

CHAPTER 15

FINDINGS AND RECOMMENDATIONS

For convenience, and for clarity, we have taken from the body of the report our findings and recommendations on each topic, and we bring them together definitively here in this findings and recommendations chapter.

Not all chapters have findings. Some have findings but no recommendations. This depends on the nature of the subject matter. We make no specific recommendations where the findings relate to historical circumstances only, and the Tribunal has no power to recommend redress that relates directly to those circumstances. Mostly, the claimants' grievances relating to the nineteenth century are about land, and we may not recommend the return of land not in Crown title. In those cases, the redress will be the subject of negotiation between claimants and Crown, and we leave that to them.

15.1 CHAPTER 2: THE RISE AND FALL OF THE WAIRARAPA LEASEHOLD ECONOMY

15.1.1 Crown concession

The Crown acknowledges that its initial response to the theft of property and assaults on Barton's Run, which required Māori to cede a large area of land at Maungaroa, was disproportionate to the offences that had been committed, and was a breach of the Treaty of Waitangi and its principles. The Crown also says that this breach did not cause material prejudice to Māori (for reasons given in its closing submissions).¹

15.1.2 Tribunal findings

We find that:

- ▶ The Crown did not exercise in good faith its legal right to control all transactions in customary land between British subjects and Māori. We have found no evidence that the Crown explained to Māori that its control of land transactions would include leases, or that Māori really understood pre-emption at all. Nor was there a 'law and order' imperative that gave legitimacy to the exercise of such a power.
- ▶ Making leases illegal so that Māori had no alternative to sale if they wanted the benefits of settlement was neither fair nor reasonable. The Native Land Purchase Ordinance 1846, and the pressure it put on Māori, represented an unwarranted

interference in te tino rangatiratanga (full chiefly authority), undermining Māori capacity to engage with settlement on equal terms and on a self-sustaining basis. The Crown's opposition to settlers leasing land directly from Māori occasioned the loss of a major opportunity for Māori to participate in the colonial economy on an equal footing from the outset. This breached the article 2 guarantee of te tino rangatiratanga.

- ▶ In its application rather than in its drafting, the application of the 1846 ordinance privileged settler interests over the interests of their Māori landlords. Māori were threatened with the removal of squatters, but the squatters themselves were reassured: their tenure would be protected and strengthened if they assisted the Crown in acquiring the freehold from Māori. This differential treatment breached the Treaty principles of good faith and equity, and the guarantee of citizenship in article 3.
- ▶ The cession of Maungaroa (Barton's Run): This 1845 incident arose when Te Weretā and others with interests in land leased to Barton were aggrieved because they had been left out of the leasing arrangements, and carried out a muru (traditional plunder) of goods. The response of Sub-Protector Forsaith was to require Te Weretā to cede a large block of land as penance. We consider that response was disproportionate. Forsaith's actions could have been reversed by subsequent Crown agents, notably Crown purchase agent Donald McLean, but they were not. The Crown advanced its wider purchase objectives while maintaining the appearance of legality and impartiality.

We find that the Crown breached Treaty principles by:

- failing to act in good faith (particularly in not undoing Forsaith's deeds once the extent of their unfairness was appreciated);
- failing to actively protect Māori interests;
- failing to accord Te Weretā and affected others

equality before the law (the process Forsaith engaged in with Wairarapa Māori would never have been imposed on Pākehā), thereby denying those Māori the rights of British citizens under article 3; and

- insisting on an outcome that allowed it to keep the land concerned, avoid admitting fault and losing face, leave Te Weretā ostensibly in the wrong for the events of 1845, and earn a respectable profit. This conduct breached article 2 and the principle of active protection.

15.2 CHAPTER 3A: CROWN PURCHASING – POLICY AND PRACTICE

15.2.1 Tribunal findings

(1) *Crown practices*

Article 2 of the Treaty guarantees te tino rangatiratanga of te iwi Māori. The guarantee states that Māori could keep their land until they wished to sell. This puts on the Crown a significant onus of proof: only those sales where Māori willingly, freely, and knowingly consented were made in accordance with the Treaty. Where there is no informed consent, transactions breach the Treaty, both in its terms and its principles.

In the 1850s, the Crown and its officers knew and understood the tenets of good purchasing. Getting agreement before purchase on area, boundaries, interest holders, shares, and price is the sensible, reasonable, and fair way of making sure that there is informed consent. The Crown did not conduct its purchasing activities in this inquiry district in accordance with these tenets. In the Wairarapa, standards were lowered to facilitate speed, so that the district could be opened for settlement. In Treaty terms, the desire for speed does not justify dispensing with the procedural safeguards that ensure that consent is informed.

A district-wide purchase was assumed by the Crown

from the first, with Māori to be confined to occupation reserves. It is nowhere apparent that Māori agreed to this approach. Even if at the komiti nui (a pivotal hui) they agreed in principle to large-scale Crown purchase, that agreement was conditional upon the details of each transaction being separately ascertained and agreed, and on the Crown delivering on its promises of other benefits. Neither of these conditions was fulfilled.

With the possible exception of the Castlepoint purchase, the Crown did not conduct a proper investigation of rights before embarking upon purchase. There were no hui on the land in question where interest holders could openly debate who owned what and in what proportion. There were no surveys to show clearly what land was being sold and what reserved. There was therefore no informed consent, and later payments and adjustments of boundaries did not remove the prejudice that flowed from this want of good process.

We are particularly critical of the Crown's practice of making initial payments to favoured rangatira away from the eyes of other leaders and resident hapū. These payments were effectively deducted from the tribal patrimony without community knowledge or consent. This was a deliberate strategy on the part of the Crown to predispose persons of influence to their way of thinking. Nor did later settlements negotiated with those who were at first ignored mitigate the prejudice.

The koha/five percents were also wrongly deployed to pressure Māori into accepting the Crown's offer to finally settle purchases that they were disputing. Again, this breaches the principle of active protection and is, in our view, a cynical departure from the message conveyed to Māori at Tūrangānui. We also think that Māori were entitled to an endowment of five percent of the on-sale price on all the lands that they sold. Crown officers should not have withheld entitlement to this benefit as a means of offsetting the relatively high cost of purchasing the home-stand blocks.

Because many of the purchases were so ill defined,

Māori could not really negotiate a deal to which they *could* meaningfully consent. For instance, how could there be a real negotiation on price when significant terms of the contract (such as exactly where the boundaries were, and the location and size of reserves) were at large? Perhaps at the time Māori did not feel disempowered by this, because they trusted that the Crown would deliver the wider benefits that were promised. But it did not. This makes the imposition on Māori of such an unfair bargaining situation, in which the usual advantages of a vendor with a willing buyer were effectively removed, even more serious. This was a conspicuous failure actively to protect Māori, or even just to accord them the ordinary terms of fair contractual practice.

Accordingly, *we find* that the Crown's abandonment of good purchasing practice in the Wairarapa purchases we have described undermined the capacity of Māori to make informed community decisions. This was a diminution of *te tino rangatiratanga*, and breached the Treaty.

The practices described, which were adopted by McLean and continued by his successors, were the antithesis of what was required – that is, a process that provided for free, willing, and informed consent, a fundamental requirement of article 2 of the Treaty. They therefore breached article 2, the Crown's duty to act in good faith, and the principle of active protection.

(2) Surveys

We find that the Crown's failure to survey land before the sale was finalised, or indeed within a short period thereafter, compounded the breaches already identified. Deeds signed without survey, and where the price was arrived at without information about the number of acres involved, were deficient purchases.

The Crown knew that purchases conducted in this way were deficient. Crown officials regularly acknowledged that survey was a priority, and necessary to make sure that reserves were protected and owners received their Crown titles. But nevertheless, purchasing continued without

survey information. This conduct breached the Crown's obligation to act towards its Treaty partner in good faith.

Only at Castlepoint were boundaries at all defined before the purchase was undertaken. Subsequent deeds routinely purported to transfer land ownership even though the boundaries of the land to be transferred were undefined and uncertain. Purchases arranged like this lacked informed consent, because the vendors did not know – and could not know – what they were agreeing to. This is a clear breach of article 2.

