

CHAPTER 5

FINDINGS AND RECOMMENDATIONS

5.1 TREATY FINDINGS

We now consider the Crown's policy in terms of the plain words and meaning of the articles of the Treaty of Waitangi, and also in light of the principles that arise from the overall meaning and context of the Treaty. The Treaty of Waitangi Act requires us to determine whether actions or proposed actions of the Crown are contrary to the principles of the Treaty. This does not mean that the plain terms of the Treaty can be 'negated or reduced'.¹ The Court of Appeal has noted that 'a breach of a Treaty provision . . . must be a breach of the principles of the Treaty'.² We begin our analysis, therefore, by considering whether the policy is consistent with the individual terms of the Treaty.

Under article 1 of the Treaty, the Crown acquired *kawanatanga* (the right to govern). It is clear that *kawanatanga* gives the Crown the authority to make the present policy and enact it as legislation. *Kawanatanga*, however, must be exercised in light of the guarantees in article 2 and article 3 of the Treaty.

5.1.1 The policy is in breach of article 2 of the Treaty

As noted in our discussion in chapter 2, article 2 of the Treaty guaranteed:

- ▶ 'te tino rangatiratanga o o ratou whenua o ratou kainga me o ratou taonga katoa' (Māori version); and
- ▶ 'full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and such other Properties as they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession' (English version).

The Treaty also introduced the Crown's right of pre-emption (*hokonga*), as the means for Māori to voluntarily cede as much of their property as they wished in order for settlement, development, and mutual prosperity to take place.

The Crown's actions breach article 2 in two respects:

- (a) Historically, the Crown did not protect Māori *tino rangatiratanga*, or even the more limited English concept of ownership, of the foreshore and seabed. Instead, the

1. Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), p 386

2. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 693

Crown actively assumed ownership of the foreshore and seabed for itself, without the consent of the Māori right-holders, and without compensation. Occasional and specific extinguishment of Māori rights through purchase (such as parts of the Thames foreshore) were the exception that proves the rule. Because it was aware of Māori claims to own the foreshore and seabed and to exercise authority over it, the Crown acted in breach of the Treaty when it took those rights for itself. The Crown assumed (incorrectly) that it was acting according to the common law. It ignored or made inadequate responses to many Māori protests over its actions.

- (b) Today, the Crown is faced with a situation where, as we outlined in chapter 2, the Court of Appeal's judgment leaves at large the question as to whether the Crown owns the foreshore and seabed as a matter of law. The High Court and the Māori Land Court have jurisdiction (respectively) to declare the common law rights of Māori, or to declare the foreshore and seabed to be customary land and award it in fee simple. Where customary rights of Māori are found to subsist, those rights will burden the Crown's title or, where the rights are sufficiently ample, override or replace it. The Government is not prepared to accept the outcome of the Court of Appeal's decision: it is not prepared to allow these rights to be declared by the courts according to law.

Instead, the Government plans to enact a policy that will take away those courts' jurisdiction in respect of foreshore and seabed. The High Court's jurisdiction is to be abolished altogether. The Māori Land Court's is to be changed substantially so that the judges there will operate under constraints that (among other things) preclude the vesting of land in fee simple title. The new regime for recognising customary interests will, we think, confer both fewer and lesser rights, and the rights will not have the status of property rights at law. However, no one (including the Crown) can undertake a really informed analysis of the quality and quantity of rights that would be conferred by the courts as compared with the regime under the policy. This is because the Government is not prepared to run the risk of letting the courts exercise their respective jurisdictions. The right for Māori to go to court to prove the nature and extent of their property rights in the foreshore and seabed is thus being removed, notwithstanding wholesale objection from Māori. We think that a policy that removes the means whereby property rights can be declared is a policy that in effect removes the rights themselves.

5.1.2 Is there a Treaty justification for overriding article 2?

The standard to be met has been described by the Turangi Township Tribunal: 'if the Crown is ever to be justified in exercising its power to govern in a manner which is inconsistent with and overrides the fundamental rights guaranteed to Māori in article 2 it should be only in exceptional circumstances and as a last resort in the national interest'.³ We concluded in

3. Waitangi Tribunal, *The Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995), p 285

chapter 4 of our report that there is no overriding need for the foreshore and seabed policy in the national interest. The Crown is not driven to act, and so it lacks the necessary moral and legal grounds for overriding the guarantees made to Māori in article 2 of the Treaty.

5.1.3 The policy is in breach of article 3 of the Treaty

Article 3 of the Treaty provided: ‘Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the rights and privileges of British Subjects’. We will consider the principle of options below, but we note here that article 3 of the Treaty guaranteed to Māori the rights of all citizens to equal treatment under the law. As our discussion in chapter 4 has demonstrated, the Crown’s policy fails to honour this guarantee.

