

In part II of our report, we posed the key questions:

- ▶ What Treaty standards applied to the political relationship between the Crown and the Central North Island tribes?
- ▶ Did the Crown miss (or actively reject) opportunities and requests to give effect to its Treaty guarantees of Maori autonomy and self-government?

In this section, we summarise our answers to those core questions and come to an overall conclusion.

The Turanga Tribunal summarised the Maori entitlement to autonomy as follows:

By Maori autonomy, we mean no more than the ability of tribal communities to govern themselves as they had for centuries, to determine their own internal political, economic, and social rights and objectives, and to act collectively in accordance with those determinants.¹

We agree with that summation. We also agree with the findings of the Tribunal in its *Taranaki Report*, as follows:

- ▶ The principle of autonomy is central to the Treaty, and is the cardinal expression of the principle of partnership.
- ▶ Tino rangatiratanga and mana motuhake are equivalent terms for aboriginal autonomy and aboriginal self-government.
- ▶ The Treaty principle of autonomy or self-government includes the right of indigenous peoples to constitutional status as ‘first peoples’ (tangata whenua); the right to manage their own policy, resources, and affairs within the minimum parameters necessary for the operation of the State; and the right to enjoy cooperation and dialogue with the Government.
- ▶ Sovereignty in New Zealand, in terms of absolute power, cannot be vested in only one Treaty partner, as

the Crown’s sovereignty is constrained by the need to respect Maori authority (tino rangatiratanga).

- ▶ It is more appropriate to talk about responsibility than power in New Zealand, as the Treaty envisaged two spheres of authority that inevitably overlapped. These overlaps require negotiation and compromise on both sides.²

Further, we find that Maori had an article 3 Treaty right to self-government through representative institutions at a community, regional, and national level. This was very important to the way in which nineteenth-century governments perceived the need for legitimate government to be by consent. It provides the key context for how we judge the reasonableness of the Crown’s actions from 1840 to 1920. Settlers obtained full and responsible self-government at regional and national levels, having refused to settle for anything less. Maori were quick to point this out and to demand the same.

The Crown submitted that its Treaty obligations in that respect were governed by the circumstances of the time, and that the Tribunal must not apply present-day standards or expectations of what the Crown could reasonably have done in those circumstances. The claimants, on the other hand, see their history as a series of opportunities for the Crown to have given effect to its Treaty guarantee of their autonomy and self-government – opportunities that were either lost or actively rejected. Throughout the nineteenth century, and into the twentieth century, they sought to engage with the Crown on a political level, to secure their management of their own lands and affairs, and to obtain legal powers of self-government. In their view, the Crown denied their repeated requests and demands, acting instead to promote settler interests at their expense. The Crown replied that the degree of ‘self-management’

promised by the Treaty was a matter of legitimate debate, that its officials genuinely thought assimilation was in the best interests of Maori, and that lost opportunities were either impracticable or too uncertain for the Tribunal to judge them.

In our view, giving effect to the Treaty guarantees of autonomy and self-government was entirely practicable in the nineteenth century. Key to Maori autonomy and tino rangatiratanga was the right and ability of communities to manage their lands and resources. At this community level, colonial politician WL Rees pointed out that Maori wanted 'an executive power over their lands through representatives chosen by themselves from among themselves; a Government, in fact, of the owners by the owners for the owners.'³ Rhetoric about the evils of communalism aside, he saw no reason of principle why they could not, in fact, have what they wanted:

The whole tendency of modern times is to modify extreme individualism by collective action. Why then should we not apply to the Maori owners of land the same principle of government which we find to be indispensable amongst ourselves?⁴

Community autonomy was practicable through a variety of committee and corporate structures, which British law could easily have accommodated.

At the regional and national levels, there were also many models of autonomy. Mostly, these took either a geographical or an institutional form. Provinces, states, and all sorts of federal models abounded. Home Rule for Ireland, for example, meant a parliament to pass laws for and to govern a territory, in conjunction with wider citizenship and a federal-imperial Parliament. For Maori, as Wi Pere put it, while there was Maori land left in New Zealand, Home Rule meant Maori making their own laws about their own lands. The Te Arawa petition of 1891 emphasised that there was nothing about a Maori parliament to divide the races or undermine the authority of the Queen or the New Zealand Parliament.