The lack of surveys meant that there was no overall picture of the dimension of the Crown's purchases until it was too late. By the time realisation dawned and a reaction started in the early 1860s, well over 1,500,000 acres had been sold to the Crown. The absence of maps and plans deprived Māori of the ability to monitor what was happening across the district, and protect themselves from selling too much land. Likewise, Crown officials, lacking survey information, could not act to protect Māori from excessive land sales even if they had been so minded. This breached the Crown's duty of active protection and the guarantee of *te tiro rangatiratanga*.

(3) *The Tautāne block*

When McLean purchased this block from Te Hāpuku's party and a scattering of Wairarapa-based chiefs, the Crown knowingly ignored the rights of resident hapū. Legitimate right holders were denied the opportunity to exercise a genuine and informed choice about the land before any moneys were paid or promises made. Effectively, the Crown trapped certain landholders into agreeing to the sale – an undeniable act of bad faith. The Crown's actions were compounded by its subsequent decision to substitute a one-off payment of £500 for the koha/five percents to which the former owners of Tautāne block would otherwise have been entitled.

Accordingly, *we find* that the Crown's conduct breached the Treaty and the principles of partnership, active protection, and equal treatment.

15.3 CHAPTER 3B: CROWN PURCHASING – RESERVES

15.3.1 Crown concession

The Crown acknowledges that:

to the extent that it failed adequately to delineate and protect reserves agreed upon in Wairarapa land purchases, or that it unreasonably delayed issuing grants where these were promised, Wairarapa ki Tararua Māori suffered prejudice and that these failures were in breach of the Treaty and its principles.²

15.3.2 Tribunal findings

We find that, in failing to reserve adequate land for Māori, the Crown breached its duty actively to protect Māori interests. Māori were prejudiced in that the Crown's meagre provisions effectively precluded their engaging with the settler economy, except as wage labourers and subsistence farmers.

The Crown also breached the principles of the Treaty by failing to ensure that Māori were protected in the ownership of their reserves by:

- ▶ vaguely defining reserves and failing to survey them, rendering them incapable of precise identification and therefore protection;
- ▶ purchasing reserves from the Tūrakirae, Hikurangi, and Ngātapu purchases and others, especially where such purchases were from a limited number of vendors;
- ▶ purchasing reserves as a purported means of resolving disputes, when it had caused the disputes by poor purchase practice, and other solutions were not explored; and
- ▶ purchasing reserves from individuals, when the true ownership lay with a larger group, and the Crown knew that to be the case.

For example, part of the Whāwhānui reserve was mistakenly included in the on-sale to Barton.

We see these practices and instances as a clear Crown

failure to honour its duty to protect the interests of all those who legitimately held them.

The Crown breached the principle of active protection in all these cases, and also breached its duty to act towards Māori with the utmost good faith. Māori were prejudiced because the Crown's breaches undermined their tino rangatiratanga and helped propel them towards landlessness.

Despite later Crown efforts to investigate complaints that promised reserves had not in fact been set aside, or had been incorrectly purchased, remedies were rarely found. When they were, they took a long time, and resolution was seldom fully satisfactory. In cases where achieving a fair result for Māori would involve upsetting Pākehā settlers, the settlers' interests were routinely put before those of Māori.

Accordingly, *we find* that the Crown's efforts to redress longstanding problems were too long delayed and too limited to mitigate the Treaty breaches detailed above.

15.4 CHAPTER 3C: CROWN PURCHASING: BENEFITS OF SETTLEMENT IN TERMS OF EDUCATION AND HEALTH

15.4.1 Tribunal findings on education

We find that none of the education that the Crown provided met the needs of Māori children. Both native and board schools failed them. Even the schools that Wairarapa Māori themselves endowed with land were allowed to founder.

This was a signal breach of promise, given the Crown's reliance on promises of (inter alia) education as a means of persuading Wairarapa Māori to let the Crown purchase their land, and open up the district to settlement.

After Governor Grey made these promises in 1853, a crucial 30 years elapsed before there was any meaningful effort to provide schools for the Māori community in the Wairarapa. This was an opportunity lost. Good education

for Wairarapa Māori from the time when land purchases began might have facilitated an altogether different transition from traditional to colonial life.

This delay, together with the typically short lifespan, meagre spread, and low standard of the district's native schools, and the unsuitability for Māori of both native and board schools, had multiple negative consequences. They exacerbated disparities in the socio-economic position of Māori and non-Māori. They neither prepared Māori to advance educationally to tertiary level nor provided the kind of agricultural skills training that might have enabled them to develop their remaining land assets. These failings breached the Crown's duties of good faith and active protection.

The evidence does not allow us to answer with certainty whether these failings amounted to a breach of article 3 rights of equal access. What we can say is that fewer children went to native schools in this district than in many other places. Lack of access to purpose-built Māori education in native schools *should* have prejudiced Māori children in the Wairarapa ki Tararua inquiry district. However, the evidence about native schools – their low aspirations for Māori children enshrined in less academic curricula, and their lower qualification standards – indicates that missing out on them may not have been a disadvantage at all. However, the alternative – board schools – were probably no better for Māori children, and because of the discrimination they suffered, might even have been worse. The Crown failed in its duty, which arose both from its own undertakings and from its duty of active protection under the Treaty, to devise and provide effective means of delivering education to Māori children.

As regards te reo Māori, we acknowledge that the Crown's responsibility for language and culture loss – especially in this district, where settlers so quickly outnumbered Māori – is a complex matter. We acknowledge the efforts of recent leaders to set up kōhanga reo and kura kaupapa in the district, in the face of considerable local Pākehā opposition. The Crown, via the

Education Department, should have taken a more active role in promoting the value of Māori educational initiatives – kōhanga reo (pre-schools), kura kaupapa (primary schools), and wānanga (tertiary institutions) – to all sections of the Wairarapa ki Tararua community. *We recommend* that the Crown constantly reviews the degree of support necessary for te reo to be preserved and promoted in this region, in partnership with the iwi of Wairarapa ki Tararua.

15.4.2 Tribunal findings on Pāpāwai and Kaikōkiri gifted lands

The Crown failed to intervene to protect Wairarapa Māori from the wrongful implementation of their gift of land for schools. By the time the Government passed the necessary legislation in the 1940s, needs had changed, and the establishment of Māori schools on the land gifted for that purpose was no longer viable.

We find that the Crown breached the principle of active protection when it failed to step in early in the life of the trust to ensure that the Anglican Church handled the gift and the resulting trust properly. It failed also – and its failure is especially critical in those first 30 years, when Wairarapa Māori children lacked a suitable school – to help establish the schools that both Church and Crown promised.

We recommend that the Crown enters into discussions with the beneficiaries of the trust about implementing the original intention that the children of all tangata whenua of the Wairarapa are entitled to benefit.

15.4.3 Tribunal findings on health

We find that, in land purchase negotiations between Crown officials and local Māori in the early years of the colony, the Crown undertook to provide hospitals and doctors for Wairarapa Māori.

We do not consider that the services of one native medical officer – for which the Crown paid only in part – fulfilled this promise. Certainly, providing doctors and

hospitals in the Wairarapa in the 1850s and 1860s would have demanded a great deal of political motivation and funding at a time when the State's attention was usually elsewhere, and money was often short. Nevertheless, we hold the Crown to the understandings that we believe would have been held by the Māori who gathered at the Tūranganui komiti nui in 1853: that the Crown would provide doctors and hospitals for Māori, without delay. Here, the Crown clearly failed. If the health services for Māori that followed had been of an altogether different standard, the prejudice suffered from the failure to implement its promises fully and early, as it should have done, might have been mitigated. But they were not.

The limitation of subsidised health services to those communities of Māori that were classed as 'indigent' was a particular feature of Māori health care into the twentieth century. The application of this policy consistently went against the interests of Wairarapa Māori, who for reasons that are difficult to discern, were not considered poor enough to qualify.

We find that the subsidised services were wrongly limited to exclude Wairarapa Māori. They should have received the free medical care they continually asked for, and officials should have acknowledged that the duty arose from earlier Crown promises of health benefits, rather than looking at the financial status of recipients. The Crown erred when it refused the health-related petitions of Wairarapa Māori, and when it consistently confined its assistance to minimal levels.