- (a) First, the common law rights of Māori in terms of the foreshore and seabed are to be abolished, and their rights to obtain a status order or fee simple title from the Māori Land Court are also to be abolished. The removal of the means whereby property rights can be declared is in effect a removal of the property rights themselves. The owners of the property rights do not consent to their removal. In pursuing its proposed course under these circumstances, the Crown is failing to treat Māori and non-Māori citizens equally. The *only* private property rights abolished by the policy are those of Māori. All other classes of rights are protected by the policy. This breaches article 3 of the Treaty of Waitangi.
- (b) Secondly, Māori are entitled under article 3 not just to equal treatment but also to the protection of the rule of law. When matters of property arise which involve the definition of rights, all citizens are able to take those matters to the courts for definition and, as appropriate, protection. As we observed in chapter 4, Māori actively pursued their right to have their property rights determined by a court of law. Having obtained a result from the courts which the Government did not like, the Crown’s solution is a policy to cancel the ability of the courts to further define, articulate, and award those property rights. This violates the rule of law, the protection of which was guaranteed to Māori in article 3. By enacting a policy that is contrary to the rule of law, and which disadvantageously affects Māori, the Crown breaches article 3.

In the four ways described above, the Crown has acted and proposes to act in serious breach of the plain terms of the Treaty of Waitangi. We now go on to consider the principles of the Treaty, as they arise from its broader meaning and context. As the Muriwhenua Tribunal has noted, ‘a focus on the terms alone would negate the Treaty’s spirit and lead to a narrow and technical approach’.⁴ We consider next whether the Crown’s past and proposed actions in connection with the foreshore and seabed are contrary to the principles of the Treaty of Waitangi. In doing so, we rely on the very extensive explanation and analysis of Treaty

4. Waitangi Tribunal, *Muriwhenua Land Report*, p 386

principles that has taken place in the courts and in the Waitangi Tribunal, and apply them to the claims before us.

5.1.4 The principles of reciprocity and partnership

Māori ceded sovereignty (English version) or kawanatanga (Māori version) to the Crown in article 1 of the Treaty, in exchange for the Crown's protection of Māori tino rangatiratanga. In our discussion of the Treaty in chapter 2 above, we defined the Crown's duty in this respect as one actively to protect and give effect to property rights, management rights, Māori self-regulation, tikanga Māori, and the claimants' relationship with their taonga.

We also defined those aspects of tino rangatiratanga which relate to authority over the fore-shore and seabed, as including:

- ▶ a spiritual dimension and a relationship based on ritual and whakapapa;
- ▶ a physical dimension, with the ability to enforce rāhui, grant access, and control distribution of resources;
- ▶ a dimension of reciprocal guardianship (kaitiakitanga);
- ▶ a dimension of use, which is sometimes rendered as an equivalent to use-rights under English law;
- ▶ manaakitanga, where, as Sir Hugh Kawharu put it, 'sharing (through manaaki) and authority (mana) are applied concurrently';⁵ and
- ▶ manuhiri from across the seas, who were granted certain use-rights, as part of the relationship established between the peoples before 1840.

The Crown's exercise of kawanatanga has to be qualified by respect for tino rangatiratanga, as defined above. The Tribunal has called this the principle of reciprocity, which is an 'over-arching principle' that guides the interpretation and application of other principles, such as partnership.⁶ The nature of the relationship between the Treaty partners is a reciprocal one, with obligations and mutual benefits flowing from it. For example, in its *Report on the Mangonui Sewerage Claim*, the Tribunal said that:

The basic concept was that a place could be made for two peoples of vastly different cultures, of mutual advantage, and where the rights, values and needs of neither would necessarily be subsumed . . . It is obvious however that to achieve the objective, compromises on both sides are required and a balance of interests must be maintained.⁷

The notion of a balance of interests is reflected in the description of the Treaty relationship as akin to a 'partnership' between the Crown and Māori. As expressed by the president of the

5. Document A35 (Kawharu), p 17

6. Waitangi Tribunal, *Maori Development Corporation Report* (Wellington: Brooker's Ltd, 1993), p 113; Waitangi Tribunal, *The Turangi Township Report*, pp 284–285

7. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Mangonui Sewerage Claim* (Wellington: Department of Justice, Waitangi Tribunal, 1988), p 4

Court of Appeal in the Lands case, ‘the Treaty signified a partnership between the races’ and each partner had to act towards the other ‘with the utmost good faith which is the characteristic obligation of partnership’.⁸ He also added that ‘the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Māori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible ministers, and reasonable cooperation.’ Other judges made similar comments.⁹ Since then, the principle of partnership has been constantly referred to in Tribunal reports.

In practical terms, the application of the principles of reciprocity and partnership to the foreshore and seabed policy is clear. The Treaty envisaged a future for both peoples, sharing resources and developing them, as we noted in chapter 2. In the balancing of interests required for a successful partnership, we think that there is a place for both peoples and their interests in the foreshore and seabed. As claimant witnesses explained it to us, the obligations of manaakitanga would ensure public access, properly regulated, even if there were no other safeguards.

