CHAPTER 4

PUBLIC WORKS TAKINGS AND THE TREATY OF WAITANGI

The Waitangi Tribunal has yet to make findings on all of the major issues raised by public works takings of Maori land. Public works-related issues have been raised and commented on as ancillary issues in various reports however, and recently the *Te Maunga Railways Land Claim Report* was concerned specifically with a relatively small public works claim. This claim was particularly concerned with issues related to compulsory taking and the return of land no longer required for public purposes. The Tribunal has also identified general overarching Treaty principles in various reports that appear to be relevant to public works-related claims.

The Treaty principles identified by the Tribunal, in general, attempt to balance the article 1 right of the Crown to exercise kawanatanga or governorship with the guarantee of protection of rangatiratanga to Maori in article 2, as well as the guarantee to Maori of all the rights and privileges of British citizens in article 3. These include the principle that the Crown authority, to make laws for the peace, order, and security of New Zealand, is subject to an undertaking to protect Maori interests.

For example, the *Manukau Report* found that kawanatanga means that the Crown has authority to make laws for the peace, good, order, and security of New Zealand, subject to an undertaking to protect Maori interests.[1] In the *Motunui Report* it was also found that the Treaty represents an exchange of gifts – the gift of the right to make laws, in return for the promise to do so in a way that accords the Maori interest an appropriate priority.[2]

In the *Mangonui Report*, comment was specifically made on the need to take account of Maori interests in carrying out public works projects. The Tribunal stated that:

> It was a condition of the Treaty that the Maori possession of lands and fisheries would be guaranteed. The guarantee requires a high priority for Maori interests when works impact on Maori needs or particular fisheries, for their guarantee was a very small price to pay for the rights of sovereignty and settlement that Maori conferred.[3]

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1. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, Wellington, Government Printer, 1985, p 90
2. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1983, p 61

The requirement on the Crown to protect Maori interests extends to a duty to actively protect those interests. In the *Manukau Report* it was found that:

> The Treaty of Waitangi obliges the Crown not only to recognise the Maori interests specified in the Treaty but actively to protect them . . . It follows that the omission to provide that protection is as much a breach of the Treaty as a positive act that removes those rights.[4]

The Crown also has an obligation to recognise tribal rangatiratanga. 'Te tino rangatiratanga' includes the right of management as well as ownership of land, resources, and other taonga, according to Maori cultural preferences. In the *Mangonui Report* the Tribunal, in commenting on whether Ngati Kahu had been prejudiced in their ability to present their views and have them heard in the planning process, found that:

> It was also clear [from the Treaty] that traditional mechanisms for tribal controls would continue to be respected and maintained. The main difficulty is that they were not. On the contrary . . . policies were introduced over a century ago to put an end to tribal powers. Criticism that a tribe has failed to object is largely to blame the victim of the historic process for its current condition. The nub of the problem is in the omission of the Crown to recognise the tribal position and to provide the legal foundation and resources for tribes to contribute more fully to local affairs and to take all necessary steps for the protection of tribal interests.[5]

Linked to this is the right of Maori to choose 'to develop along customary lines and from a traditional base, or to assimilate into a new way . . . [or] to walk in two worlds'.[6] This also means that the guarantee in article 3 of the Treaty, conferring the same rights and privileges of citizenship, should not displace this principle of choice.

In the *Orakei Report* it was also recognised that:

> In recognising 'te tino rangatiratanga' over their lands the Queen was acknowledging the right of the Maori people for as long as they wished, to hold their lands in accordance with long standing custom on a tribal and communal basis.[7]

Taonga includes all things highly prized by Maori, including tangibles such as fishing grounds, harbours, and land, and intangibles such as Maori language and the mauri or life force of a river.[8]

The Tribunal has also found that the Crown has an obligation to 'ensure that [Maori] were left with sufficient land for their maintenance and support or

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3. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Mangonui Sewerage Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1988, p 60
4. Waitangi Tribunal, *Manukau Claim*, p 95
5. Waitangi Tribunal, *Mangonui Sewerage Claim*, p 47
6. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1988
7. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 1987, pp 134–135
8. For example, Waitangi Tribunal, *Manukau Report,* pp 93–95, and *Motunui Report,* p 59

livelihood'.[9] This finding is also supported by Lord Normanby's instructions to Captain Hobson when settlement was originally contemplated, that land necessary for the 'comfort and subsistence' of the Maori people was not to be purchased.