Overall, the Treaty, the land fund, and the Crown's specific undertakings to Wairarapa Māori, together meant that tangata whenua of this district were – and are – entitled to receive good health care without extra cost to them. Historically, the care provided should have been of a nature and extent that, as far as possible, protected them against the adverse effects of settlement, and fitted them physically and mentally for full participation in the new colonial order. The care was not of such a standard. *We find* that the Crown breached its promise and breached the Treaty.

15.5 CHAPTER 3D: CROWN PURCHASING: KOHA/ FIVE PERCENTS

15.5.1 Crown concession

The Crown acknowledges that:

it failed reasonably to discharge its obligations under the five percent clauses that were incorporated into certain purchase deeds in the Wairarapa area. This failure caused prejudice to Wairarapa ki Tararua Māori, and was a breach of the Treaty and its principles.³

15.5.2 Tribunal findings

We *find* that, in both process and substance, the Crown breached the Treaty in its interpretation and management of the koha/five percent clauses and the fund. It breached the contracts it entered into in the deeds, breached article 3 by using fund moneys to pay for services to which Māori were entitled as citizens, and also signally failed to protect Māori interests actively.

We *also find* that the Crown breached article 2, because Grey's promise of the koha/five percents, and their underpinning of general benefit, persuaded Māori to consent to the purchase of their land. But they were duped. The promises – including provision of additional assistance via the koha/five percent clauses to engage with the new colony – were broken. Thus, the Crown gained Māori consent to the sale of their land under false pretences; there was no free and willing consent.

15.6 CHAPTER 4: THE NATIVE LAND COURT AND LAND PURCHASING, 1865–1900

15.6.1 Crown concessions

In regard to the Native Land Court:

- ▶ The Crown concedes that it failed to ensure that Seventy Mile Bush reserves, which were set up under the Volunteers and Other Lands Act 1877, came under

the Native Equitable Owners legislative regime. This Act was designed to remedy ill-effects of the 10-owner rule (implemented under section 23 of the Native Lands Act 1865). The Native Equitable Owners Act provided for the identification of the trust inherent in titles where the few named on the title were there in a representative capacity, and enabled all the right holders to be named.⁴

- ▶ It admits that it breached the Treaty to the extent that Crown officials 'used unreasonable pressure' to obtain the remaining signatures in favour of sale of certain Seventy Mile Bush blocks.⁵

In regard to Nireaha Tāmaki, the Crown said that it did not consider that the evidential basis was sufficient to support an acknowledgement of Treaty breach.⁶

15.6.2 Tribunal findings

Māori opposition to the Native Land Court resulted in efforts to establish an alternative mechanism – a national body, or Pāremata (Parliament), to make laws and regulations for their own land and resources. Like earlier Tribunals, we *find* that this was entirely consistent with the Crown's kāwanatanga (government) and with the Treaty's guarantee of tino rangatiratanga.⁷ When, through the Kotahitanga Movement, Māori did set up their own self-funded elected body with very considerable popular support, the Crown should have worked with it and empowered it. By failing to do so, we consider that the Crown missed a crucial opportunity to effect a Treaty partnership and institutionalise Māori autonomy centrally and locally. This was especially the case since the moderate wing of the Kotahitanga, with which the Seddon Government carefully cultivated a relationship, was not seeking to usurp the role of the New Zealand Parliament. It proposed to put the Pāremata's measures before the New Zealand Parliament for ratification.

We endorse the central North Island Tribunal's finding that:

In failing to incorporate Kotahitanga into the machinery of the State, and share power with Maori in a meaningful way at the central level, the Crown acted in serious breach of the principles of the Treaty.⁸

We also find, as regards the Native Land Court, that:

- ▶ While some settler politicians genuinely believed that Māori would benefit from the establishment of the Native Land Court and the conversion of customary title to Crown title, this ‘humanitarian’ objective was secondary to the Crown’s goal of facilitating land acquisition. If the main aim was truly to create a government-endorsed forum where disputes over land, title, and resources could be resolved, Māori should have been consulted about what they needed and how it might be achieved. As the Hauraki Tribunal noted about the argument that good intentions lay behind the establishment of the Native Land Court, good intentions are ‘not enough for adequate fulfilment of the Crown’s Treaty obligations to Maori.’⁹
- ▶ By 1865, it was clear that some modification of Māori customary land tenure was needed to allow settlement to proceed and to allow Māori to benefit from new economic opportunities. But this did not require all customary lands to be converted, or purchased from Māori – especially in the Wairarapa, where some 1.5 million acres of freehold land had already left Māori hands to make the region available for settlement.
- ▶ The option of holding on to some lands in customary tenure should have been available to Wairarapa Māori. But it was not, because the Native Land Court undermined collective decision-making, and because by the time the court was established, customary processes were already under strain – partly as a result of extensive Crown purchasing, much of it rushed and in contravention of established practices for gaining full, informed consent.
- ▶ The Native Land Court exacerbated this strain by imposing new processes that substituted traditional dispute resolution and usurped traditional roles.

It did not allow proper consideration of what land Māori really needed to retain, nor did it respect deliberate decisions by Māori to withhold certain land from the Crown. Yet Wairarapa Māori who wanted to engage with the modern economy had no choice but to go to the court.

- ▶ The Crown, when designing and implementing the Native Land Court, did not seek the consent and cooperation of Wairarapa Māori. The Crown’s guarantee of te tino rangatiratanga implies that the full understanding and consent of Māori was required when law changes were proposed that would profoundly affect them and their chief asset (land). A hui similar to that held at Kohimārama in 1860 should have been convened to discuss the proposed court with Māori, before the Native Lands Bill went to Parliament and became law in 1865.¹⁰
- ▶ The system created under the native land laws made it very difficult for Wairarapa Māori to keep any of their land under customary tenure. If they wanted to participate in the colonial legal, political, and economic system (and even if they did not), they needed a title that they could use in the commercial world – and the Native Land Court process was the only way of securing one. We reject the Crown’s argument that native land legislation provided opportunity (except for a brief period) to select a ‘form of communal title’. None of the legislative measures cited by the Crown provided for the real communal title or effective communal control that many Wairarapa Māori sought. No effective corporate title was created in law until the twentieth century.
- ▶ The costs associated with the Native Land Court process (which included fees, surveys, attendance, and the toll that absence took on normal economic activities) is likely to have contributed significantly to the hardships faced by Wairarapa ki Tāmaki-nui-ā-Rua Māori in the late nineteenth century. The burden cannot be quantified, partly because of inadequate record-keeping. We accept the claimants’ argument

that the Crown was obliged to keep such records as part of its protective function in monitoring the court and its effects. The Crown cannot advance the unavailability of such evidence to support its case that costs were not excessive. Nor is it necessary for the claimants to show that costs were always excessive, and always resulted in immediate alienation, to demonstrate that Native Land Court costs were part of an inequitable system that undermined Māori capacity to exercise rangatiratanga over their lands and resources.

- ▶ As regards *the northern Bush blocks*, the Native Land Court process surrounding the Crown's acquisition involved serious Treaty breaches. In particular:
 - Paying 'groundbait' payments to selected chiefs as a means of luring right holders into selling before they had the opportunity to decide for themselves was a particularly egregious breach of article 2. The owners never gave their full and free consent to sell the land, and the Crown deliberately undermined their rangatiratanga.
 - The hui held at Waipawa before the court sitting did not satisfy the requirement for transparent dealing. Advance payments had already been made to a number of individual claimants, and clearly the land was destined to go before the court irrespective of the outcome of this meeting (given that the native land laws permitted an application by any Māori).
 - The Native Land Court was shown to be an inadequate and flawed forum for determining customary rights, making its decisions on the northern Bush lands not necessarily reliable. Native Land Court Judge Rogan's application of the 10-owner rule undoubtedly resulted in prejudice to the wider community, in terms of both the sale of land and ownership of land that was retained. This is particularly blameworthy because the court had available to it, and failed to use, legislative alternatives that would have

allowed all those entitled to be recognised on titles.