Even so, we accept that the Crown has the authority to develop a policy in respect of the foreshore and seabed. However, the principles of reciprocity and partnership require it to do so in a way that gives meaningful effect to te tino rangatiratanga, and balances the interests of both peoples in a fair and reasonable manner. We do not think that the Crown’s policy meets this test. In expropriating property rights:

- ▶ before they are defined;
- ▶ without consent; and
- ▶ in the absence of an exigency like war or impending chaos;

the Crown seriously breaches these principles of the Treaty.

At the very least, the principle of partnership requires the Crown to make informed decisions on matters affecting Māori.¹⁰ The Crown itself states that there are uncertainties arising from *Marlborough Sounds*. Its response to this is to abolish potential property rights before they can be awarded, and without being certain what they are. This is not how partners act in good faith towards one another. Instead, it is, as we concluded in chapter 4, quite unfair to Māori. The unfairness is of a character that flies in the face of the norms of good government in developed societies. The result is a serious Treaty breach.

We explained in chapter 2 how the Crown failed to uphold te tino rangatiratanga of Māori in the 163 years between 1840 and 2003, when the Marlborough Sounds case was decided. The many and various actions that depleted Māori landholdings in breach of the principles of the Treaty are too well known to require repetition here. But suffice to say that these historical breaches compound the present-day breaches involved in the policy and add to their gravity.

8. *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 665 (Lands case)

9. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker and Friend Ltd, 1991), p 207

10. Waitangi Tribunal, *The Tarawera Forest Report* (Wellington: Legislation Direct, 2003), p 26

If the Crown were now simply to accept the legal position post-*Marlborough Sounds*, it would go some way towards allowing the development of a regime for the foreshore and seabed that is more Treaty compliant than the pre-*Marlborough Sounds* position. Moreover, such a course has to recommend it one cardinal feature that the Government's policy conspicuously and fatally lacks: Māori agreement. As we said in chapter 4, the post-*Marlborough Sounds* situation is far from ideal for Māori, and, in Treaty terms, does not sufficiently protect Māori rights in the foreshore and seabed. But it is a course that Māori chose. It was the one way open to them to have legal rights declared, and they wish to pursue it.

The Crown, however, has chosen to take unilateral action to extinguish the Māori rights even before they have been properly articulated at law.

5.1.5 The principle of active protection

As the president of the Court of Appeal stated in the Lands case, both parties to the partnership have obligations. The Crown's obligation, he continued, is 'not merely passive but extends to active protection of Māori people in the use of their lands and waters to the fullest extent practicable'. Referring to passages in the Waitangi Tribunal's *Te Atiawa, Report on the Manukau Claim*, and *Report on the Te Reo Maori Claim* that supported that proposition, he described them as 'undoubtedly well founded'.¹¹ He also described the Crown's responsibilities as being 'analogous to fiduciary duties'.¹² The Muriwhenua Tribunal described the principle of active protection as embracing three other key elements of the Treaty relationship – honourable conduct, fair process, and recognition by the Crown and Māori of one another's authority.¹³

The Crown's foreshore and seabed policy expropriates the current legal property rights of Māori, which may amount to a fee simple in some cases, and vests them in the people of New Zealand. The people of New Zealand – which, for practical purposes really means the Crown – will be the 'owners' of the foreshore and seabed, and Māori people will not, and never can, own any part of it. As we discussed in chapter 3 of our report, Māori might, under the opportunities provided by the clarification of the law in *Marlborough Sounds*, have obtained fee simple ownership or a set of rights, including some that were exclusive in nature. Those possibilities will be foreclosed forever.

Instead, the Crown offers a more limited 'customary title' and the chance to prove particular use-rights. The benefit of these recognitions of the customary interests of Māori in the foreshore and seabed is that they would provide a basis for increased participation in coastal decision-making. This falls far short of the authority encompassed in tino rangatiratanga,

11. *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 665 (Lands case). See also the similar statements of the other four judges at pages 682, 693, 703, and 716.

12. *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 664

13. Waitangi Tribunal, *Muriwhenua Land Report*, p 388

and far short too of the fee simple titles potentially available through the Māori Land Court. It falls short even of the ‘bundle of rights’ that the High Court might declare to be owned by Māori. Any of these would, we think, inevitably lead to Māori having a bigger say in coastal management, but with other benefits as well. Certainly, the Crown is not offering *nothing* in return for what it is taking away. But we think its offer falls very short of actively protecting the tino rangatiratanga or potential property rights of the claimants before us – and of course, it is not an offer that has been accepted by Māori.