Another relevant general principle is that the Crown cannot evade its obligations under the Treaty by conferring authority on some other body. In the *Manukau Report*, for example, it was found that there is a duty on the Crown not to confer authority on an independent body without ensuring that the body's jurisdiction is consistent with the Crown's Treaty promises:

> the Crown cannot divest itself of its Treaty obligations or confer an inconsistent jurisdiction on others. It is not any act or omission of the [Auckland Harbour] Board that is justiciable but any omission of the Crown to provide a proper assurance of its Treaty promises when vesting any responsibility in the Board.[10]

In the *Mangonui Report* the Tribunal found that this principle extended to the laying down of rules for local authorities and the Planning Tribunal.[11]

The Tribunal has found that there is some duty on the Crown to consult, or at least discuss, with Maori at the earliest possible opportunity, proposals that are likely to affect Maori interests. The comment was made in the *Manukau Report*, for example, that in relation to town planning processes, 'To achieve a reasonable compromise it is preferable that there be consultation with the tribe rather than have the tribe resort to objection processes, or even protests and demonstrations'.[12]

This was furthered amplified in the *Mangonui Report*:

> Even at the outset there is a Maori complaint that the opportunity to be involved [in the planning process] is merely by an objection procedure which operates after the local authority's plans have been drawn and publicised. The procedure is available to the public as a whole. The tribes were given a special status by the Treaty however and the objection procedures were often inconsistent with their ways, compelling a confrontational stance. The complaint is valid in our view but not because there is a duty to consult in all cases. It is the prior opportunity to discuss that is most especially wanting. Early discussions build better understandings in an area of cultural contact where the potential for conflict is high. Agreements may not be reached but new insights may be obtained and the subsequent debate may at least be better informed.[13]

There have also been some Tribunal findings and observations specifically related to public works takings of Maori land. In earlier reports the Tribunal raised the major issue of whether compulsory takings of Maori land for public purposes were in themselves a breach of the Treaty. There was an issue of whether, given article 2 guarantees, all compulsory takings were a breach or whether there were some circumstances where takings might be justified. The Tribunal made no

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9. Waitangi Tribunal, *Orakei Report*,
10. Waitangi Tribunal, *Manukau Report,* p 99
11. Waitangi Tribunal, *Mangonui Report,* p 4
12. Waitangi Tribunal, *Manukau Report,* p 125
13. Waitangi Tribunal, *Mangonui Report*, pp 4–5

specific general findings but appeared to indicate that the taking had to be measured in some way, for example as only a 'last resort' or where there were clearly issues of peace, security, and good order involved. In addition, related issues were also raised such as prior negotiation being a prerequisite before compulsory takings could be made and the need to compensate for compulsory takings.

For example, in the *Orakei Report* the Tribunal commented on the taking of land for defence purposes:

> the Crown's action in compulsorily taking this land appears to be a breach of Article 2 of the Treaty which requires the consent of the Maori proprietors to any disposition of land. At the same time the Preamble to the Treaty speaks of the anxiety of the Crown not only to protect the just rights and property of the Maori but also to secure peace and good order. It is arguable that the sovereign act of the Crown in taking land for defence purposes with a view to securing peace and good order is acting for the benefit of all citizens, Maori and European alike, and is not inconsistent with the principles of the Treaty.[14]

In this the Tribunal appeared to believe that defence purposes might come under the description of peace and security and therefore might not be a breach. However, in the same report, the Tribunal found that in taking land for housing:

> The Crown prejudicially affected. . . . Those Ngati Whatua owners whose land was compulsorily acquired against their wish and without their consent and thereby acted inconsistently with the principles of the Treaty which guaranteed the Maori families and individuals the undisturbed possession of lands they wished to retain.[15]