- The Crown prioritised purchasing land over honouring Māori wishes to keep certain lands sacrosanct either by keeping them as reserves or by the insertions on their title of restrictions on permanent alienation. This represents a serious Treaty breach. We strongly reject the Crown's argument that the fact that some lands were retained by Māori in the initial purchasing period (such as the Tāmaki and Piripi blocks) showed they could control the process of land alienation. In fact, Māori were able to retain lands only insofar as they remained outside the ambit of the Crown's immediate land purchase objectives and the interests of settlement.
- ▶ The Crown breached its duty of active protection by putting in place a legislative regime that did not allow Wairarapa Māori to retain sufficient land for their present and future needs. The Crown could have worked with Māori to develop ways for them to make decisions about their land that would allow them to engage with the new economic opportunities of the colonial world, while ensuring the collective interests of Māori communities were not hijacked by the actions of individuals. But the Crown did not do this. Instead, it set up a system that individualised land – awarding titles to 10 or fewer owners – and provided no other effective choice of tenure. At the same time, despite acknowledging that Māori were fast becoming landless, Crown agents were purchasing 'inalienable' lands as cheaply as possible – the very antithesis of active protection.
- ▶ The legislative reforms that followed the introduction of the Native Land Court Act 1865 (for example, the 1867 section 17 amendment and the 1873 Act) were inadequate and came too late to address the concerns of Wairarapa Māori about the role of the Native Land Court, the Native Land Act, and the 10-owner rule.
- ▶ The Crown failed in its duty to provide accurate

surveys before any land was permanently transacted through the court, or even negotiated.

- ▶ The Crown's actions following Nireaha Tāmaki's appeal to the Privy Council over the disputed Manganainoka–Kaihunu transactions breached the Treaty. Through the Land Titles Protection Act 1902, the colonial Parliament removed the capacity of Māori to challenge the legality and validity of the Crown's extinguishment of native title in the New Zealand courts, thereby denying Māori the potential benefit of the Privy Council's finding. As well as being constitutionally dubious, this breached article 2, which guarantees that Māori can keep all land they do not freely wish to sell: any legislation that takes away the courts' power to interrogate whether land was legitimately sold derogates from this guarantee. The Crown's actions also breached article 3, which guarantees Māori the rights and duties of citizenship, because it removed the right of Māori to have their claims heard in court.
- ▶ The Crown failed to provide for informed community consent about Native Land Court processes and sale. Simply calling a big hui before land was sold was not in itself sufficient for the Crown to be able to claim that there was adequate consultation and an informed, self-managed process of consent to land alienation. Consensus could not be reached in one meeting when many interests were involved, and when the details of the purchases were unknown. Moreover, when land was taken to court, Māori generally found they had little control over how the court's investigations proceeded and what form of title would result, and were not adequately informed about how individualised title would affect collective control over land in future. And their desire for collective control was thwarted by the introduction of majority decisions in land dealing in 1869, which meant the interests of the collective could be hijacked by the binding decisions of individuals.
- ▶ The Crown advantaged the purchase process and

purported settlement needs over reasonable and necessary protections for Māori. The Crown made certain concessions here – namely, that undue pressure was placed on some owners to complete purchases – but we consider that what actually happened was a far more serious breach of the Treaty than the Crown has conceded. Considerable pressure was placed on individuals who were representing (but were not legally responsible to) their hapū to encourage alienation of very extensive areas at the lowest possible prices. This sometimes happened before any court investigation and without adequate discussion of boundaries or the extent of customary rights and tikanga (traditional rules for conducting life) over the lands. It was done with very little care to ensure owners were in position to make informed and careful decisions on behalf of others about their present and future needs. These acts and omissions breached article 2 guarantees and the Crown's duty of active protection.

15.7 CHAPTER 5: SUFFICIENCY: HOW MUCH WAS ENOUGH?

15.7.1 Crown concession

The Crown concedes that it failed actively to protect the lands of Wairarapa Māori to the extent that today Wairarapa and Tāmaki-nui-ā-Rua Māori are virtually landless, and this was a breach of the Treaty of Waitangi and its principles.¹¹

15.7.2 Tribunal findings

While many influences contributed to the impoverishment of iwi of Wairarapa ki Tāmaki-nui-ā-Rua in the late nineteenth century – including international economic trends and the activities of unscrupulous individuals – we are in no doubt that the Crown was primarily to blame. Its land purchase, land title, and land development policies adversely affected the capacity of Māori to retain and manage

their land and consequently their chance to prosper. The Crown's early and rapid purchase of most of the Wairarapa district under pre-emption, closely followed by a concerted buy-up of Tāmaki-nui-ā-Rua under the Native Land Court system, left iwi with nothing even resembling adequate landholdings. This in turn initiated a downward spiral, which officials and observers began commenting on well before the turn of the century. Despite this recognition, the Crown failed to put in place systems to ensure that Māori continued to retain the land they still owned at that point.

At the same time, the Crown was taking an active role in the development of farming – providing settlers with titles to established land blocks with access and infrastructure as well as targeted financial assistance. Māori argued for something equivalent, but it did not materialise. This effectively denied Māori the same opportunities as the rest of the population, at a time crucial for the development of their remaining land interests as viable farms.

Accordingly, *we find* that:

- ▶ the Crown breached its duty of active protection by failing to take the necessary steps to ensure that iwi in Wairarapa ki Tararua had a real prospect of retaining sufficient land to enable them to participate in the colonial economy on terms of reasonable equality, and to provide for their own cultural needs; and
- ▶ the Crown, in implementing policies to assist smallholders, including state lending, breached the guarantee to Māori of equal treatment as British citizens under article 3.

15.8 CHAPTER 6: THE MANAGEMENT OF MĀORI LAND IN THE TWENTIETH CENTURY

15.8.1 Tribunal findings

Our findings on sufficiency and landlessness in Chapter 5 apply also to the twentieth century. Here, we are particularly concerned with the Government's legislative regime. Developments such as the abolition of the Māori land councils, the reopening of Māori land to purchase under

the 1905 and 1909 Native Land Acts, the land board regime created by those Acts, and the succession laws that applied until Te Ture Whenua Māori Act 1993 – all contributed to Māori being progressively less able, until the very end of the twentieth century, to hold on to what little land they retained.

Accordingly, *we find* that:

- ▶ The Crown's failure to intervene earlier to prevent the ongoing diminution of Māori land in the twentieth century breached its Treaty obligation of active protection. This is as serious as the breaches of the nineteenth century, because, by the twentieth century, it was so much more critical to ensure that tangata whenua kept the little whenua (land) they had left.
- ▶ By the twentieth century, the Crown knew more, and could do more, because New Zealand was a fully developed state with resources at its disposal. At least, Māori should have been offered similar assistance to that made available to others, especially Pākehā owners of smaller areas of undeveloped lands, who had limited capital. Steps the Crown could have taken included assessing the land needs of iwi and hapū, providing access to state lending (at least equivalent to what was available to Pākehā), and halting further attrition of their land base. All these options were possible in the early decades of the twentieth century. Development schemes were a well-intentioned Crown initiative to remedy some of the problems afflicting Māori land. But they came too late to make much of a difference, and the way they were implemented – including the failure to involve owners in the management of the land – meant they were largely unsuccessful.
- ▶ The Crown's duty to support Māori in their own tikanga in relation to their own land remained *at all times*, including times when other policy emphases prevailed. Thus, the Crown's obligations under the Treaty applied even when assimilationist views generated legislation that allowed Māori land to be bequeathed outside the family.¹²

- ▶ Such legislation breached the Treaty because it eroded Māori land tenure, whakapapa (lineage), and whaunaगतanga (ethic of connectedness by blood), all guaranteed to Māori under article 2. Prejudice certainly resulted.
- ▶ The legislative regime also breached the principle of options (as articulated by the Muriwhenua Tribunal in 1988). The laws governing Māori land tenure between 1909 and 1993 reflected not only the desire for settlers to readily purchase Māori land, they also reflected the belief that Māori would ultimately be assimilated into English society and become subject entirely to the common law. While some Māori of course yielded to this pressure, the Crown was not entitled to impose its assimilationist views on its Treaty partner so that effectively there was little or no choice to be had. It is plain to us that Māori choices about their land in the twentieth century were far too often forced.