Models included:

- ▶ the United States, with its self-governing tribal domestic nations and its autonomous states, all consonant with a strong federal (central) government;
- ▶ the Canadian federal system, which accommodated First Nation self-government (though badly) by a statute called the Indian Act, and French Canadian law and culture by a federal structure of autonomous provinces;
- ▶ Britain, a multinational state with elements of legal pluralism, a strong tradition of local self-government, a variety of legal structures for corporate and community land ownership and asset management, and the burgeoning Irish Home Rule movement;
- ▶ Europe, with its 'civilised' multinational and multi-ethnic states, including, for example, the autonomous cantons of the Swiss federal State;
- ▶ India, with its indigenous principalities, autonomous increasingly at law (though subject to indirect rule) as the nineteenth century wore on;
- ▶ the Pacific protectorates, where the British Crown recognised a divided 'external' and 'internal' sovereignty in the late nineteenth century;
- ▶ New Zealand's own British-made constitution, with its quasi-federal provision for autonomous Native Districts and provinces; and
- ▶ British elective bodies as adapted by Central North Island Maori, especially church (and other) committees, which they melded with their own traditional institutions, made use of at community, regional, and national levels, and put forward as their model of choice.

From these and other models, we conclude that the Crown had practical examples of community, regional, national, and institutional forms of autonomy applicable to the circumstances of Maori in New Zealand. Exactly how such models would, or could, have been adapted in this country was a matter to be debated and agreed between governments and Maori. We note, of course, that the models were of mixed significance – in Britain, for example, legal and national pluralism and the Home Rule

movement sat uneasily alongside attempts at assimilation and domination.

Nonetheless, we find that the Crown had reasonable and practicable options for complying with the standards of the Treaty. Those options were known to the Crown, ‘visible’ to policy-makers, sought by Central North Island Maori, conceivable and justifiable to at least some settler politicians, affordable, and practicable. They were not always, however, consistent with settler self-interest and some British standards of the time. The honour of the Crown, however, pledged in the Treaty and by later undertakings and promises, required that at least one of the options be taken up. We find that the practical options available to the Crown for giving effect to autonomy and self-government met the Treaty test of reasonableness. The Crown was perfectly capable of complying with the standards of the Treaty in the circumstances.

We think that the Crown, in the Treaty, Lord Normanby’s instructions, and various policy statements during Crown colony government, envisaged that both Maori and settlers would benefit from the colonisation of New Zealand, and that Maori could effectively govern themselves under their own laws for the foreseeable future. The epitome of this was the ability to declare self-governing Native Districts provided in the 1846 and 1852 Constitution Acts.

Starting from this base, there are three threads running through the history of the Central North Island in the nineteenth century:

- ▶ the Crown’s determination to colonise New Zealand and to repress Maori autonomy where it appeared to be an obstacle to colonisation;
- ▶ Maori determination to maintain their autonomy, and to develop new mechanisms for exercising their authority in a manner compatible with the settler State; and
- ▶ a series of missed opportunities where the Crown envisaged recognising and working with Maori autonomy, and could (and should) have done so. The Crown could – and did – conceive of recognising and working with Maori institutions but chose not

to do so. This is not a presentist interpretation, judging nineteenth-century actors by impossibly modern standards, but one reached on a balanced evaluation of the evidence, aspirations, and ethics of the times.

The Crown’s active repression of Maori autonomy, and its conscious and deliberate failure to develop or utilise the missed opportunities, are together a breach of the Treaty guarantee of tino rangatiratanga. They form a principal breach of the Treaty of Waitangi in the Central North Island inquiry, from which other Treaty breaches and prejudice follow.

