

TREATY STANDARDS FOR THE CROWN'S DEALINGS WITH MAORI LAND IN THE CENTRAL NORTH ISLAND

Historical Treaty claims have from the outset raised concerns about the Crown's land purchases from Maori, and its regulation of private transactions in Maori land. The impact of the native land legislation, under which the Native Land Court converted customary title into forms of negotiable title, has also been the subject of claims in many areas.

Assessing the Crown's Treaty obligations in respect of its administration of Maori land and the new tenure system, and its conduct and regulation of Maori land transactions, is not new territory for the Tribunal. This is particularly the case where claims relating to nineteenth-century land administration and land transactions are concerned – though claims relating to twentieth-century Crown land administration, title issues, and alienation have increasingly been brought to the Tribunal's attention. Public works legislation, and takings of Maori land for public works, have also been scrutinised in several reports.

In light of this, we review applicable Treaty guarantees and principles, as well as key findings already made by the Tribunal, which will guide us in our assessment of claims before us.

ISSUES

We address the following issues:

- ▶ What Treaty principles (and Tribunal findings) are applicable to the Crown's introduction of a new

system of native title, its regulation of the new title system, and its administration of Maori land?

- ▶ What Treaty principles (and Tribunal findings) are applicable to the Crown's provisions for alienation of Maori land?

We turn now to the first major issue for this chapter.

KEY QUESTION: WHAT TREATY PRINCIPLES (AND TRIBUNAL FINDINGS) ARE APPLICABLE TO THE CROWN'S INTRODUCTION OF A NEW SYSTEM OF NATIVE TITLE, ITS REGULATION OF THE NEW TITLE SYSTEM, AND ITS ADMINISTRATION OF MAORI LAND?

The claimants' case

The claimants, relying on both texts of the Treaty, argued that the Crown was clearly under an obligation to recognise and consult with tribal leaderships with regard to the introduction of the Native Land Court into their rohe. As the very introduction of the court, and its conversion of customary property rights protected under the Treaty, would affect the rangatiratanga of chiefs over their lands, the Crown was under a particular duty to actively protect Maori.¹ In terms of this principle, the Crown was required to work with Maori to jointly design a process that would allow settlement and active Maori engagement in the economy.

Turning to twentieth-century land administration, the claimants cited the *Rekohu Report* in respect of the implementation of a policy of individualised title and its prejudicial effects on Maori. They submitted that if this Tribunal were to make a similar finding, there could be found a positive obligation on the Crown to recognise and address some of the relative disadvantage that the ‘pseudo-individualisation’ of title has placed Maori under. Such an obligation could be founded on article 2 obligations to recognise and protect traditional Maori land-holding structures undermined in the nineteenth century without Maori consent. It could also be based on article 3 obligations to ensure equal citizenship of New Zealand, in that the title situation with Maori land caused difficulties with developing and using their lands that would not normally be encountered by New Zealand citizens. Thus there might be obligations on the Crown to facilitate changes from the title situation inherited from the nineteenth century to alternative systems of landholding which would allow Maori a fairer basis from which to use their lands in their own interests.²

The Crown’s case

The Crown’s key Treaty arguments were made generally, rather than specifically in relation to land administration and alienation. Counsel did, however, consider article 2 of the Treaty, stating that it ‘contains a promise that Maori property rights and the authority contained within the term *tino rangatiratanga* will be respected’. *Tino rangatiratanga*, counsel stated, meant ‘more than ownership of the property rights contained in article 2. It connotes a degree of Maori control and management over what Maori own.’ And the Crown acknowledged ‘an element of mutuality’ in the promises made by the Crown and by Maori in articles 1 and 2 of the Treaty: ‘If the Treaty means that the Crown promised to protect *rangatiratanga* so did Maori promise to acknowledge and protect *kawanatanga*.’³

The Crown put it to us that there are ‘essentially two core Treaty principles apparent from the jurisprudence of the Courts and the Tribunal’:

- ▶ Maori and the Crown should act honourably, reasonably and in good faith towards one another because of their special relationship created by the Treaty of Waitangi.
- ▶ The Crown must actively protect the Maori interests protected by the Treaty. Such protection is not absolute but requires the Crown to do what is reasonable in the circumstances.⁴

As we have already seen in part II, the Crown placed considerable weight on the importance of applying Treaty principles in accordance with this requirement of ‘reasonableness’, rather than importing ‘presentist’ understandings into the discussion.