This final observation leads us to consider a second dimension of the principle of active protection. In developing its policy, the Crown consulted with Māori and received written submissions. Māori rejected the policy in an overwhelming fashion. We think that the standards of honourable conduct, fair process, and recognition of each other’s authority, noted above, require the Crown and Māori to try to reach a negotiated agreement. This will not always be possible, but the attempt should be a meaningful one. It seems clear to us that the extreme haste of the Crown’s consultation, and its apparent unwillingness to make real or significant changes to its policy in response to Māori concerns, falls short even of a minimum interpretation of the principle of active protection. The Crown is not required to take action that is unreasonable in the prevailing circumstances, but (as we noted in chapter 4) we do not see any compelling reason for the Crown to act in the way that it has done. We find, therefore, that the Crown is in breach of the Treaty principle of active protection.

5.1.6 The principles of equity and options

As the Tarawera Forest Tribunal noted, article 3 is normally considered ‘the source, or one source, of the Treaty principles of equity and options’.¹⁴ The principle of equity is that the protections of citizenship apply equally to Māori and non-Māori. Sometimes expressed as the principle of equal treatment, it requires the Crown to treat Māori and non-Māori fairly and equally, and to treat Māori tribes fairly vis-à-vis each other.¹⁵ It has been applied to the question of social services in the *Napier Hospital and Health Services Report*.¹⁶

The principle of options draws more widely on the Treaty as a whole and its context. The Ngāi Tahu sea fisheries Tribunal summarised it as follows:

In essence [this principle] is concerned with the choice open to Maori under the Treaty. Article 2 contemplates the protection of tribal authority and self-management of tribal resources according to Maori culture and customs. Article 3 in turn conferred on individual Maori the rights and privileges of British subjects. The Treaty envisages that Maori should

14. Waitangi Tribunal, *Tarawera Forest Report*, p 28

15. Waitangi Tribunal, *Maori Development Corporation Report*, pp 31–32

16. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), pp 61–64

be free to pursue either or both options in appropriate circumstances. The Crown is obliged to offer reasonable protection to Māori in the exercise of the rights so guaranteed them.¹⁷

As we noted above in our discussion of breaches of the plain terms of the Treaty, we think that Māori are entitled to equal protection under the law, in terms of their rights as citizens. A policy that effectively expropriates one class of property (Māori rights under common law and Te Ture Whenua Māori Act), but leaves all other classes of private property intact, is in breach of the principle of equity. Furthermore, a government that denies coastal tribes the ability to own fee simple of the foreshore and seabed, but at the same time enters into arrangements that recognise equivalent rights in other tribes (such as the right to own a lakebed in fee simple) is in breach of the principle of equal treatment. Coastal tribes are not being treated equally with other classes of property owners, or with other tribes.

In addition, as citizens Māori are entitled to their options under the law. They are entitled to have their property rights defined by the courts. In the late 1950s, they took up this option in the litigation which resulted in *In Re Ninety-Mile Beach*. In that case, the Crown was content with the result, for it favoured the Crown. A similar exercise of their option in *Marlborough Sounds*, however, resulted in a decision in favour of the Māori parties, and the Crown has responded quite differently.

Post-*Marlborough Sounds*, Māori can choose whether to rely on common law principles and take their foreshore and seabed property rights to the High Court for definition and declaration. Alternatively, they can rely on the test of 'held according to tikanga Māori' and seek a status order and fee simple title from the Māori Land Court. Making the choice, and pursuing one or other course, is the exercise of both a Treaty right and a legal right. The Crown's policy proposes to remove these rights. Depriving one class of citizens of their right to go to court to have legal rights declared is a serious matter. It is, in our view, a breach of the Treaty principles of equity and options.

5.1.7 The principle of redress

Where the Crown has acted in breach of the principles of the Treaty, and Māori have suffered prejudice as a result, we consider that the Crown has a clear duty to set matters right. This is the principle of redress, where the Crown is required to act so as to 'restore the honour and integrity of the Crown and the mana and status of Māori'.¹⁸ Generally, the principle of redress has been considered in connection with historical claims. It is not an 'eye for an eye' approach, but one in which the Crown needs to restore a tribal base and tribal mana, and provide sufficient remedy to resolve the grievance. It will involve compromise on both sides, and, as the

17. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 274

18. Waitangi Tribunal, *Tarawera Forest Report*, p 29

Tarawera Forest Tribunal noted, it should not create fresh injustices for others.¹⁹ We think it applies to our inquiry only indirectly. It applies in respect of the historical breaches of the Treaty described in chapter 2 – namely, the alienation from Māori ownership and control of most Māori land and resources in the years from 1840 to 2003 (when the Marlborough Sounds case was decided). More specifically, we have identified that the Crown has not protected te tino rangatiratanga over the foreshore and seabed since 1840. Instead, it has assumed ownership and control for itself. This action of the Crown was in breach of the Treaty, as we have found above. These breaches will typically be dealt with in the context of the Tribunal's district inquiries, when the Tribunal investigates all the claims of Māori affected by Treaty breaches in a particular part of the country. Claims in respect of foreshore and seabed will be considered in each area, and where Treaty breach and prejudice are found, they will require redress.