In the *Motunui Report*, the Tribunal found that the Treaty obliged the Crown to protect Maori fisheries from the consequences of settlement and development of the land. In the same way, in the *Orakei Report*, the Tribunal found that the Crown had an obligation to protect the papakainga and especially the site of the marae from the deleterious effects of a public work.[16] In the report summary, the Tribunal also referred to the 1912 taking of land for a sewer under the Auckland and Suburban Drainage Act 1908 that resulted in loss of shellfish beds and flooding, as being contrary to the Treaty.[17]

In the *Mangonui Report* the Tribunal also raised the issue of whether the Treaty forbids the compulsory acquisition of Maori land in any circumstances, but did not pursue it because in that case the land was not traditional Maori land. It had been purchased by Ngati Kahu after the land had been subject to a public works designation. The Tribunal had also received no legal argument on the issue.

In both the *Ngati Rangiteaorere Report* and the *Mohaka River Report*, the Tribunal considered the taking of lands for roads and railways. While it was acknowledged that there was a general public benefit from a road or railway, there was a related issue of the Crown failure to negotiate with Maori owners before using

14. Waitangi Tribunal, *Orakei Report*, p 167
15. Ibid, p 162
16. Ibid, p 158
17. Ibid, p 3

compulsory provisions. In the *Mohaka River Report* the Tribunal considered that in taking land for roads and railways 'apparently without any negotiations with Ngati Pahauwera, the Crown was ignoring their rights of rangatiratanga'.[18]

In the *Ngati Rangiteaorere Report*, part of the claim concerned the taking of a road under the provisions which enabled the Crown to take up to 5 percent of Maori land for a road without compensation. The Tribunal had also heard no legal argument on whether the compulsory taking of Maori land breached the Treaty and therefore made no finding on this issue but did make some general observations on public works issues for future legal argument.

The Tribunal felt that the concept of rangatiratanga guaranteed to Maori in the Treaty included the absolute dominion over their land. If they had been told in 1840 that kawanatanga, as ceded to the Crown, would mean the limiting and eventual loss of rangatiratanga over their lands, they would not have signed the Treaty. Indeed, some who feared this, did refuse to sign.

The Tribunal observed that the English text could well be understood to include the Crown right to ensure free passage for all citizens under kawanatanga. This could extend to the right to acquire land for public roads. The argument could also be extended to allow for compulsory acquisition 'in the last resort' of necessary public rights of way, on payment of fair compensation. But against this had to be balanced the guarantees in article 2 of the full, exclusive, and undisturbed possession of lands and the reservation to the Crown of a right of purchase of such land as Maori wished to sell. In the Maori version there was also the guarantee of 'te tino rangatiratanga' or chiefly control over as well as possession of their lands. The Tribunal noted that the question went right to the heart of the Treaty and it was insoluble unless one article could override another, or there was a compromise. The Tribunal also noted other reports that spoke of the need for compromise.

In the particular claim before it, the Tribunal expressed doubts over whether the Crown could properly assert its kawanatanga over Ngati Rangiteaorere's rangatiratanga by compulsorily acquiring their land for roads. In any case, the Crown failed to carry out the necessary prerequisites. It failed to consult about the need for a road, and it failed to genuinely negotiate over the purchase of the land. 'The Crown therefore had no right to proceed to compulsory acquisition'. Further, the taking of land without compensation amounted to a confiscation. 'Whatever the merits of compulsory acquisition as a last resort, there can be no justification of the failure to pay compensation'.[19]

The *Te Maunga Report* was specifically concerned with a public works land-taking and the return of the land to the former Maori owners when it was no longer required for public purposes. The Tribunal described the central issue of public works takings as the conflict between the obligation of kawanatanga in article 1 and the guarantees of protection of rangatiratanga in article 2 of the Treaty. The question was, under what circumstances could the Crown right to govern in the public interest override the Crown obligation to protect Maori interests guaranteed in the

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18. Waitangi Tribunal, *The Mohaka River Report 1992*, Wellington, Brooker and Friend Ltd, 1992, p 70
19. Waitangi Tribunal, *The Ngati Rangiteaorere Claim Report*, Wellington, Brooker and Friend Ltd, 1990, pp 46–48