But in respect of nineteenth-century native land laws, the Crown conceded that such laws ‘can fairly be criticized for failing to provide for more effective corporate/communal governance mechanisms’. In Treaty terms, this ‘may be one of the principal failings of the native land laws generally.’⁵

In respect of previous Tribunal reports, the Crown’s submission noted that it did not intend to relitigate the generic findings of the Turanga Tribunal, although in practice that concession was somewhat vitiated by a standing qualification:

The Gisborne Tribunal Report contains an extensive analysis of the scheme and intent of the native land laws and the design of the Native Land Court. It is not the intention of the Crown in this inquiry to re-litigate those issues. Rather, the focus of the Crown’s submission is on how the Court operated in the CNI region, and CNI Maori reaction to it.

It should not be assumed that the systemic faults of the native land laws identified by the Gisborne Tribunal necessarily apply in the CNI, or have particular application to it. As Dr Pickens, Crown Historian, stated, it is necessary to ‘drill down’ and to see how the Court operated on the ground. This is

necessary in order to test whether some of the more general assertions about the Court hold true in this region. There is significant variety of experience in the CNI with the Court.⁶

The Tribunal's analysis

Successive Tribunals have considered the establishment of the Native Land Court, and the new tenure system introduced and administered through the court. In particular, their focus has been on the article 2 Treaty guarantee to Maori not only of their 'lands and estates, forests and fisheries' – that is, possession of their property – but also of Maori control over their property. This leads first to consideration of the right of the Crown, in exercising its *kawana-tanga*, to make changes to the basis of customary title by which that property was held, and the circumstances in which any such right might properly be exercised.

The Crown, the Native Land Court, and its title system

The establishment of the Native Land Court was considered by the Turanga Tribunal in light of the 'essential Treaty bargain'. The Tribunal found that there was no doubt that by the cession of 'sovereignty' or 'te kawana-tanga katoa', the Crown secured the right, among others, to make laws for the regulation of Maori title, including the transfer of that title. But that right was not unfettered:

By the terms of the second article, the Crown offered two crucial guarantees in the context of the native title system. The first was that Maori title would be respected. This was most explicitly stated in the English text promise to protect Maori in the 'exclusive and undisturbed possession of their lands'. The second was that Maori control over Maori title would also be respected. This is best encapsulated in the Maori text promise of 'te tino rangatiratanga o o ratou whenua'. There can be no question but that both promises were absolutely fundamental to the Treaty bargain.

From this it followed, the Tribunal found, that:

the Crown's right to make laws for the regulation of Maori title could not be used to defeat that title or Maori control over it. On the contrary, the Crown's powers were to be used to protect Maori title and facilitate Maori control.

Maori had a corresponding obligation to accept:

that it was the Crown's role to develop and implement the native title system. Maori could be consulted over these matters, but they had given up the power to operate outside the Crown's laws.⁷

The Hauraki Tribunal acknowledged that there were 'good reasons' in the context of the developing colonial economy for the Crown to establish an independent tribunal (the Native Land Court) to determine 'intersecting and disputed claims to Maori customary land, and to administer legislative modifications to customary tenure to meet new needs.'⁸ It did, however, issue a strong caution. At the very least, the Tribunal stated, the Crown's duty of active protection implies that such changes made by governments should have been made with the understanding and consent of Maori. Instead, the persistent and growing Maori demand that their own institutions be given more authority in determining customary interests was given little recognition.⁹

That, it seems, to us, is the pivotal point. As the Rekohu Tribunal pointed out, an aspect of *rangatiratanga* was that, to the extent practicable, Maori would control their own affairs. 'That must have included the development of their own institutions to resolve disputes between tribes.'¹⁰ The alternative, as the Tribunal suggested, was that judges would attempt to manage Maori custom from the outside, looking in. Such an alternative was inconsistent with the autonomy guaranteed to Maori by the Treaty. There was a fundamental disjunction when Maori law was placed under the control of a British court, with the decisions to be made

not by the Maori people concerned but by a British judge. The Treaty could not be kept in those circumstances.¹¹

The Treaty standard universally adopted (by those Tribunals which have considered the introduction of external adjudication of Maori titles) is that a step fraught with such consequences for Maori, and for the system of native title that protected their customary rights, could only have been taken with their consent.