The breaches of the Treaty arising from the effective expropriation of property rights under the Government's current policy *cannot* however be put right simply by the kind of settlement foreshadowed in the principle of redress. This principle was developed by the Tribunal for settlement of historical breaches, and is not apposite here.

It was developed for situations where Māori *had no legal rights*. They had no legal position to rely on in the courts. Their appeal was to the Treaty, which is not enforceable in the courts. Their only recourse was therefore to this Tribunal.

The claimants before us are in a different situation. Their legal position is otherwise. The Court of Appeal has said that they may be able to prove, before the High Court or the Māori Land Court, that they have property rights in the foreshore and seabed. We have found, in this inquiry, that it is likely that Māori property rights in the foreshore and seabed would be declared by the High Court and/or the Māori Land Court. Our finding is of course without legal status: it simply forms the basis for our recommendations. However, at this point ours is the best estimation that can be made of the likelihood of property rights being declared, because we have heard argument and evidence on that point. The Government has decided that the courts will not be allowed to do that.

The effect of the Government's policy in property terms can be expressed a number of ways, and we have used a number of expressions in this report. We have said that the removal of the routes whereby property rights will be articulated at law is tantamount to an expropriation. We have called it 'effectively expropriation', and characterised it as having 'an expropriatory effect'.

It is certainly the case that, post-*Marlborough Sounds*, Māori do not yet have an articulated or declared property right in the foreshore and seabed. What they have is a right to prove that they have such a property right. Mr Boast characterised it in this way:

19. Ibid

What Maori have at present, following *Ngati Apa*, is clearly a property right. It is inchoate in the sense that the rights will need to be clarified by bringing an action in the Courts . . . it is almost certain that at least in *some* instances this inchoate right will translate into a freehold title . . . At the present time Maori have the right and ability to do this: there is a right which exists at the present time, a valuable right.²⁰

It may be more technically correct to characterise the property of Māori in the right to prove they have property rights as a chose in action – a right that needs an action in the courts to be enforced.²¹ A chose in action is in itself property, and taking it away without compensation is illegal.

When legal rights are taken away, what is called for is compensation, not redress. We want to be absolutely clear, therefore, that although the Crown's policy breaches the Treaty, that breach cannot be discharged here by redress alone.

In fact, the Crown's policy itself raises the possibility that redress will be available to applicants. The Māori Land Court will have the power to refer applicants to the Government, in cases where their property rights are of greater ambit than can be recognised under the new regime.²² We have observed already, in chapter 4, that the exchange of a legal right to compensation for a legislated possibility of redress is a poor exchange. We have explained the distinction between compensation and redress, and the stronger legal basis for compensation when legal rights are removed. Redress occupies a vaguer territory, where the language of right gives way to the language of hope. The result is that if the Crown wishes to remove the legal property rights of Māori, redress only will not be an adequate remedy, and will not restore the Treaty relationship.

5.2 PREJUDICE

The categories of prejudice are threefold.

5.2.1 Māori citizenship devalued

We have said that the Crown's proposed policy violates the rule of law. The rule of law is a fundamental tenet of the citizenship guaranteed by article 3. Removing its protection from Māori only, cutting off their access to the courts and effectively expropriating their property rights, puts them in a class different from and inferior to all other citizens. This discrimination provides the basis for an enduring and justified sense of being wronged, and

20. Document A55(a) (Boast), para 12.25(a)

21. Ibid

22. Document A21 (Policy), paras 264, 268, 270–271

marginalises Māori in a way that we fear will threaten the harmony of race relations. The prejudice to Māori – and indeed to our society as a whole – can hardly be overstated.

5.2.2 Powerlessness through uncertainty

Post-*Marlborough Sounds*, Māori are on track to having their rights in the foreshore and seabed defined by the courts. The path through the courts is well understood and clear: all that is required to achieve definition of the rights through the courts is time. Everyone knows that there will be a day, once all the appeals are concluded, on which the Māori property right (if proven) will be known and declared. It will then be slotted into the known system of property rights. There may be a significant lapse of time until that day arrives, but everyone knows where the path is leading: there is certainty about the process and what it produces. The outcome is not known in each case, but predictions can be made based on the factual circumstances of the applicant, in light of the law discussed in chapter 3.

If the path through the courts were to continue uninterrupted, so that the Māori rights were ultimately defined and declared, Māori would arrive at a point where each group has a clear bargaining position based on the number and quality of the rights they own. Simply, those people would know what they had. This is a position of strength. It would provide leverage whether in relation to local government (to effect their greater participation in decision-making in the coastal marine area), or central government (in the event that government wished to take away some or all of the rights).

However, through the policy, the Crown proposes wholly to change the position for Māori, in ways that are new, untried, and only loosely described. As a result, a whole raft of new uncertainties is created. We have described them at length in chapter 4. The uncertainties will all be loaded on to Māori. The Crown, by contrast, has sheltered itself from risk.