Treaty? And even when an overriding public interest could be identified, if that public purpose for which the land was taken was no longer relevant, then what fiduciary obligation remains with the Crown to ensure that land compulsorily taken from unwilling sellers is returned to the original owners?[20]

The Tribunal, while not suggesting that Maori land should never be used for public purposes, did emphasise that compulsory taking provisions cut across the Treaty guarantee of rangatiratanga. The Tribunal did not believe that the Crown had to take freehold title in order to use Maori land for public works. The Tribunal gave the example of the Crown leasing land for the Ohaaki power station and stated there were numerous other examples of leasing land for public purposes. The Tribunal felt that there is therefore no need for the Crown to take the freehold because there are other alternatives that can be negotiated. This also means that when the land is no longer required for a particular use, it can more easily be returned and the status of any improvements negotiated.

In general terms, the Tribunal recommended that amendments be made to the Public Works Act 1981 so that provisions were made requiring all persons exercising public works related-functions and powers to act in a manner consistent with the Treaty of Waitangi. In addition, where Maori land is required for a public work and negotiation fails, provisions should enable a compulsory taking for a specific use of the land which is a partial interest such as a lease, not the full freehold title. When Maori land taken was no longer required for any public purpose, the Crown should also have discretion, depending on the circumstances of each case, to return the land at no cost or at less than the market value.[21]

The general Treaty principles as defined by the Waitangi Tribunal have in many cases been supported by the courts. The High Court found, for example, in 1987 that, although following established legal authority, the Treaty standing alone did not confer enforceable rights in a municipal court, it still had significance through its mention in various legislation. and the rulings of the Waitangi Tribunal as a specialist tribunal were to be given considerable weight by the High Court.[22]

A few days later this was confirmed by the Court of Appeal.[23] It held that Waitangi Tribunal reports were clearly to be considered authoritative unless otherwise found to be inaccurate. It also confirmed many of the principles identified by the Tribunal. These included that the acquisition of sovereignty was made in exchange for protection of rangatiratanga. As a result, the Treaty implied a partnership and the duty to act reasonably and in good faith.

Justice Cooke found that the principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy. The test of reasonableness however is necessarily a broad one and the parties owe each other cooperation. Justice Cooke also agreed that ‘the duty of the Crown is not merely passive but extends to active protection of the Maori people in the use of their lands and waters to the fullest extent practicable’.

The Appeal Court also supported the Waitangi Tribunal finding that:

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20. Waitangi Tribunal, *Te Maunga Railways Land Report*, Wellington, Brookers Ltd, 1994, p 4
21. Ibid, p 81–82
22. *Huakina Development Trust v Waikato Valley Authority* (1987) 12 NZTPA 129
23. *The New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 664

> if the Waitangi Tribunal finds merit in a claim and recommends redress, the Crown should grant at least some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it – which would be only in very special circumstances if ever.

The Appeal Court was reluctant to find that there was an absolute requirement on the Crown to consult in every case, but felt this could be necessary in areas of importance and it was still the duty of the Crown to at least gather sufficient necessary information on Treaty implications. Consultation was also an obvious way of demonstrating good faith which was an accepted Treaty principle. The court also accepted the importance of honouring the Treaty and described the Treaty as creating 'responsibilities analogous to fiduciary duties'.

The Privy Council has also recently found that foremost among the principles of the Treaty are the obligations which the Crown undertook of protecting and preserving Maori property, in return for being recognised as the legitimate government of the whole nation by Maori. The obligations are not absolute and unqualified, but rely on reasonableness, mutual cooperation, and trust. It was also stated that if a taonga was in 'a vulnerable state' (in that case the Maori language) then the Crown may well be required 'to take especially vigorous action for its protection'. It concluded that 'any previous default of the Crown could, far from reducing, increase the Crown's responsibility'.[24]

24. *The New Zealand Maori Council v Attorney-General* unreported, 13 December 1993, Privy Council PC14/93, p 5