In particular, we find that, in meeting opportunities and Maori requests to give effect to its Treaty guarantees, the Crown had five practicable options available to it:

- ▶ The first option: declaring self-governing Native Districts under section 71 of the Constitution Act 1852.
- ▶ The second option: declaring Native Districts under the Native Districts Regulations Act 1858 and the Native Districts Circuit Courts Act 1858.
- ▶ The third option: providing meaningful power at the central government level, through full and fair representation in the New Zealand Parliament or a national Maori assembly or both.
- ▶ The fourth option: including the Kingitanga in the machinery of the State.
- ▶ The fifth option: providing legal powers for regional and local self-government by Maori institutions in partnership with Government officials, through State-sponsored runanga (or komiti). This included legal powers for Maori communities to determine their own land and resource entitlements, and to manage those lands and resources for themselves through their own corporate bodies.

We find that the Crown failed to act effectively on any of these options until it enacted the Maori Councils Act in 1900. We also find that the intentions of that Act, in our preliminary view, were defeated so that it did not actually give effect to the Crown’s Treaty guarantees.

The detail of how the Crown lost or actively rejected opportunities to take up these five options was as follows.

THE CONSTITUTION ACT 1852

Section 71 of the Constitution Act empowered the Governor to declare self-governing Native Districts in which Maori law and authority would apply and have the force of British law. This provision was never used. Settlers, however, received provincial and central self-government and a Parliament under this Act. Maori were not represented in that Parliament until 1867. Property qualifications were used to largely prevent them from voting in provincial elections. In the 1870s and 1880s, Rotorua and Taupo Maori sought increased representation in Parliament, more equal to their proportion of the population (which entitled them to many more than four seats). The governments of the 1870s and 1880s refused to give Maori a fairer (and more powerful) presence in central government. The Kingitanga and Kotahitanga continued to press for section 71 to be adapted for and carried out in the 1890s but the New Zealand Government refused to comply with their requests.

THE KINGITANGA

A series of politicians and commentators, from Sir William Martin and Bishop Selwyn to the Secretary of State for the Colonies, thought that an accommodation with the Kingitanga was possible. They urged the Government to adopt and give legal authority to the Kingitanga as a provincial government or a Native District, or at the least to tolerate and work with it. Models such as the United States or the Swiss cantons were put forward as possible ways to reconcile Maori and Pakeha authority within a federal framework of autonomy. The settler Government seriously considered this advice, but ultimately rejected it. Various governors failed to take this advice, until their authority was fully replaced by settler responsible government.

After responsible government was instituted, recognising and working with the Kingitanga was still an option. It was considered from time to time (especially at the time of the Rohe Potae compact) but ultimately rejected by the

Government. Crown counsel, for example, identified a lost opportunity not noted by the claimants. There were negotiations between the Government and Kingitanga in 1878–79, and the Premier, Sir George Grey, offered powers of local self-government, but no agreement was reached because of the Government's refusal to return confiscated land.⁵ The question of whether the Kingitanga could be recognised, accorded legal powers, and included in the political arrangements of the State, was under active consideration throughout the nineteenth century.

THE RUNANGA MOVEMENT OF THE 1850S AND 1860S

A series of politicians and commentators also recommended giving legally enforceable authority to the runanga. The settler Parliament accepted this idea and passed the Native Districts Regulations Act and Native Districts Circuit Courts Act, but refused the Governor funding to make the legislation work. This refusal undermined the Acts, and it limited Maori cooperation. Later, Grey introduced the New Institutions – official runanga with legal powers – under these Acts, but they were abandoned in 1865 after they proved unsuccessful in preventing war. The swift abandonment of Grey's New Institutions, without giving them a chance to work properly or obtain legitimacy, was a critical missed opportunity for State-sanctioned Maori self-government. Ngati Raukawa, for example, thought that they had negotiated an agreement with George Law and would be able to work in partnership with the Crown, but these hopes were dashed.

In the words of historian BJ Dalton, the wars led to 'an end to the projects of native welfare and self-government which had filled the Governor's despatches and the pages of the colonial Hansard for years.'⁶ Even so, the deliberate inclusion of the 1858 legislation in the Thermal Springs District Act of 1881 meant that they remained a live option for parts of the Central North Island.