The prejudice to Māori is clear. If the Crown proceeds with the policy as currently framed, Māori will be delivered for an unknown period to a position of complete uncertainty about where they stand. This is a very weak position to be in, and the Government has ensured that Māori will have nowhere to turn for a remedy.

5.2.3 Mana and property rights lost

The Crown proposes to cut off the path for Māori to obtain property rights in the foreshore and seabed. All the opportunities that might have flowed to them as owners of rights or title – affirmation of ancestral mana, the ability to exercise kaitiakitanga and manaakitanga, the ability to develop traditional uses and derive commercial benefits as resource-holders – will be lost. The number and quality of rights that the courts might uphold remain a matter for speculation, but it is our view that ample rights would at least sometimes be declared. There is no undertaking to pay compensation for the loss of rights. What is offered for their loss is a

policy that we found gives lesser and fewer rights in respect of foreshore and seabed, and a process to enhance Māori participation in decision-making affecting the coastal marine area. That process promises much, but we fear will deliver little.

These are the categories of prejudice we have identified. We have not sought to be exhaustive in noting every single item of prejudice under each of the three categories. However, we think that the categories cover the range. The prejudice we have identified is very serious indeed.

5.3 RECOMMENDATIONS

The Treaty of Waitangi Act 1975 requires us to make recommendations arising from the practical application of Treaty principles.²³ If the Tribunal finds a claim to be well-founded:

it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or prevent other persons from being similarly affected in the future.²⁴

Earlier in this chapter, we outlined the ways in which the Crown's policy breaches the Treaty, and the prejudice that we think Māori will suffer as a result. We now make recommendations that we hope will assist the Crown to act in a manner more compliant with the Treaty, and to avoid the substantial prejudice we foresee if the policy is enacted in its present form.

It follows from chapter 2 of our report that a government whose intention was to give full expression to Māori rights under the Treaty in 2004 would recognise that where Māori did not give up ownership of the foreshore and seabed, they should now be confirmed as its owners. Pragmatically, however, we recognise that giving effect to *te tino rangatiratanga* is not currently on the political agenda. Rather, the focus now is on the exigencies of *Marlborough Sounds*, and that focus is what made this an urgent inquiry. What is on the political agenda is the Government's policy, and that has been the principal subject of our inquiry.

We think that the policy reveals three areas where the Government may have misunderstood, or may not have been fully advised upon, the implications of its approach in that:

- ▶ overriding the rule of law, by denying Māori access to the courts to ascertain their property rights, and abrogating the rights themselves without promising compensation, is a very unusual and significant step in 2004;
- ▶ the extent of the property rights that are to be overridden must be assessed in the light of what the High Court and Māori Land Court might realistically find them to be, rather than in terms of the Crown's view of what they *should* be;

23. Treaty of Waitangi Act 1975, preamble

24. *Ibid*, s 6(3)

- ▶ the processes for securing enhanced Māori participation in decision-making concerning the coastal marine area are ill-conceived. They do not engage realistically with the profound difficulties of securing Māori representation that works, the numbers of people who would need to be involved for any agreements to be useful, and the consequences of the level of Māori disaffection with the Government's plans.

In light of these considerations, we recommend that the Government revisits the question of whether its policy is the only or best means of ensuring that the values underlying their four principles are upheld.

We invite Ministers to consider whether, singly or in combination, any of the options set out below might achieve the essentials of what they want to achieve, and in a way that would be more compliant with the Treaty, and with the other norms we have mentioned. We note that the preference of claimant counsel was for us to recommend only the course proposed in option 1 below – namely, that the Government should now agree to abandon its policy and engage with Māori in negotiating on the appropriate way forward. We do strongly recommend that course, but we have chosen as well to put forward a range of suggestions, so that whatever course the Government chooses, it is aware that there are opportunities to enhance its performance in Treaty terms.

In putting forward the options, we note up front that full compliance with the Treaty would require the Crown to negotiate with Māori and obtain their agreement to a settlement, as happened with respect to commercial fishing and Rotorua lakes. All the other options involve a compromise between Treaty principles, claimant preferences, and what the Government might regard as practicable. They are, to borrow Professor Mutu's phrase, 'least worst' options. We have in mind our statutory obligation to be practical and to have regard to all circumstances of the case.

As we have said, we think Māori are entitled to tread the path they chose – that is, recognition of rights through the courts – without interference by the State. Accordingly, our suggestions proceed generally on the basis that the least intervention is the best intervention.

They also proceed on the premise that any action that the Crown takes unilaterally, short of full restoration of te tino rangatiratanga over the foreshore and seabed, will breach the principles of the Treaty. As we see it, it is critical that the path forward is consensual.