Did Maori consent to its introduction? The Turanga Tribunal considered expressions of Maori opinion at Kohimarama (1860) on the possibility of an independent adjudicator of titles. It also examined evidence taken before two inquiries, held after the establishment of the Native Land Court, which investigated the operation of the Native Lands Act 1865 – the 1871 inquiry conducted by Colonel Haultain, and the Hawke's Bay Land Alienation Commission of 1873. It found that:

- ▶ 'Maori were always interested in the establishment of an independent forum for resolving inter-community rivalry over land, but only ever on the basis that it would be Crown-sponsored but Maori owned and operated';
- ▶ 'Maori at a national level never actively supported the establishment of the court in its 1865 form', and came to develop 'deep suspicion' of it after the Hawke's Bay experiment; and
- ▶ by the time the Native Land Act 1873 was enacted, after eight years' experience of the Native Land Court, Maori had come to view it in an 'extremely negative light'.¹²

The Tribunal found that in view of:

the explicit words of the Treaty, the imposition of the Native Land Court in a form which did not facilitate Maori control of title allocation questions, and against express Maori opposition, was in obvious breach of the article 2 control guarantee.¹³

The Tribunal noted:

the Crown's persistent refusal to allow Maori to manage their own affairs at community or tribal level in accordance with

Treaty promises, and its insistence on treating Maori communities as unassociated collections of private individuals.¹⁴

This was a fundamental breach of the principle of autonomy.

In the Crown's submission, these findings must be tested for their applicability in the Central North Island region. We need to consider, therefore, the degree to which the Treaty principles of partnership and autonomy were honoured in the specific circumstances of how the court and title system were introduced (and then persisted with) in the Rotorua, Taupo, and Kaingaroa districts. Did the Central North Island tribes consent to the introduction of a title-adjudication body in the specific form of the post-1865 Native Land Court? Did the Maori leaders of the Central North Island endorse or oppose the introduction and continued operation of the court and its title system? Was their historical experience in that respect typical of the national experience, as described in the report *Turanga Tangata Turanga Whenua*, or does the evidence require a departure from the generic findings of the Turanga Tribunal? We address those questions in chapter 9 below, using the standards explained in the *Turanga Report*.

Also, in the Crown's submission, we need to apply a test of reasonableness in our application of Treaty standards to its actions in the nineteenth century. What could or should the Crown reasonably have done in the circumstances of the particular time? We have already discussed such a test for nineteenth-century land laws and the operation of the Native Land Court – vis-à-vis the principle of autonomy and the near-unanimous Central North Island Maori request for collective tribal decision-making – in part II of this report. We do not repeat that discussion here.

The nature of the titles created by the land laws

We turn secondly to consider the nature of titles provided for in nineteenth-century legislation, a matter of key importance for claimants over many years that has been deliberated on by a number of Tribunals. In general terms, the

nineteenth-century land laws provided for individualisation of titles, and failed to provide some form of community title which would have reflected customary rights and authority.

The Hauraki Tribunal, considering the Crown's argument that the objectives behind the first Native Land Act – that of 1862 – included a 'civilising mission', welcomed its 'frank admission' that paternalistic attitudes underlay the supposed betterment of Maori through a radical change to their land tenure. But Maori property rights are protected by article 2 of the Treaty. There may be some circumstances, carefully defined, in which they can be interfered with in the public interest. (We return to this point below.) But, the Tribunal stated: 'Gratuitous interference with Maori land tenure for the purpose of transforming their social order is something else again. However well-intended parliamentarians might be, unless full consultation and the consent of Maori were obtained, it was difficult to see how Parliament could interfere 'without infringing the tino rangatiratanga recognised under article 2 of the Treaty'.¹⁵

To avoid charges that the 'civilising' aspect of land-tenure change was merely a cloak for settler self-interest and the overriding of rangatiratanga, various tests must be met: Maori consent to and cooperation with the design and implementation of the native land legislation; serious discussion with Maori about the constant adjustment of the legislation over the next century to ensure that the changes were what they wanted; and evidence that the Acts did include 'realistic provisions for Maori advancement as well as that of settlers'.¹⁶

The Hauraki Tribunal concluded that the 'civilising mission' aspect was a motivation secondary to that of facilitating the acquisition of remaining Maori land, largely through direct settler purchase (seen as more likely to succeed than Crown purchase). The proponents of the 'civilising mission' prescribed the kinds of tenure to which Maori customary rights would be converted. This prescription was 'ethnocentric and paternalistic'. Maori were not involved in the design of new forms of tenure. And far