15.8.2 Tribunal recommendations

The damage done by the legislative regime that was in place for much of the twentieth century cannot be undone because the Tribunal has no jurisdiction to recommend the return of land in private ownership. We are limited to suggesting legislative and policy changes, and compensation – which is, of course, an inadequate remedy for situations where the prejudice to tangata whenua concerns their mana (authority), identity, and tūrangawaewae (core tribal land).

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

1. That the Crown works with Wairarapa ki Tāmaki-nui-ā-Rua Māori in the light of the significant breaches of the Treaty relating to keeping and using Māori land, to design a means whereby the Crown either:
 - (a) lends money to owners of Māori land on the security of that land; and/or
 - (b) guarantees lending to owners of Māori land by

other institutions unwilling to accept Māori land as security;

2. That the Crown engages with Wairarapa ki Tāmaki-nui-ā-Rua 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 Wairarapa ki Tararua to:
 - (a) effect amalgamations and exchanges to ameliorate the effects of the poor partitioning of titles in the past; and
 - (b) apply for the court to exercise its new jurisdiction to facilitate access to landlocked land. The Pūkaroro reserve will be a good starting point.
3. This recommendation, if accepted, would involve the Crown in paying for the costs of surveyors and lawyers;
4. That the Crown provides financial assistance to enable Māori owners to enforce court orders in respect of their land; and
5. That the Crown assists the owners of Taueru urupā to work with local bodies to form the roads that will afford access to their urupā. If this avenue does not succeed, assistance to invoke the Māori Land Court's jurisdiction with respect to landlocked land will be required (see recommendation 2(b) above).

15.9 CHAPTER 7: WAIRARAPA MOANA AND POUĀKANI

15.9.1 Crown concessions

The Crown acknowledges that at the time of the 1896 Wairarapa Lakes agreement, it did not ensure that the parties had a clear understanding of what would constitute ample reserves and their location. It also did not ensure that it could successfully implement the reserves provision in a timely way. This resulted in considerable delay before lands to meet the Crown's obligation were vested in Māori and surveyed access provided. This contrasts with the fact the Lakes agreement immediately gave the Crown a clear

title over the Wairarapa lakes, which enabled it to address settlers' concerns.

The Crown acknowledges that its accumulated acts and omissions in relation to the Lakes agreement constitute a breach of the Treaty and its principles. It also acknowledges that its failure to inform Māori and discuss the proposed taking of Pouākani prior to the Crown's entry on to the land and the construction of a number of structures on that land constitutes another breach.¹³

15.9.2 Tribunal findings

In numerous ways, Māori property rights were overridden, disregarded, and dishonoured during the events that led to the transfer of ownership of Lakes Wairarapa and Ōnoke (and their surrounds) from tangata whenua to the Crown, and Wairarapa Māori subsequently taking ownership of land at Pouākani instead.

We find that the Crown's conduct amounts to a grievous breach of its obligations to act towards its Treaty partner with the utmost good faith, and so as to protect their interests actively. Counsel for the Crown acknowledged that the Crown's failure to make lakeside reserves, and the delay in vesting and surveying the Pouākani lands, were 'regrettable'.¹⁴ Our assessment is that the Crown's culpability is altogether more serious.

We find that the Crown's actions in compulsorily acquiring 787 acres of Pouākani land for the Maraetai dam, and compulsorily leasing 683 acres as a site for Mangakino township breached the principles of the Treaty – and specifically its duties of active protection, and to act with the utmost good faith – because:

- ▶ The owners will never get back the land that is under the dam and under the town, and these acres were the best farmland in the block.
- ▶ The Crown's process for taking the land for the Maraetai Dam was deficient in several respects, including the notice given and the process for assessing and paying compensation.
- ▶ The compensation paid was negligently in the extreme.

The compensation principles applied allowed the Crown to pay a price that was discounted because the Crown had not provided road or rail access to the land since 1916; the only 'betterment' that had occurred came as a result of the hydro works, and the landowners were considered to be entitled to only some of the benefit of this.

- ▶ The owners have not been compensated for the loss of productivity of Pouākani land as a result of approximately 191 hectares of power line corridors located there, although evidence presented showed financial loss as a result.¹⁵
- ▶ Mangakino township was never going to be viable after the works finished, and encouraging the Pouākani owners to take over the leasing scheme 'principally to ensure that the Crown could achieve the best possible price for houses erected on the land'¹⁶ breached the Crown's duty to actively protect Māori interests. Even if (and we doubt this)¹⁷ officials genuinely believed that Mangakino would thrive, and that the leases would prove to be an asset for the Māori landowners, a Crown properly focused on the welfare of these Māori would have tested optimism more rigorously by conducting a study *before* transferring the leases to the Māori owners; and developed a mechanism to rescue them from their plight in the event that the predictions of those who doubted that Mangakino was viable came to pass.
- ▶ The basis upon which the owners took over management of the Mangakino leases – especially the fixed terms for 14 years – was uncommercial, and exacerbated the problems that the owners faced as a result of the failing town. The Crown did not properly advise or assist the owners to manage the risks of taking over the scheme.

We find no Treaty breach in relation to the development scheme at Pouākani.

Overall, *we find* that the Crown's conduct in respect of Wairarapa Moana and Pouākani prejudiced Wairarapa Māori in that:

- ▶ Their mana in and around Wairarapa Moana, and their spiritual connection with the Moana was, if not lost, then dramatically undermined.
- ▶ This loss of mana affected their status and identity.
- ▶ The costs of many decades of conflict brought about by the Crown's conduct were high. They included the emotional and spiritual costs of the stress of participating in a dispute on a long-term, relentless basis; very considerable financial costs; and the loss, as a result of engaging in the conflict, of other opportunities that they could otherwise have pursued.
- ▶ Because the Crown did not grant reserves beside or near Wairarapa Moana, Wairarapa Māori had no base there for fishing or other hapū or tribal activities, nor any presence there as tangata whenua. Their connection with their ancestral lakes has thereby been reduced and diminished.
- ▶ Their traditional leaders were undermined by the unavailability, as a result of the Crown's conduct, of options that would really promote the welfare of Wairarapa Māori – either the lakes themselves, or the reserves that were promised. As a result, leaders were left with no alternative but to lead their people towards options they would never have chosen or promoted had real choice been available.
- ▶ The relationship between Wairarapa Māori and Waikato Māori was jeopardised by the grant to Wairarapa Māori of land in the southern Waikato, where they were not tangata whenua.
- ▶ Wairarapa Māori received no benefit at all from the Pouākani land for the first 40 years of their ownership of it. It was in fact a detriment, as they struggled in vain to get the Crown to provide assistance with access or development. At the same time, their wetlands were being drained, and commercial eelers were allowed access to their fishery. They had to live with the manifest unfairness of this 'exchange': while they had years of enduring adverse effects, the Crown

and settlers instantly benefited from their gift of the lakes, from the attendant right to control the outlet from Lake Ōnoke to the sea, and from the sale of land around the lakes.

- ▶ Before they derived any benefit from the Pouākani land, nearly 800 acres of it were compulsorily acquired for hydro works, and another nearly 700 acres were compulsorily leased for Mangakino township. The process by which the acquisition was undertaken showed them no respect at all as owners, and the compensation principles applied were designed to ensure that the price they received was very low.
- ▶ In human and financial terms, running the Mangakino leases took a huge toll on the community of Pouākani landowners in the Wairarapa.