5.3.1 Recommended options

(1) Option 1: The longer conversation

We must begin with the option that was urged on us by all claimant counsel. Māori really want the process to begin again. They want the opportunity to sit down with government and properly explore the options that are genuinely available. As we have said, they consider that they have not had that opportunity. A number of claimant counsel expressed optimism that the Crown's four principles could be accommodated in a negotiation:

5.3.1(2)

It is quite wrong for the Crown . . . to assume that the four principles around which the Crown seeks to develop its policy are not achievable within a Maori and Treaty compliant regime.²⁵

It may be that the conversations would be long ones, and would take place over an extended period. We think that is appropriate. The issues are complex. The rights being interfered with are important ones. Although Māori clearly prefer the path through the courts to the one proposed by the Government, the subtleties of each are almost certainly imperfectly understood. It is also very doubtful that the Government really understands where Māori are coming from. The adversarial way in which the issue has developed has led to people taking positions rather than really communicating. In our hearing, we heard from some outstanding people about their perspectives of where the Māori interests lie in terms of tikanga and identity. We think that the government needs to hear those kōrero. They make it clear that the issues here are not simply legal or political. They are about people, and their conception of themselves as beings connected to the environment through whakapapa, tikanga and emotion. We became very aware that the costs of pushing this policy through in the face of such opposition, and such principled and spiritually based opposition, will be very high indeed.

Legislative change is not imperative immediately. If any really pressing matters arise, a holding pattern could be legislated while the bigger picture is sorted out.

We think that this longer conversation would also provide the Government with the opportunity of exploring options for settling the Māori interest in the foreshore and seabed, where they do not wish to give effect to it. The effect of the Sealord deal was to quantify the Māori interest in the fisheries, and slot it within a Pākehā management framework by expressing it in terms of individual transferable quota. While this settlement has obviously had its problems (and they are not all sorted out yet), this was an example of the Crown recognising Māori property interests, and giving effect to them. Such an approach is certainly preferable to a unilateral approach that has proceeded at speed in the face of overwhelming Māori opposition, and is (in our opinion) inherently flawed in important ways.

Potential to achieve a settlement the same kind of outcome may exist here. For instance, interests in aquaculture and minerals could be brought to the negotiating table. The extent to which Māori are prepared to exchange foreshore and seabed rights for money or other compensation remains an entirely open question, and is one for iwi and hapū Māori alone to answer. However, as far as we can discern, such conversations have yet to begin, and until they do it will not be at all clear what might or might not be able to be achieved.

(2) Option 2: Do nothing

We have discussed at length the possible consequences of no intervention. As we see it, the risks of letting the courts' jurisdictions take their course are not unacceptable, given the

²⁵ Document 96(a) (Ertel), para 27. See also, for example, doc A99 (Ferguson), paras 87–91, 126; doc A46 (Powell), paras 89–103; doc A115 (Castle), para 2.4.

strong and legitimate Māori interest in preserving the status quo. We think that if real problems emerge from court decisions, such that others' interests may be jeopardised in a way that is not regarded as tenable, those issues can be addressed when and if they arise. Solutions could then be tailored to real and known situations, whereas now many of the evils that the policy theoretically remedies are hypothetical. Chapter 4 covers in detail the implications of the 'do nothing' response.

(3) Option 3: Provide for access and inalienability

Māori do understand the anxiety non-Māori people have about the availability of access to the beach. Māori people are realistic. They do not believe that any system will deliver to them exclusive possession of the beaches. Most do not even want it. There is room to manoeuvre around that whole issue.

We think that a least-intervention policy could be developed cooperatively that provided a basis for the courts' jurisdiction to continue, but with the options for remedies being limited such that public access was a given except in a few limited situations. These would include wāhi tapu, and rāhui. The need for Māori to deny access to urupā is already provided for in the existing policy.²⁶

Likewise, there is a common view that Māori interests in the foreshore and seabed should be inalienable. This could also be legislated for.

(4) Option 4: Improve the courts' tool kit

It was submitted to us that there may be difficulties with the range of instruments available to the High Court and the Māori Land Court when they come to consider customary title.

Awkward issues include the following:

- ▶ In the High Court, it is not clear what remedy is available once a customary title or customary right is found and declared. There is no obvious mechanism for issuing any kind of title;
- ▶ In the Māori Land Court, the court may vest customary land in an entitled group, giving rise to a certificate of title. But there is no power to vest any interest that comprises fewer than the full range of interests comprised in a full fee simple estate, and the rights may often fall short of that.

It could be left on the basis that the court (High Court or Māori Land Court) simply makes a declaration about the nature and scope of the customary interests comprised in the title, and the declaration itself would come to be recognised as giving rise to a property interest. However, under the Land Transfer Act, all interests in land must be registered on the title, and for the sake of consistency, provision should arguably be made for a registration system to be established for customary interests.

26. Document A21, paras 25, 218

The current proposal is that the Māori Land Court will be required to establish a register.²⁷ This could be established by legislation to record any declarations of customary interests in land made by either the High Court or the Māori Land Court.