THE KOHIMARAMA CONFERENCE OF 1860

Governor Gore Browne agreed to Maori requests that he call an annual Maori ‘parliament’ of this kind, but his successor (Grey) failed to keep the promise. This was a critical missed opportunity for meaningful Maori participation and power in central government.

THE NATIVE COUNCIL PROPOSAL OF THE 1860S

Gore Browne intended to create a native council to provide an advisory body that would represent Maori views and interests in the central government. The British Parliament introduced a Bill to carry this out. Ultimately, the attempt foundered on the opposition of the settler Government.

THE NATIVE LANDS ACT 1862

The earliest incarnation of the native land legislation provided for a Maori body to decide title, with a Pakeha president, on a flexible, commission-style basis. The Native Lands Act 1865 turned this into a British-style court with a dominant Pakeha judge.

THE NATIVE PROVINCES BILL 1865

This Bill provided for the establishment of a quasi-federal arrangement of Maori provinces in the North Island, with the Government represented in those provinces by a Resident. The Bill’s introduction was postponed for six months, but the Government fell before that time had elapsed.

TRANSITION

By the end of the 1860s, the Crown had deliberately chosen not to empower Maori authority at either a tribal/district/

provincial level or at a national/central government level, despite the clearly articulated requests and aspirations of Maori, and the view of at least some politicians and settlers of the time that it was both feasible and desirable to do so.

The presentist debate hinges on an expectation of unreasonably ‘modern’ behaviour from nineteenth-century governments. The period from 1840 to the mid-1860s, in which there was a relative balance of Maori–Pakeha power in New Zealand, and a potent political role for governors and the Colonial Office, provided a context in which the ‘missed opportunities’ described above had a reasonable chance of being adopted and made to work.

In the 1870s and beyond, the prospects for a Treaty-compliant outcome declined in the wake of military conquest, settler population growth, responsible government for a settler parliament, and a predominance of settler power. Nonetheless, it was still possible for governments to buck the trends. Ballance assured Maori in the 1880s that the Government and Parliament were ‘strong’, able to resist the pressure of land-hungry settlers, to protect Maori interests, to act in the genuine best interests of both races, and to secure to Maori the self-government and political power to which they were entitled.⁷ Professor Ward considered that it was still possible for governments to resist ‘settler prejudice’ successfully in their Maori and land policies in the 1880s.⁸

THE NATIVE COUNCILS BILLS OF 1872–73

The first Bill was introduced by the Government in 1872 and provided for native councils with some legally enforceable powers of self-government and of title determination. This initiative was strongly supported by Central North Island Maori, but the Bill was withdrawn by the Native Minister. A second Bill was introduced and similarly withdrawn in 1873. Instead, the extremely unsatisfactory Native Lands Act 1873 was enacted. A third Bill was promised for 1874 but never introduced.

THE KOMITI MOVEMENT OF THE 1870S AND 1880S

In the 1870s and 1880s, Central North Island Maori (and others) sought to manage their lands, economic development, internal affairs, and relationship with the Government by means of elected komiti (committees). They sought official recognition of their komiti and legal powers from the State, so that their arrangements could be enforced at law. Maori members introduced various Bills to try to secure such powers for the komiti in the early 1880s. In 1883, the Government passed the Native Committees Act, with the avowed intent of providing District Committees with powers of self-government and a role in title determination. In 1886, Native Minister Ballance gave powers of land management to smaller-scale block committees through the Native Lands Administration Act. The 1886 Act was repealed in 1888.

The Native Committees Act 1883 and the Native Lands Administration Act 1886 show that the Crown could have engaged constructively with the komiti movement and given it legally enforceable powers. Ballance promised Maori that his measures would give them ‘large powers of self-government’, as guaranteed by the Treaty, and he specifically promised to increase the powers of the District Committees.

Both Acts, however, were weak and inherently flawed, resulting in no real change. The Rees–Carroll commission of 1891 called the Native Committees Act a ‘hollow shell’ which actively ‘mocked’ Maori aspirations. The 1886 Act was more promising, but Maori refused to use it. This was because Ballance did not include the key prerequisites that they had specified at their national hui at Waipatu: the commissioners to work jointly with (tribal) District Committees; and the block committees to be directly responsible to their communities and to act only as directed. A period at which it was politically possible to meet at least some Maori aspirations, therefore, became yet another missed opportunity (partly by deliberate choice, partly by accident).