15.9.3 Tribunal recommendations

We recommend that, in addition to general redress that responds to the serious Treaty breaches identified, the Crown should:

1. Return to Wairarapa Māori ownership of the bed of Wairarapa Moana.
2. Gift to tangata whenua any land in Crown ownership adjacent to either of the two lakes, Wairarapa and Ōnoke, or anywhere in their vicinity, as a reserve or reserves.
3. Work with tangata whenua to design a special arrangement for management and control of Wairarapa Moana (including Lake Wairarapa, Lake Ōnoke, and such of their surrounds that are not in private ownership) that recognises and gives effect to the status of Wairarapa Māori as its rightful owners and kai-tiaki (guardians). This arrangement should:
 - (a) fully reflect the special relationship between tangata whenua and their customary fishery in the lakes; and
 - (b) go well beyond the existing wetland plan in

- providing for the primacy of tangata whenua interests in the lake.
4. Compensate Pouākani owners for the opportunity cost of bearing the burden of administering the Mangakino leases for nil real return over 40-odd years.
 5. Reassess the compensation paid to the owners for the land taken for the Maraetai dam in the light of new, Treaty-compliant criteria, including:
 - (a) compensation for the unique qualities and hydro potential of the land;
 - (b) compensation for all 'betterment' effected by the hydro works.
 6. Compensate the Wairarapa Māori owners of the land at Pouākani for the loss of productivity occasioned by the power line corridors.¹⁸
 7. In relation to the 'lost 200 acres', *we recommend* that the Crown either accepts the conclusions of its witness Andrew Joel; or, if it wishes to go further, commissions a survey and legal opinion of the kind that would have resulted from a title investigation, if the Native Land Court had undertaken one in 1930. If the conclusions of Joel's opinion are confirmed, a process to assess compensation should ensue. Compensation should then be paid, with interest, to the land's traditional owners.

15.10 CHAPTER 8: PUBLIC WORKS TAKINGS

15.10.1 Tribunal findings

We find that the compulsory acquisition of Māori land for public works in Wairarapa ki Tararua breached article 2 of the Treaty of Waitangi. No acquisitions in the district met the test of being required in circumstances where the national interest was at stake and where there were no other options.

There are three factors that exacerbate the Crown's Treaty breach in respect of public works:

- ▶ Māori were not represented in Parliament at the time when their Treaty rights were abrogated by the adoption of English public works norms through legislation.
- ▶ The land fund model of colonisation implemented in New Zealand involved Māori accepting a low price for their land in return for other benefits, including infrastructure like roads and bridges. Requiring them then to give up ownership of further land for public works, sometimes without compensation, was an extra and unfair burden.
- ▶ There is a quality of exploitation about how this burden was imposed: Māori land was made subject to the five percent rule and local authorities were allowed to compulsorily acquire Māori land, just as Māori political power was declining because of greater settler numbers and the land wars.

The whole public works regime was, and remains, monocultural. The Crown failed to apprehend, and take account of, the special significance of land to Māori. In particular, it had no regard to the fact that, by the twentieth century, the land remaining in Māori hands was usually important or strategic for both cultural and economic reasons. Continuing to facilitate the land's easy compulsory purchase by (mainly) local authorities was a woeful failure to protect Māori from unnecessary cultural, spiritual, and financial loss.

The legislation was not procedurally fair as it related to Māori land. Most public works Acts contained different regimes for Māori and other land, and owners of Māori land had fewer procedural protections. The requirements that were developed in England for procedural protection of landowners' rights – especially good notice to every individual with interests in the land, fair compensation, the right to object, and offer-back for repurchase when the original purpose expired – were inconsistently and poorly applied to Māori land.

The Crown's delegation of compulsory acquisition powers to local authorities breached the Treaty.

Compulsory acquisition is a significant erosion of Māori property rights that should only be contemplated in rare and tightly controlled circumstances. Legislation that allowed the State's power to be deployed by many different local authorities for evermore trivial purposes flagrantly cut across the guarantees to Māori in article 2. The Crown also failed to supervise offer-back provisions, allowing local authorities to redeploy land for other purposes, or offer the land back to others because offering it back to the descendants of multiple Māori owners was characterised as impracticable.

The small-scale and humdrum nature of the many local authority takings in the district meant that it was not necessary to acquire Māori land compulsorily, as many other sites would have been suitable. A possible exception to this may have been certain coastal roads, and possibly also particular stopbanks and gravel pits. However, the Crown offered neither evidence nor submission to this effect. Moreover, there is no evidence of attempts to acquire land for these kinds of purposes by negotiation rather than compulsion. In every instance, negotiated purchases could have been – and should have been – tried before any compulsory measures were taken. The legislation provided no threshold for resorting to compulsory measures for trivial works; nor was there any requirement to consider alternative sites before taking Māori land; nor was there any requirement to consider whether owners of land sought for works had other Māori landholdings. All these omissions breached the Crown's Treaty duties, particularly its duty of active protection.

Where Māori land was taken in preference to general land – which *we find* occurred at least in the case of the Dannevirke Borough Council's takings in the Tahoraiti blocks – the Crown failed to monitor the situation. It failed also to provide a legislative regime that curtailed authorities' power to act in this way. These failures breached article 3 of the Treaty, and also the Crown's duty of active protection.

The failure of the Crown to ensure that all compulsorily acquired Māori land was offered back once no longer

required for the original purpose was a lamentable breach of its duty to actively protect Māori interests. Had a proper offer-back regime been in place, some of the negative effects of compulsorily acquisition might have been averted.

15.10.2 Tribunal recommendations

The constant delay in making changes to the public works regime, which clearly conflicts with Māori rights under the Treaty, reflects badly on the Crown's bona fides in the Treaty area. It is not even as though public bodies are in the business, nowadays, of compulsorily acquiring land to any extent. Even if, sometimes, it is deemed necessary to compulsorily acquire land, Māori land now comprises only five percent of land in New Zealand. Surely the time has come to compel authorities to look elsewhere for any land that simply must be purchased.

Hence, *we recommend* a number of specific changes to public works legislation. Many have been recommended by previous Tribunals, but are yet to be implemented; others are additions of our own.

(1) Recommendations on legislation

We recommend that the Crown acts to change the current public works regime without further delay:

1. In particular, *we recommend* that the Public Works Act 1981 be amended to provide that it should be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi.
2. As a consequence of recommendation 1, *we recommend* that part 11 of the Public Works Act 1981 be amended so that:
 - (a) The Crown and local authorities are expressly authorised to:
 - (i) acquire a lease, licence, or easement over;
 - (ii) enter into a joint-venture arrangement in respect of; or
 - (iii) arrange for an exchange of land in respect of Māori land required for public purposes,

instead of acquiring the freehold title of such land.

(b) The Crown or local authority should not seek to acquire Māori land without first ensuring that no other suitable land is available as an alternative.

(c) If the Crown or a local authority wishes to acquire Māori land for a public work or purpose, it should first give the owners adequate notice and, by full consultation, seek to obtain their informed consent at an agreed price.

(d) If the owners are unwilling to agree, the power of compulsory acquisition for a public work or purpose should be exercised only in exceptional circumstances and as a last resort in the national interest.

(e) If the Crown or a local authority does seek to acquire the use of Māori land for a public work, it should do so by acquiring a lease, licence, or easement, as appropriate, on terms agreed upon with the Māori owners or, failing agreement, by appropriate arbitration. Should there be exceptional circumstances where the acquisition of the freehold by the Crown or a local authority is considered to be essential, Māori should have the right to have that question determined by an appropriate person or body, independent of the Crown or local authority.

3. As a consequence of recommendation 1, *we also recommend* that part III of the Public Works Act 1981 be amended to require the Crown or local authority, as the case may be, to:

(a) consult with former Māori owners or their successors before deciding not to offer surplus land back to such owners, and before putting any land taken for a public work to any other purpose; and

(b) offer to return surplus land to Māori ownership at the earliest possible opportunity with the least cost and inconvenience to the former Māori owners.

4. In determining the price at which the land is offered back to the former Māori owners, *we recommend* that the Crown or local authority:

(a) share with such owners the increased value in

the land arising from the use and development of their land;

(b) have regard to the means of such former Māori owners;

(c) have regard to the circumstances surrounding the compulsory acquisition of such land;

(d) have regard to the special circumstances of multiple Māori owners and to seek to accommodate such circumstances;

(e) have regard to the adequacy of the compensation paid when the land was compulsorily acquired, in the light of Treaty principle; and

(f) have regard to whether the Crown should pay compensation to Māori when the land is returned. The quantum of any such compensation is to be assessed on the basis of a fair return to Māori for the use of the land by the Crown, and the length of time the land has been used for any public purpose.

