

APPENDIX V

THE CROWN'S 1996 POLICY ON CLAIMS INVOLVING PUBLIC WORKS ACQUISITIONS

The Crown's broad definition of the kinds of legislation covered by its August 1996 policy on Treaty claims involving public works acquisitions is appropriate and reasonable. Moreover, the Crown's recognition that quite often Maori land gained by 'agreement' was in fact given under duress does the Crown credit. The document therefore goes some way towards acknowledging the Crown's responsibility in respect of public works acquisitions but, in the light of the discussion at section pti.11, falls short of what is required in the following respects:

- The definition of 'land' affected should be read to include *waters* – the rivers, streams and swamps which were extremely important for the Maori ecology and which were drastically affected by public works policies and drainage projects.
- It must be accepted that, from time to time, the Crown has obligations under article 1 of the Treaty to acquire land compulsorily in the public interest. On the other hand, as the Tribunal has pointed out, it has a duty to do so only when there is no other recourse, only after appropriate consultation with the persons affected has been conducted, and only after other possible approaches have been exhausted. This is as true for Pakeha land and waters as it is for Maori land and waters, but article 2 of the Treaty presents the Crown with the obligation of special regard for Maori rights. Yet, far from the authorities being more careful about consulting and compensating Maori than Pakeha, the reverse was commonly the case. There were (and are) no doubt circumstances in which sheer urgency makes full consultation and discussion of alternative approaches difficult: wartime exigencies, for example, or the excessive cost of delaying projects (although this should be genuinely serious, not a matter of common convenience, overriding normal consent). The Treaty obligation to give active protection to a people who had little experience with bureaucratic and legal processes compared with Pakeha, and who had all the added difficulties stemming from complexity of title and lack of access to credit, should have made the Crown especially careful of Maori rights. There were signs that more care was taken in the early days; Maori were militarily strong on the ground then and the Colonial Office kept an eye on the activities of settler politicians. But from 1865 on, the colonial Legislature's attitude towards Maori became somewhat vengeful, and Maori land and water were intruded upon with less care than Pakeha land apparently on the basis that somehow Maori 'owed' something to the colony's development, especially because they could not or would not pay local body rates in the same way as Pakeha did. From 1865 to 1981, especially, despite occasional concessions in the law to the special

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circumstances and disadvantages of Maori, it proved all too expedient for central and local government to take Maori land and pay compensation grudgingly, if at all.

- The Crown's policy in respect of offer-back is illogical, from a Treaty perspective. The Crown's statement assumes that only the legislation of 1981 imposes an obligation upon it to offer back to Maori land surplus to public work requirements – that only failure since that date to offer back land would constitute a Treaty breach. But in terms of the Treaty of Waitangi Act 1975, legislation, or the absence of legislation, should be reviewed in the light of Treaty principles, not vice versa. The Treaty of Waitangi Act Amendment Act 1985 extends the jurisdiction of the Waitangi Tribunal to review any act of omission or commission claimed to have prejudicial effect on Maori, including 'any ordinance or regulations, order, proclamation, notice or other statutory instrument made, issued, or given at any time or after the 6th day of February 1840' or 'any policy or practice (whether or not enforced) adopted by or on behalf of the Crown' (s 6(1)). Presumably the actions or inactions of the Crown must be interpreted by the Waitangi Tribunal in the light of the Treaty itself, including expectations of a reasonable balance between the Crown's rights and obligations of *kawānātanga* and its obligation to respect *tino rangatiratanga*, as indicated by the Court of Appeal in 1987. In this light, the failure to offer back land taken from Maori for public works but not used for the purpose intended (or for any genuine public purpose at all) might be considered as much a breach of the Treaty before 1981 as after.
- The question of offering the land back at current market value, including the price of improvements, is a contentious issue. On the one hand, the improvements and added value have generally been created by the capital and energies of the national community; on that basis, Maori taking over the property should pay at least something towards the value of the improvements. On the other hand, the national community has had the benefit of the land for some time – often a very long time – and often for no initial cost, or very little cost, in compensation. That would allow for at least a substantial discounting of current market value.
- By the same arguments as above, the Crown's refusal to recognise the acts or omissions of local authorities and statutory bodies is also illogical. A reasonable inference from section 6(1) of the Treaty of Waitangi Act would seem to be that the acts, orders etc of local bodies, acting in capacities bestowed upon them by statutes of parliament, are indirectly actions of the Crown-in-Parliament. At the very least, it is highly legalistic and ungenerous of the Crown to evade responsibility for the actions of local authorities that it created and whose tendency to take Maori land for public works in preference to Pakeha land (and without the full exercise of due process) it had long been aware of. Moreover, the Maori Trustee (that is, the Secretary for Maori Affairs) and Maori land boards have mixed records in terms of their association with local authorities in the taking of Maori land for public purposes.
- If this be accepted, it opens the way to a great many claims for Treaty breaches, but the Crown's policy puts a heavy onus of proof on claimants to prove each case a breach. As in the case of claims arising from the operation of the Native Land Acts, this is impracticable, except in respect of relatively recent or well documented actions. Confusion in the legislation, the great variety of definitions of 'Maori land' and shifting applications of the law, even year by year, makes specific identification of each breach very difficult. Even where cases of Treaty breaches can be proved, the research and legal costs are considerable. As with the impact of Native Land Acts, the

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case for a broad-brush approach up to a certain date is strong and likely to serve the best interests of all parties. Moreover, the Crown policy notes that a claimant group may have lost land through 'one or more public works acquisitions but also through earlier or later Crown actions' and accepts that in 'addressing a claimant group's concerns, the Crown should consider the overall impact on the claimant group of all Treaty breaches'. Conceivably a factor in the quantum of settlement could be allowed for land takings and disturbance to waters for each tribal rohe up to a certain date to settle the general grievance, while specific breaches within the living memory of claimants, and claims for the return of particularly valued pieces of land, are dealt with separately.