from producing beneficial outcomes for Maori, the opposite was the case.¹⁷

The article 2 guarantees to Maori have been seen as central by the Tribunal from the outset. The Oakei Tribunal, assessing the Treaty compliance of the early Native Land Acts, began by addressing the significance of the guarantee of tino rangatiratanga. Their discussion takes us to the essence of the undertaking given by the Crown in respect of continued Maori exercise of their rights over land and resources, and it is helpful to refer to it here. That Tribunal acknowledged their debt to John Rangihau of Tuhoë, who emphasised the importance of the quality of 'commonality' which in his view distinguished the true rangatira. Recognition by the people was one of the most important factors in the assumption of leadership; the role of rangatira, he said, was 'people bestowed'. The authority embodied in the concept of rangatiratanga is also the authority of the people. Thus, the Oakei Tribunal found, the acknowledgement in the Maori text of the 'tino rangatiratanga' of Maori over their lands 'necessarily carries with it, given the nature of their ownership and possession of their land, all the incidents of tribal communalism and paramountcy'.¹⁸ These 'include the holding of land as a community resource and the subordination of individual rights to maintaining tribal unity and cohesion'.¹⁹ This had consequences for the way in which decisions to alienate were made: 'only the group with the consent of its chiefs could alienate land'.²⁰

The title provisions of the key early native land legislation have been examined by successive Tribunals. The Oakei Tribunal found that the provisions of the Native Lands Act 1865 – which enabled tribal ownership of Maori land to be extinguished on the application of any one member of the tribe, without the consent of the remainder – were inconsistent with the principles of the Treaty,

whereby in recognising te tino rangatiratanga in and over their lands the Crown acknowledged the authority or mana of the Maori people for so long as they wished to hold their

land in accordance with long-standing custom on a tribal and communal basis.²¹

The Tribunal was also deeply concerned at the empowerment of the Native Land Court under the 1865 Act to vest land in only 10 beneficial owners, so that the remaining members of the tribal community might be involuntarily dispossessed without their consent. Such dispossession ‘with a stroke of the pen . . . was a most flagrant violation of the Treaty.’²² Moreover, the Crown omitted to take ‘timely and appropriate action’ to ensure that the provisions of section 17 of the amending Native Lands Act 1867 – which required the Native Land Court to list on the back of the certificate of title the names of all owners in addition to those listed on the front of the certificate – were implemented by the court.²³ Section 17, the Mohaka ki Ahuriri Tribunal stated, was clearly one attempt by the Crown to remedy the impact of the 10-owner rule, but Chief Judge Fenton refused to implement it.²⁴ Thus the Crown recognised the shortcomings of the 1865 Act, in the Tribunal’s view, by passing amending legislation in 1867, by repealing the Act in 1873, and by legislating in 1886 for the readmission to titles of excluded owners. ‘But it failed to ensure that the judiciary complied with the 1867 amendment and it did not compensate any Maori for whom, by 1873 or 1886, it was too late.’²⁵

The Native Land Act 1873 was the particular focus of the Turanga Tribunal, which made a key finding in respect of its title provisions. The Tribunal found that the Act did not make provision for community ownership and management of Maori land, but instead provided ‘a kind of virtual individual title’. All customary right-holders in a block were named on a memorial, but they did not secure individual title in the true sense of that term. The right remained vested in common with all other owners. The land technically remained customary land. But the Native Land Court’s award identified the right-holders in each block, each holding individual shares, and each able to alienate his or her shares. But no more than that. The law made it easier to sell land than to retain and use it. This

‘selective individualisation’ breached the express guarantee of tino rangatiratanga in article 2 of the Treaty.

The 1873 Act breached a Treaty promise made explicitly ‘ki nga rangatira’ (to the chiefs), ‘ki nga hapu’ (to the tribes or communities), ‘ki nga tangata maori katoa’ (and to all the ordinary or Maori people), all of whom had layers of rights in tikanga Maori:

By excluding hapu from sale or lease decisions, the Act removed a separate right holder to which an explicit Treaty promise had been made. By failing to provide legal support to chiefly leadership in questions of land alienation, the Act similarly breached a Treaty promise explicitly made to hapu leaders. In this way, the Act confiscated rights formerly vested in tikanga Maori. It effectively removed from these two levels, the right to participate in the most important decisions the community collectively and its members individually would ever make.²⁶

This Treaty breach had major impacts on Maori control of their land at the community level. The prejudice was lasting. First, as noted, it removed from rangatira and hapu the right to participate in the most important decisions that the community would ever make – those about land sale and land retention.²⁷ Sale or lease could only be achieved by the transfer of the newly created individual, undivided interests, and community decision-making was thus rendered irrelevant and legally impotent. Secondly, Maori quickly lost control of the process of alienation. There was, in the Tribunal’s view, a key (and intentional) link between the new title system and the operation of alienation processes, which we consider below.