5. If for any reason the former Māori owners are unable or unwilling to take up the offer-back, *we recommend* that the Crown or local authority is to offer the land to the wider hapū or tribal group to which the former Māori owners belong.

6. In order to facilitate the process of offer-back, *we recommend* the amendment of section 134 of the Te Ture Whenua Māori Act 1993. This section enables the Māori Land Court to vest any Māori land acquired by the Crown or a local authority for public works purposes, for which it is no longer required, in those Māori found by the court to be entitled to receive it. However, under section 134, only the Crown or a local body may make such an application to the court. *We recommend* that the Act be amended to enable the owners from whom the land was originally taken or their descendants to apply to the court for the return of such land.

7. *We recommend* that section 342 of, and schedule 10 to, the Local Government Act 1974 should be amended or repealed to prevent local bodies from avoiding the requirements of the Public Works Act 1981 to offer

back lands to their former owners once they are no longer required for public works.

(2) Recommendation on offer-back standards

We recommend that Land Information New Zealand retains its existing standards relating to the offer-back of gifted land and continues to give vendor agencies the discretion to return improvements on gifted land for less than current market value.

(3) Recommendation on Ōkautete School

Having already acted properly in giving the Ōkautete School site back to the tangata whenua, we recommend that the Crown now also gives to those people the school buildings and school house located on the site.

(4) Recommendation on research assistance

We have found that the land compulsorily acquired for public works in Wairarapa ki Tararua should not have been so acquired, for its acquisition in that way breached the principles of the Treaty of Waitangi. We recommend that the Crown now assists the claimants to find out more about what happened to land that was compulsorily acquired from Māori in this inquiry area. They require access to information that will tell them what compulsorily acquired land has been disposed of without offering it back to its former Māori owners. If it exists, they should also be given access to information about any compulsorily acquired land that may be declared surplus and offered back to the descendants of the original owners in the future. Investigation of the former will help avert further Treaty breach and investigation of the latter will provide better information about the extent of the prejudice flowing from compulsory acquisitions.

These recommendations should be brought to the notice of the Minister of Lands, the Minister of Justice, the Minister in Charge of Treaty of Waitangi Negotiations, and the Minister of Māori Affairs.

15.11 CHAPTER 12B: LOCAL GOVERNMENT LEGISLATION

15.11.1 Tribunal findings

We find that, while the Local Government Act 2002 exposes iwi to the policies and actions of local government, it does not hold councils to account if they fail to provide opportunities for Māori to participate in decision-making or do not actively protect environmental taonga (treasured property). In other words, the Crown has delegated responsibility to local councils but has not delegated an equivalent level of accountability.

In the public works chapter (ch 8), we have already discussed the Crown's delegation of powers to local authorities. There we found that that the Crown may not avoid its Treaty obligations by unilaterally deciding that Crown functions will be carried out by others.

Delegation of Crown functions is of course in accordance with the Treaty if the Crown's Treaty obligations go with the delegation. However, we have seen in all spheres of local government activity that the Treaty provisions in the relevant legislation are not sufficiently prescriptive to oblige local bodies to conduct themselves in a manner that is consistently Treaty-compliant. In this, the Crown fails in its duty of active protection.

Thus we consider that both the Local Government Act and the Resource Management Act require more compelling Treaty provisions. Also needed are regular audits, and sanctions for non-compliance.

15.11.2 Tribunal recommendations

We recommend that the Government commit to a comprehensive review of these Acts that achieves:

- ▶ a representative of Rangitāne and a representative of Ngāti Kahungunu on all territorial and district councils in this inquiry;
- ▶ engagement by all local authorities with the Māori communities they serve;
- ▶ concentration of functions in fewer local authorities, so that the burden on Māori of having to form

effective relationships with many different bodies is lessened;

- ▶ increased participation of Māori in voting for, working for, and serving on councils;
- ▶ shared power and delegation of local authorities' functions to Māori entities in all appropriate areas and circumstances;
- ▶ increased capacity of tangata whenua to engage meaningfully in resource management decision-making (which will involve paying and training them); and
- ▶ substantial upskilling of council staff and councillors in understanding the Māori world-view, including enhanced skills in te reo Māori me ōna tikanga (the Māori language and related customs). Councils should also be required to provide incoming councillors and new staff with information and education material on (among other matters) local tribal boundaries and significant sites; local tribal organisations, trust boards, corporations and leaders; the current Treaty discourse; Treaty settlements; and Crown Treaty obligations and how they are expressed in the Resource Management Act 1991 and local government legislation.

We also endorse the findings of the 2005 'Local Futures' study, which called for further research 'investigat[ing] how elements like trust, credibility, integrity and willingness to communicate can be incorporated into local government practice'.¹⁹ We agree, and see an associated need for better information management and information-sharing.

While we recognise that steps have been taken by some local authorities in some places to improve Māori representation and participation in local government decisions, we emphasise that this is not required in the legislation – and nor are there sanctions for poor practice. To ensure that good working relationships happen all the time, rather than arbitrarily or opportunistically, we call for clear lines of accountability that are supported by legislation that enables, promotes, and (at least for key decisions) *requires* full involvement of tangata whenua.

15.12 CHAPTER 12C: THE DEPARTMENT OF CONSERVATION

15.12.1 Tribunal findings

We *find* that partnership is the practical effect of section 4 of the Conservation Act 1987. For the Department of Conservation, this means identifying ways to devolve and share its statutory decision-making powers to Māori or with Māori, thereby achieving genuine partnership. Only then can the department be said to be truly giving effect to the principles of the Treaty of Waitangi in all its work.

15.12.2 Tribunal recommendations

(1) Recommendations on Department of Conservation

As a first step, we *recommend*:

- ▶ The establishment of a joint working group comprising representatives from iwi and the Department of Conservation. Its role should be to review the department's activities and current relationships within the region and to identify opportunities for joint decision-making and funding for Māori programmes.²⁰ Situations where it is appropriate for iwi to have control, rather than being part of a joint decision-making arrangement, should be identified – a notable example is the management and control of wāhi tapu (sacred places). Opportunities for Māori cultural-commercial enterprises on conservation land should also be on the working group's agenda.
- ▶ That the Crown fund the upskilling and participation of te iwi Māori in environmental decision-making. This concerns not only the involvement of tangata whenua with conservation issues and the Department of Conservation but also with local government, the Resource Management Act 1991, and heritage management. Crown funding is necessary so that iwi can properly fulfil the partnership role inherent in section 4 of the Conservation Act 1987.

In addition, the following should be explored:

- ▶ A Department of Conservation cadet scheme for the rangatahi (young people) of Wairarapa ki Tāmaki-

nui-ā-Rua. This would enable the tangata whenua and the department together to develop expertise in both Māori and Pākehā conservation perspectives and techniques among local people, especially the young.

- ▶ More dialogue between the Department of Conservation and tangata whenua about how best to address the twin issues of resources and training.

(2) *Recommendation on Pūkaha Mount Bruce*

Regarding the future of this partnership, we consider that joint management and joint ownership would be the ultimate expression of partnership between the Crown and Rangitāne.

We recommend the return to them of part-ownership of the reserve as fitting cultural redress for Rangitāne o Tāmaki-nui-ā-Rua.

15.13 CHAPTER 12D: MĀORI HERITAGE MANAGEMENT

15.13.1 Tribunal findings

We find that there is real disillusionment with the present heritage management regime. To overcome it, a less bureaucratic and more Māori-driven system is required. Reconstituting the Māori Heritage Council as an independent body running its own heritage protection regime could be an option, but it may be too costly to have separate bodies for Māori and Pākehā heritage. But a body with more Māori expertise and leadership, comprising people whose main interest is Māori heritage, is required.

15.13.2 Tribunal recommendations

We recommend legislative change in a number of areas:

- ▶ The Resource Management Act 1991 (ss 33, 36B) or the Historic Places Act 1993 or both must be amended to *require* Māori involvement in decision-making about consent applications that involve Māori heritage, and also in decisions about heritage orders. Māori need to

be involved from the outset, and need to be properly funded to do so. At present, local authorities are not using the available legislative opportunities to devolve power to tangata whenua.