THE FENTON AGREEMENT OF 1880

In 1880, Chief Judge Fenton (for the Government) negotiated an agreement with the Rotorua Komiti Nui to establish a township and allow the Native Land Court to enter the district. The Fenton Agreement could have been a model for how the Crown would engage with Maori at a district level of political partnership. It appeared also to provide for joint local administration of Rotorua township, and for the Komiti Nui to have a legally enforceable role in title determination. Its actual outcomes were very different. Nor did the Crown extend this model by entering into other such agreements with tribal leaderships, which it was clearly capable of doing with sufficient incentive.

THE THERMAL SPRINGS DISTRICTS ACT 1881

The Thermal Springs Districts Act 1881, in theory the legislative enactment of the Fenton Agreement, provided for Maori to be consulted quite extensively about how the land and, in particular, the geothermal resources should be managed. In some ways, it appeared to be a protective measure and even vested the Crown, according to Gilbert Mair, with the role of trustee.⁹ The historical evidence suggests that this opportunity to give Central North Island Maori meaningful input into the management of their lands and geothermal resources, and to have the Crown act as their agent for leasing lands, was not in fact implemented by the Crown. Instead, the Crown introduced the Native Land Court and targeted all thermal sites for purchase, against the known wishes of their owners. (These points will be explored further in parts III to v.)

Section 9 of the Act provided for Maori local self-government by the inclusion of the Native Districts Regulation Act 1858 as a provision. Native Minister Rolleston and Fenton appear to have intended giving legal powers to ‘Village Runanga’ alongside the special Maori–Crown Rotorua town board, but this section of the Act was never brought into force. Also, Maori representation on the town board was non-elective (despite promises) and reduced in

proportion until the board itself was replaced by ordinary municipal government in 1900. A promising experiment of partnership in local self-government was allowed to dissipate and die.

THE ROHE POTAE NEGOTIATIONS OF THE 1880S

In the early to mid-1880s, the Crown sought to negotiate a high-level political agreement with the Kingitanga for access to the Rohe Potae, initially to establish the main trunk railway, but ultimately to secure Government authority and land for settlement. In our inquiry district, Ngati Tuwharetoa and Ngati Raukawa were among the Rohe Potae tribes that negotiated first with Bryce and then with Ballance. The result, in the claimants' view, was a political 'compact', the terms of which were best expressed by their 1883 petition, which called for surveying an external boundary, Maori komiti to decide titles within that boundary, and the leasing of land.

At a time when Home Rule for Ireland was a genuine political possibility in Britain, and the settler Government wanted and needed an accommodation with the Kingitanga to get the railway through and open up the interior, there was potential for a genuine recognition and empowering (in the legal sense) of Maori authority in the Central North Island. It did not happen.

THE TAUPONUAIATIA APPLICATION

In 1885, Te Heuheu broke the Rohe Potae and filed the Tauponuiatia application with the Native Land Court, seeking determination of title for the whole of Tuwharetoa's lands in the Taupo district. Te Heuheu and Tuwharetoa believed that the Crown intended to permit their authority to be recognised and enforced inside their outer boundary (their own rohe potae). This belief was ultimately defeated in the Native Land Court, with disastrous results for Taupo Maori. Although the Tuwharetoa komiti controlled the

process of subdivision and lists to a very large extent, the outcome of individualised title was still a destructive one. In part, the tribe acted on the strength of Ballance's proposed reforms but these did not eventuate – District Committees were not given real powers, and block committees disappeared with the repeal of the 1886 Act.