The 1873 Act and its successors were the key nineteenth-century land laws for our inquiry. The Crown has accepted the ‘systemic faults’ of those laws as identified by the Turanga Tribunal, but asks us to test their applicability in the Central North Island. In this part of our report, we will consider the questions of how and to what extent title was individualised in the Central North Island, whether the tribes were able to obtain their expressed preference for community titles, whether they were able to deal with



'Ki nga rangatira, ki nga hapu, ki nga tangata maori katoa': the promises in the Treaty were made to tribal communities like the one that lived here at Waitahanui Pa, on the shores of Lake Taupo-nui-a-tia. This 1847 lithograph by George French Angas was based on an earlier watercolour.

their lands as they wished under the Crown-derived titles, whether communities were able to control alienation, and the extent to which the Turanga findings (described above) encapsulate the native title system as it also operated in our inquiry district.

In doing so, we will apply the Crown's test of reasonableness to the native title system and to proposed policy alternatives in the nineteenth and twentieth centuries. As we discussed in chapter 3, the Crown submitted that it should have used 'less penal' policies and laws, where those policies and laws can be shown to have been penal in their effects, and where there were known and practicable alternatives at the time.

We have already explored some of those alternatives in part II. A significant part of the Crown's case rested on the idea that the Waitangi Tribunal expects ahistorical behaviour from nineteenth-century officials and ministers, according to the standards of today rather than to standards known or conceivable at the time. In our view,

which we reiterate here, the majority standards of the settlers of the day are not the principal criterion to be considered. We noted that two peoples had to live together in one country, and that the views of Maori with regard to those things over which they exercised tino rangatiratanga had to prevail in certain circumstances. In particular, the Treaty guarantees with regard to land were so strong and uncompromising as to require the full and active protection of Maori land in their possession for so long as they wished to retain it. Any alienation – including the fundamental basis on which it was held – had to be with their free, full, and informed consent.

In terms of the individualisation of title, we referred in chapter 3 to the critique by colonial politician W L Rees, in a paper tabled in the House in 1884. First, he stated that:

a very gross act of cruelty and bad faith as well as folly was perpetrated by us when we compelled the Natives to hold their lands as individuals. The Treaty of Waitangi assured them

of ‘all their rights in their lands.’ The chief right of all was the right of tribal ownership – but a tribe of five hundred persons is totally different from five hundred distinct and opposing claimants. It is the tribe which owns the land, and it is the tribe which, in justice, ought to have sole power to use it or deal with it.²⁸

Secondly, Rees emphasised that British law and policy-makers were in fact entirely comfortable in dealing with common property through a variety of legal mechanisms. There was no genuine or insurmountable problem in that respect. These mechanisms included corporations and joint-stock companies, community bodies (such as county or borough bodies), and the Crown itself. If nineteenth-century politicians were to be truly fair and consistent, Rees argued, then all such bodies by which European community lands were held in common and administered by representatives should be dissolved, and their assets held by all interested individuals as separate, saleable titles.²⁹

Clearly, if Rees could think in that way and propose community titles for Maori land in the 1880s, it was at least possible for the Crown to have kept the Treaty guarantee of tino rangatiratanga over tribal lands. In 1894, a decade later, Sir Robert Stout told Parliament that, in his view, Maori must be dealt with ‘as they are, and not as we would like them to be’, which meant dealing with them as communal bodies. This was all the more so as there were moves within European society to correct extremes of its own individualism. He called for a return to the principles of Ballance’s 1886 Act (see chapter 6): ‘the Maoris are a communal people, and we ought to allow them committees to manage their land – committees of owners.’³⁰ ‘I say,’ he added,

that it is entirely unjust, entirely inhumane, for this colony to kill the [Maori] race: for that will be the case if you force them into individualising their titles and introduce free-trade in land...³¹

The Crown did experiment with collective mechanisms from time to time: the New Institutions of the 1860s; the

proposed native councils of the 1870s; the native committees and proposed block committees of the 1880s; the incorporations of the 1890s; and the Maori land councils of 1900. These abortive initiatives are testimony to what was possible.

In the following chapters, we will test the reasonableness of the Crown’s actions in light of the Treaty standards it had to meet and the circumstances in which it had to meet them. In particular, we will consider the known policy alternatives and how practicable they were likely to have been (accepting that we cannot know with absolute certainty all the likely consequences of any one proposal).