- ▶ Another way that the Resource Management Act could strengthen the heritage obligations of local authorities is simply by making heritage a more important priority for them. We note that ‘the protection of historic heritage from inappropriate subdivision, use, and development’ was only listed as a matter of national importance under the Act in August 2003.²¹ We hope this change to the Act will influence the next round of district plans. However, at present, heritage protection matters are not specifically mentioned under the functions of either regional or territorial authorities.²²
- ▶ The legislation must be amended to compel councils to list registered sites in plans. This change would help protect both Pākehā and Māori heritage sites, but is particularly important for Māori heritage sites, because fewer of them have so far been recognised in any way. This move, accompanied by a drive to increase the number of sites registered (see below), would greatly strengthen the ability of the whole system to provide genuine protection.
- ▶ The Historic Places Act’s provisions for heritage orders must be overhauled. The aim should be to remove the present cumbersome, complex, and expensive process whenever a heritage protection authority seeks a heritage order to protect a historic place or wāhi tapu. Instead, we propose a simple ‘one-stop shop’ whereby the heritage protection authority itself makes a proposal, advertises it, takes submissions, and then sets up a body to decide whether, in accordance with the objectives of the legislation, the order should be granted. If the answer is ‘Yes’, the territorial authority should be obliged to include it as a designation in the relevant district plan.

We also recommend:

- ▶ As a matter of priority, more funding for the Historic

Places Trust to enable it to create a register of archaeological sites in the Wairarapa ki Tararua inquiry district. Such a register is vital to ensuring that the Historic Places Act's protective mechanisms actually work. Additional funding would enable not only the creation of a register but also allow it to be maintained and added to, investigative staff to be employed, and prosecutions to be brought when sites are damaged or modified without authorisation.

- ▶ A registration drive to encourage more Māori sites in Wairarapa ki Tararua to be registered. Rangitāne's GIS project should be used as a starting point. Councils could encourage iwi trust boards and corporate bodies to identify and register their sites by offering to fund 0.5 percent of an employee's salary.

15.13.3 Tribunal recommendations on portable taonga

It is appropriate in the Treaty context for the Crown to set about remedying some past mistakes in this area. Discussions with Ngāti Hinewaka about their taonga that are currently held in various museums is a good place to start. For the Crown to assume ownership of the taonga of iwi is clearly not in accordance with Treaty principles. Iwi should not have to buy them back, and that scenario should be avoided wherever possible.

Accordingly, *we recommend* that iwi and the Crown work towards arrangements that:

- ▶ recognise Ngāti Hinewaka's relationship with these taonga;
- ▶ acknowledge that the Crown's conduct in former times breached the principles of the Treaty;
- ▶ articulate the principles for how protecting and looking after taonga should proceed in the twenty-first century;
- ▶ reflect the importance of the taonga as the physical evidence of how Māori lives were lived in the Wairarapa over the centuries;
- ▶ put in place a plan for the taonga and their future.

15.14 CHAPTER 13A: THE EFFECTS OF POPULATION GROWTH AND EXPLOITATION ON THE SEAWARD TERRAINS

The experience of Ngāti Hinewaka in attempting to assert their mana moana (traditional authority) over their seaward terrains demonstrate how difficult it is. Their endeavours to establish taiāpure (a tribal fishery protected under statute) were only partially successful. The petitions that Mita Carter mounted in 1989 and 1990, and the statements attached to the application, show an intention to exercise rangatiratanga over much more extensive areas of customary fishery than are comprised within the taiāpure in Kawakawa (Cape Palliser). It may be that, in a different political climate, the existing taiāpure legislation would enable them to do this. However, because of the uncertainty about what the word 'littoral' means in the context of the legislation, we think that an amendment of the legislation is called for.

We recommend a legislative change to make it clear that taiāpure do not need to be small, discrete areas but may be of significant size when the circumstances make that appropriate.

15.15 CHAPTER 13B: THE CUSTOMARY FISHERY

15.15.1 Tribunal findings

We find that the current customary fisheries regime does not fulfil the Crown's Treaty obligation to provide for Māori customary fisheries set out in section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

We find that the present legislative provisions under which Māori can establish and exercise customary fishing rights (including provisions for taiāpure, rāhui (temporary restrictions on access), mātaītai (food from the sea), and kaitiaki appointments) lack clarity, are difficult to put into effect, and are often viewed by Māori as 'toothless'. These factors have contributed to poor uptake. The Ministry of Fisheries has put in place some new initiatives aimed at

overcoming the problems, but these must be monitored to see if they are effective.

We saw some fundamental difficulties that seemed to have no resolution in sight – particularly the reconciliation of Māori customary rights with those of commercial fishers. However, it is apparent that effective provision for Māori customary fisheries is still very much a work in progress, and it may be that current initiatives will mend the flaws that we saw. We make no findings about Treaty breach at this stage, because the new measures have not yet been fully tried. However, our recommendations make apparent our willingness to re-enter this topic should the new initiatives prove ineffective.

15.15.2 Tribunal recommendations

We recommend that the Crown

- ▶ undertakes activities aimed at ensuring that Māori know about and understand the various options available to them under different legislative provisions; and
- ▶ reviews the current legislative regime again in five years' time, looking particularly at whether the new initiatives introduced by the Ministry of Fisheries have increased the efficacy and uptake of the provisions described above. If the review shows that provision for Māori customary fisheries has not significantly improved, or if the Crown does not undertake a review, claimants have leave to return to the Tribunal to ask for further inquiry into their claims in this area.

15.16 CHAPTER 14: RANGITĀNE IDENTITY

Although we have not found that the Crown breached the Treaty in relation to Rangitāne identity, *we nonetheless recommend* that:

- ▶ The Crown ensures that all future publications produced by government departments refer to both

Rangitāne and Ngāti Kahungunu as tangata whenua of Wairarapa. The Crown may consider writing to the chief executives of local and regional authorities to confirm its recognition of Rangitāne as tangata whenua of Wairarapa ki Tararua, and to encourage local government to develop working relationships with the Rangitāne tribal organisation, where no relationship already exists.

- ▶ The Crown takes the steps necessary to bring about the following name changes for places in Rangitāne's rohe (district):
 - Tararua to Tāmaki-nui-ā-Rua;
 - Tākitimu (Māori Land Court district) to Ikaroa;
 - Rimutaka to Remutaka.

Notes

1. Document 117(j) (Crown memorandum), p 2
2. Ibid
3. Ibid
4. Ibid, p 4
5. Ibid, pp 4–5
6. Ibid, p 5
7. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, revised ed, 4 vols (Wellington: Legislation Direct 2008), vol 1, pp 384–385
8. Ibid, vol 1, p 385
9. Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 2, pp 777–778
10. Ibid, vol 2, pp 662, 777
11. Paper 2.249 (Crown statement of general position), p 3; SOR1A (Crown final statement of response – Ngā Hapū Karanga pt A), p 2
12. Document 117(g) (Crown closing submissions), pp 3, 5
13. Document 117(j) (Crown memorandum), p 3
14. Document 117(c) (Crown closing submissions), p 13
15. Document A80 (Colley), p 6, apps 1, 2
16. Document H6 (Smiler), p 14
17. On this point, we accept the submissions of Ngā Hapū Karanga: doc 11(c) (Ngā Hapū Karanga closing submissions), pp 8–10.
18. Document A80 (Colley), pp 5, 6, apps 1, 2. As regards the presence of power lines on the land, forestry consultant George Colley estimates that the incorporation has lost \$575,714 in earnings and interest from stumpage and rental payments. He has also calculated the potential future earnings the incorporation might have expected to earn if there were no power line corridors on the land.
19. Local Futures, 'Local Government Consultation and Engagement

with Maori' (working paper 5, School of Government, Victoria University, Wellington, 2005), pp 21–22, 2005

20. Document 12 (Murray Alan Hemi claim closing submissions), p 35

21. Resource Management Act 1991, s 6(f) (paragraph (f) was added by section 4 of the Resource Management Amendment Act 2003)

22. Ibid, ss 30, 31