Clever), p 193
39. Document N18 (Bell), paras 27, 40–43
40. Submission 3.3.126, p 5
41. Document 11 (Le Gros), p 21
42. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, p 798
43. Document 12 (Le Gros), app A, p [43]
44. *Ibid*, pp [66], [77]
45. *Ibid*, p [55]
46. See, for example, Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, pp 780–781.
47. Document A54(w) (Innes), pp [31] – [33]
48. Submission 3.3.95, p 14
49. Worksafe New Zealand, *New Zealand Guidelines for the Management and Removal of Asbestos*, New Zealand Demolition and Asbestos Association, 1995, 3rd ed, March 2011, <http://www.business.govt.nz/worksafe/information-guidance/all-guidance-items/new-zealand-guidelines-for-the-management-and-removal-of-asbestos-3rd-edition>, sec 11.10
50. See examples of other public works takings involving the Māori Trustee in Waitangi Tribunal, *Tauranga Moana 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 1, pp 285, 292.
51. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 1, p xlix
52. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 2, p 442
53. *Ibid*, p 450
54. Waitangi Tribunal, *The Ngāti Rangiteaorere Claim Report 1990* (Wellington: Brooker and Friend Ltd, 1990), p 48
55. Document L4 (Wood), p 14
56. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed (Wellington: Government Printing Office, 1989), pp 53–54; Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, p 260
57. Waitangi Tribunal, *Te Kāhui Maunga: The National Park District Inquiry Report*, 3 vols (Wellington: Legislation Direct, 2013), vol 3, pp 1136, 1138, 1165
58. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 853
59. Document O2 (Peet), p 51
60. See Ngāti Apa (North Island) Claims Settlement Act 2010, ss 38(1)(b), 40; doc B13 (Maihi), p 12; doc B55 (Ngāti Apa agreement in principle), p 15; doc B56(a) (Ngāti Apa negotiations status report attachments).
61. List of owners; minutes of meeting of assembled owners, 19 December 1910, Ohotu 6F no 2 file, 1909–1911, ACTH 16036 MA1/1010, 1910/4058, Archives New Zealand, Wellington
62. Document N3 (Pōtaka), p 4
63. Waitangi Tribunal, *Te Kāhui Maunga*, vol 3, pp 1090–1091
64. See Waitangi Tribunal, *The Te Roroa Report 1992* (Wellington: Brooker and Friend Ltd, 1992), pp 209–261; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 587–607; Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 2, pp 627–701; Waitangi Tribunal, *The Hauraki Report*, vol 3, pp 933–965; Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 2, pp 493–512.
65. Waitangi Tribunal, *The Hauraki Report*, vol 3, pp 953, 964
66. Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 2, pp 507, 508
67. *Ibid*, pp 504–505
68. *Ibid*, p 508
69. Waitangi Tribunal, *Te Kāhui Maunga*, vol 3, pp 1015–1016; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Government Printing Office, 1989), pp 180–181; Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999), pp 262–263
70. Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp 1238–1239
71. See claim 1.2.38(a), p 3; claim 1.2.10, p 7; and submission 3.3.2, p 3, which mention Kai Iwi interests.