In taking this approach, we note the findings of the Hauraki Tribunal:

We note that the Crown accepts this criticism [of individualisation of title] up to a point, in observing that the balance between the collective and individual rights and interests should, in hindsight, have been weighted more towards the collective. We do not think that hindsight was necessary. In 1900, the Government introduced legislation which recognised that Maori had lost community control and restored it. But as in the nineteenth century, the measures were soon withdrawn or weakened, and alienation by individuals or sections of owners again facilitated. In short, our review of the evidence in this chapter leads to the disturbing conclusion that the Crown persisted with a legal system oriented to the acquisition of Maori land, even *after* considerable consultation with Maori and its own commissioned report [the Stout–Ngata report], which had recommended a virtual cessation of this policy.³²

This brings us to one of the major issues of our Central North Island inquiry: the legacy of the nineteenth-century title system in the twentieth century.

Crown regulation of the title system in the twentieth century

In the wake of its establishment of the new tenure system, and of pressure from the leaders of the Kotahitanga Paremata, the Crown moved in 1900 to lay the basis for

a new Maori lands administration system. According to the findings of the Turanga Tribunal, the Crown's Treaty breach in failing to provide Maori with legal community titles (which could facilitate land management and retention) is well established. Also, in the view of the Rekohu Tribunal, the nineteenth-century land laws had long-term impacts in the following century. These included:

- ▶ fragmentation of ownership;
- ▶ fractionation of titles; and
- ▶ 'acculturation' (that is, although the system was imposed on Maori, and was antithetical to custom, shares in land blocks became proof of turangawae-wae and were not willingly relinquished. For the same reason, the inclusion of all successors on titles was favoured.)³³

As noted, we will test these findings for their applicability in our region. Nonetheless, certain facts are untested. The Crown accepts that titles in the Central North Island inquiry region became fragmented, that it had 'some' responsibility to correct that problem, and that twentieth-century land laws and solutions were at least 'in part, a reaction to the impact of the 19th century native land laws.'³⁴ Given those admissions, we must consider what Treaty principles are applicable to a system which may in essence have been based on attempts to mitigate nineteenth-century breaches. In part, governments tried to provide Maori landowners with management options to overcome their disintegrating titles, and with mechanisms for recreating usable titles. In this context, we will be guided by the principles of partnership, good government, equity, and active protection.

Partnership, consultation, and autonomy

Partnership, it is generally understood, denotes the mutual obligations of the Crown and Maori to act in good faith towards each other, fairly, reasonably, and honourably. Vital to this partnership is the Crown's duty to inform itself of the views and wishes of Maori. In the 1987 *Lands* case, Justice Richardson considered the extent to which consultation was necessary for the Crown to be able to make a

properly informed decision, which meant that it had to be 'sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty'. He went on:

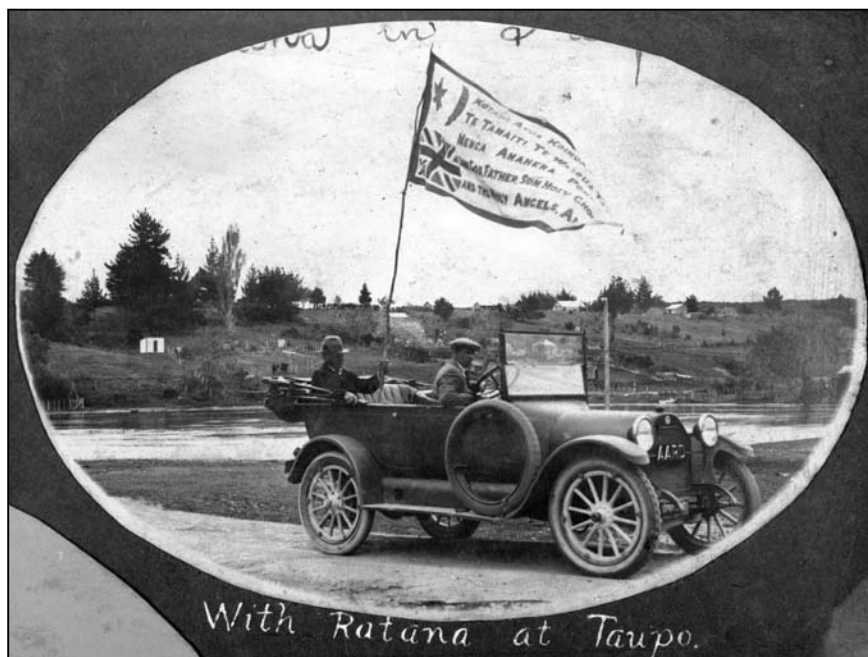
In many cases where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation. In some extensive consultation and co-operation will be necessary. In others where there are Treaty implications the partner may have sufficient information in its possession for it to act consistently with the principles of the Treaty without any specific consultation.³⁵