(5) Option 5: Protect the mana

Another approach suggested to the Tribunal was that found in the example of the Orakei Reserve. This was described in the evidence of Sir Hugh Kawharu, and advanced as an option for consideration in the submissions of claimant counsel Mr Williams. The example was described as 'an existing legal mechanism whereby land under hapu title is subject to a regime of management involving the Crown and the hapu'.²⁸

The mechanism arose as a result of the recommendations in the Tribunal's 1987 *Report on the Orakei Claim*, and was implemented by way of the Orakei Act 1991. Mr Williams argued that the Tribunal's recommendations and the consequential enactment apply to the foreshore and seabed, in that:

- ▶ Firstly, the provisions of the Act affirm Maori ownership of the land and in this case in favour of the Ngati Whatua o Orakei Maori Trust Board;
- ▶ Secondly, mechanisms have been put in place to deal with the control and management of the land. That control and management is exercised by both Maori and the Crown (even if it is by way of delegated authority to local government) by virtue of representation on the administering body;
- ▶ Thirdly, there is a statutory (and therefore legal) right of public access;
- ▶ Fourthly, there is protection for both Maori and the Crown in that the land cannot be alienated and recognises tino rangatiratanga.

Therefore, the Act and its provisions provide certainty of ownership, certainty of management and certainty of access.²⁹

These provisions, Mr Williams submitted, appear to satisfy, in a general sense, the Government's principles of access, regulation, protection and certainty, without the need to vest legal ownership in either the Crown or the 'people of New Zealand'.³⁰

Sir Hugh Kawharu confirmed that 'public access to the foreshore at Okahu Bay has been unrestricted from the day title returned to Ngati Whatua', while 'here at least the mana of Ngati Whatua stands tall, intact, and protected'. The 'key', he concluded, 'is the retention of mana'.³¹

27. Ibid, paras 190, 191

28. Document A29 (Williams), para 126

29. Ibid, para 142

30. Ibid, para 143

31. Document A35 (Kawharu), paras 60, 65

Sir Hugh was careful to point out that although this approach had worked well for Ngāti Whātua, and deserved consideration in the present context as a potential solution, he was not advancing it as a 'one size fits all' solution to situations where the desire of the public for access and the desire of Māori for mana come into play. Moreover, it must be emphasised that this was a solution to which Ngāti Whātua agreed. As a solution to the foreshore and seabed problem, it would likewise require agreement.

(6) Option 6: Be consistent

We have talked about the apparent inconsistency in the Government's preparedness to recognise the ownership interests of Ngāti Tūwharetoa and Te Arawa peoples in the bed of their lakes, and its unpreparedness to vest any kind of title in foreshore and seabed in coastal peoples.

The model that apparently works in policy terms for lakebeds could, we think, be adapted to foreshore and seabed.

Its essential elements (very similar to the Ōkahu Bay model described above) are:

- ▶ negotiation with claimants on a case-by-case basis;
- ▶ resolution of claims through special statutory settlement;
- ▶ vesting of title in tangata whenua;
- ▶ preservation of public access; and
- ▶ joint management of the resource.

5.3.2 Compensation essential

We have not sought to suggest changes to the detail of the policy, as we think changes as to detail would not redeem it. However, we make an exception in relation to compensation. If, after considering our report, the Government nevertheless wishes to proceed with its policy unchanged, we think that the Treaty requires it to acknowledge a responsibility to compensate Māori for the removal of their property rights. This is the bare minimum of what the Treaty, and any standard of fair and good government, demands.

We acknowledge immediately the extreme difficulty of identifying an appropriate and fair level of compensation for property rights that have not been investigated and declared. But this conundrum is created by the Crown itself, if it removes the means at law for determining the nature and extent of those rights. As we have said, we do not think it is necessary to remove the courts' jurisdiction. We therefore recommend as preferable option 2, the 'do nothing' option. Under that option, the courts would investigate and declare the rights, and then their ambit would be known. If the Government then considers, as a matter of public policy, that they need to be taken away, there would be a basis for assessing compensation.

5.3.3 Final word

It seems to us that claimants and the Crown agree on some fundamental points. Although the cultural imperatives are different, they agree that the public should generally have access to the foreshore and seabed (except where this would cause harm), and they agree that the foreshore and seabed should not be sold. Claimants and the Crown also agree that customary rights exist in the foreshore and seabed, are fundamentally important, and need to be recognised and protected. Further, kawanatanga carries with it a power to regulate the coastal marine area for the benefit of everyone. Claimants and the Crown agree that current tools for regulation (such as the Resource Management Act and the regime for customary fisheries) are not working well for Māori, and this needs to be improved.

These are important bases for agreement. We think that they serve as starting points for the dialogue that we say needs to happen next. We do not attempt to prescribe the nature or outcomes of that dialogue. That is for Māori and the Crown, if they agree to negotiate. Whatever happens, we hope for an outcome that is faithful to the vision of the Treaty: two peoples living together in one nation, sharing authority and resources, with fundamental respect for each other.