THE NATIVE LAND LAWS AND MAORI AUTHORITY TO MANAGE THEIR COMMUNITY ASSETS AND DETERMINE THEIR OWN ENTITLEMENTS

From the Haultain inquiry of 1871 to the Rees–Carroll commission of 1891, there was a series of Maori protests and complaints about the Native Land Court, appeals for its abolition and replacement with Maori komiti and runanga, and various Government inquiries into this issue. The Crown's rejection of almost every request or recommendation for abolition or fundamental reform, with the problems clearly known and solutions clearly articulated at the time, was a vital missed opportunity for the Crown to have acted more consistently with the Treaty and to have provided for Maori authority over their own land and resources. In particular, the undertakings of Native Minister Ballance to Maori in 1885–86, and the findings and recommendations of the Rees–Carroll commission, were still in time to have empowered Central North Island Maori self-determination and authority over their remaining lands. The 'exceptional opportunity', as James Carroll put it in 1891, was not taken up by the governments of the day.

THE KOTAHITANGA MOVEMENT OF THE 1890S

Maori wanted major reforms of the native land laws, a Maori-controlled process for determining title instead of the Native Land Court, local Maori self-government, and a Maori Parliament in conjunction with the settler Parliament. A self-convened Maori Parliament (Paremata),

HE MAUNGA RONGO

in which the Central North Island tribes were well represented, met from 1892 to 1902.

In response to this powerful political movement, the Crown made some concessions:

- ▶ provisions for block (not tribal) incorporations (1894);
- ▶ the Urewera District Native Reserve Act (1896), which purported to give the Urewera tribes a General Committee and a Maori-controlled commission to decide titles (instead of the Native Land Court);
- ▶ the taihoa policy – a temporary halt to Crown purchase of land;
- ▶ Maori land councils with a majority of Maori members and a Pakeha president to lease land voluntarily vested in the councils (1900);
- ▶ introduction of Maori bodies into the title determination process (1900); and
- ▶ Maori Councils to provide some legally enforceable powers of local government to Maori communities (1900).

The rapid reversal of most of these concessions in the first five years of the twentieth century, after Kotahitanga had lost much of its political force, was a betrayal of Maori leaders, and another tragic lost opportunity. In particular, the abandonment of the taihoa policy, the transformation of the land councils into Pakeha-controlled boards, and the removal of Maori bodies from the title-determination process, was a major violation of both the spirit of the 1900 reforms and the Treaty of Waitangi.

THE MAORI COUNCILS

The Maori Councils Act 1900 provided an opportunity for Maori self-government at both a local and central level. The annual general conferences of the councils were supposed to be a replacement for the Kotahitanga Paremata at a national, central government level. They were discontinued, however, from 1911. At a local level, the councils appear to have faded by the second decade of the

twentieth century. Native Ministers and Maori members of Parliament of the time agreed that the councils failed because they had insufficient powers and were starved of funding. Despite this perception and promises of remedy, neither Carroll nor Ngata were able to secure adequate powers or (any) funding for the councils.

CONCLUSION

Given the sheer breadth and number of lost opportunities between 1840 and 1920 – many of which were not so much lost as defeated or actively rejected – the historical evidence is overwhelmingly in support of a conclusion that the Crown committed a sustained breach of the Treaty of Waitangi. We find the Central North Island claims to be well founded in that respect.

Notes

1. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 113
2. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), pp 5–6, 19–21
3. WL Rees (as quoted in Bruce Stirling, ‘Taupo–Kaingaroa Nineteenth Century Overview’, report commissioned by CFRT, September 2004 (doc A71), pt 2, p 1457)
4. Ibid
5. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 100
6. BJ Dalton, *War and Politics in New Zealand, 1855–1870* (Sydney: Sydney University Press, 1967), p 179
7. See his speeches in 1885, reproduced in Angela Ballara (comp), supporting documents for ‘Tribal Landscape Overview, c1800–c1900 in the Taupo, Rotorua, Kaingaroa and National Park Inquiry Districts’, various dates (doc A65(k)), pp 108–160.
8. Alan Ward, *National Overview*, 3 vols (Wellington: GP Publications, 1997), vol 2, p 245
9. Vincent O’Malley, ‘The Crown and Te Arawa, c1840–1910’, report commissioned by CFRT, November 1995 (doc A49), p 271