As the Napier Hospital Tribunal pointed out, the significance of a decision to Maori who are, or might be, interested parties, must also be considered.³⁶ In the *New Zealand Maori Council v Attorney-General* 1989, Sir Robin Cooke commented in respect of the principle of partnership:

We think it right to say that the good faith owed to each other by the parties to the Treaty must extend to consultation on truly major issues. That is really clear beyond argument.³⁷

In our view, major changes in Crown policy affecting Maori property rights and land management must count as such issues. It is clear that in this respect the Crown has an inescapable duty to consult. So also must the implementation of such policies, and the determination of their success or failure, be the subject of consultation and dialogue. Moreover, consultation must be wide and involve the tribal or broader Maori leaderships, which were always deeply concerned with such fundamental issues. Further, there is no difference between the nineteenth and twentieth centuries in the requirement that Maori must consent to fundamental alterations of their Treaty-guaranteed property rights. Thus, consultation on its own was not a high enough standard. If the Crown was to keep its promise of Maori control (*tino rangatiratanga*) over those things guaranteed them by the plain terms of the Treaty, then it had to obtain their consent through partnership and dialogue, leading to a negotiated agreement.

Tahupotiki Wiremu Ratana in Taupo, 1920s. Ratana was known as the campaigner for justice, and he kept the Treaty prominently in the eye of the Labour Party.



What was reasonable in the circumstances of the twentieth century? In the Crown's submission:

It was not obvious or self-evident to policymakers until much later in the 20th century [meaning mid-century] that emphasis should be given to workable communal land management mechanisms. As late as the 1960s the *Hunn Report* was still advocating assimilation. However misguided that view might now be considered to be, it was a genuinely held one.³⁸

The evidence available to this Tribunal is that the extent of Central North Island Maori engagement with the Crown, and of putting their views to governments on the subject of their lands, was as strong in the twentieth century as it had been in the decades before. It was evident in the deputations that went to Parliament in support of petitions (as in 1905), in the interest shown in the visits of the Stout–Ngata commission and in the presentation of evidence to the 1934 royal commission, in major hui

(such as that at Tokaanu in 1909), and in the immediate feedback on policies which members sometimes referred to in the House.³⁹ In 1914, for example, Ngata read out telegrams from Te Arawa conveying the tribe's anger over proposals to proclaim lakes and rivers the property of the Crown. He also referred to a petition from the tribe, complaining of the Bill as a breach of the Treaty, and urged the Government to 'go to the people on their marae' and discuss the matter with them. The Native Minister, William Herries, agreed and the clauses were dropped.⁴⁰

We add also – in respect of the courts' criterion that the Crown should be satisfied that it has had due regard to the impact of the principles of the Treaty – that the Crown could not but have been aware of the importance of the Treaty to Maori leaderships in the first half of the twentieth century. 'We have heard the Treaty of Waitangi mentioned so often in this House,' said Maui Pomare in 1913, 'that if it were a bit of steel it would have grown very bright with usage.'⁴¹ The Treaty took centre stage, for instance, when

Labour leader Harry Holland visited Ratana Pa in 1932, and received the Ratana petition with 38,000 signatures. He listened to Tahupotiki Wiremu Ratana state Maori grievances under the Treaty: the confiscations, the Ngai Tahu claims, funds for Maori servicemen, rating and taxation, and Lake Taupo. Ratana referred also to mana motuhake. On that occasion, Holland stated:

Where the Treaty of Waitangi, land and other claims or business of the Maori people are concerned, I personally would rather have you or your candidates come to Wellington to brief us, and advise us on these matters. Finally, let me say again, my party and I will support you in all of your works.⁴²

The importance of article 2 Treaty guarantees to communities within our inquiry region was kept before the Crown by Maori leaders and political movements. The Ratana movement, for example, worked over many years for the recognition of the Treaty of Waitangi. Its first member of Parliament, Eruera Tirikatene, read the assurances of article 2 aloud in the House in October 1932, and soon afterwards presented a copy of the Treaty and seven books of signatures, totalling 45,000, asking Parliament to make it statutory. Among the communities of our inquiry region are a number with a long tradition of adherence to the Ratana Church and movement. The Ngati Hineuru kuia, Hinei Reti, spoke to the Tribunal of that spiritual tradition and the guidance it gave in seeking answers in the temporal and political worlds:

the Treaty of Waitangi, that's Piri Wiri Tua [Ratana] has claimed that we need to have the Treaty recognized as part of the Government – that we are in partnership; that we have as much right as Government to say what our people need rather than be told what we need.

Piri Wiri Tua, she explained 'is the campaigner, a campaigner for justice'.⁴³

The arikitanga of Ngati Tuwharetoa also urged Treaty guarantees on the first Labour Government later in that decade. Finding themselves faced with a massive bill in the aftermath of the collapse of the Tongariro Timber

Company with which Ngati Tuwharetoa had had a long-standing agreement to mill their west Taupo timber and build a branch railway, the iwi embarked on both legal and political action. As their legal case wound its way to the Privy Council, Ngati Tuwharetoa held a large hui at Waihi in 1939, attended by tribal leaders from many parts of the central North Island. Two subsequent delegations urged consideration of the Treaty on the Crown, though they got little encouragement for basing their case on the Treaty. The Attorney-General stated, however, that the terms of the Treaty 'do undoubtedly bind the conscience of the Crown'.⁴⁴

Hoani Te Heuheu's letter to the Prime Minister, Peter Fraser, written after the Privy Council had turned down the Ngati Tuwharetoa appeal, and shortly before he passed away, returned again to the importance of the Treaty. In his view, the Privy Council had turned the responsibility for rectifying the prejudice suffered by the tribe back onto Parliament:

Now we know where the responsibility for carrying out the Treaty lies. It lies with Parliament. Hitherto, Government departments have been allowed by various Governments to decide. As a result the Treaty has been more or less hidden from sight. Now it is in the lap of Parliament to nurse and nourish as something precious in the relations of the two races.⁴⁵

A constant theme of Central North Island Maori leaders, in their many delegations, deputations, petitions, letters, and other representations to the Crown, was the need for representative tribal bodies to manage, control, and administer Maori lands.

Could the Crown have answered 'yes' to their pleas? We note first that, in its submission, the Crown acknowledged for the nineteenth century 'that the native land laws can fairly be criticised for failing to provide for more effective corporate/communal governance mechanisms'.⁴⁶ Secondly, it points out that there was a corporate ownership model available from the 1890s onwards – the incorporation. Thirdly, however, it argues that it was not 'obvious' or 'self-

evident' to policy makers that emphasis should be given to communal mechanisms until the mid-twentieth century. Fourthly, it suggests that it was reasonable for policy makers to identify economic progress with ownership in severalty until later in the twentieth century.⁴⁷

And yet its ministers sometimes clearly acknowledged – and explained their policies in terms of – the collective management that Maori were seeking from the Crown. In 1909, for example, the Native Minister, James Carroll, described the Government's provisions for meetings of owners as 'practically a resuscitation of the old runanga system, under which from time immemorial the Maori communities transacted their business'.⁴⁸ Whenever there were more than 10 owners in a block, the runanga would take the form of meetings and resolutions of assembled owners, by which 'the majority of owners' in 'communal blocks' would be enabled to manage their land. 'I cannot think,' the Minister explained,

of any fairer way of ascertaining the wishes of the Native owners in regard to the disposition of communal areas, or consulting them in all larger questions relating to the settlement of their lands.

This 'device for dealing with communal blocks' had 'been found of great use in the past', and the Crown, he promised, would only purchase 'from the runanga' (and not from individuals) where blocks had more than 10 owners. The intention was for committees to farm as well as alienate land, and for communal reserves to be set aside, with provision for their 'control, management, and government'.⁴⁹

Carroll's explanation was accepted as true in the House. The Opposition expressed concern that meetings of assembled owners and incorporations – and even the vesting of land in Government boards or the Native Trustee – were 'driving' Maori into the 'old communal system', a 'system which has never raised any race in the scale of civilisation'.⁵⁰

In the Legislative Council, the Attorney-General did not describe the Bill as reinstating runanga and communal decision-making for individualised land titles, but he

did put some emphasis on incorporations. The Bill was designed to do many things, including facilitate settlement of Maori land by Europeans (see chapter 11). Among them, the functions of incorporations were extended. Dr Findlay, the Attorney-General, explained that the original purpose of incorporations had been solely to facilitate alienation of multiply owned land. The powers of incorporations had been changed later so that they could manage as well as alienate land. Having 'done good work in the past, it is found prudent to extend their functions'.⁵¹

In 1909, therefore, far from being unable to conceive of or support it, the Government claimed to be restoring collective decision-making (by runanga), and to be strengthening the incorporation model for multiply owned Maori land. Meetings of assembled owners remained a key element of land administration for the remainder of the twentieth century. In chapter 11, we test that mechanism against what was, in the circumstances, believed to have been an achievable standard – a return to tribal collective decision-making.

In our view, the negotiation over the Central North Island lakes in the 1920s was also a model of what was conceivable and practicable in the first half of the century. The outcome of negotiations between the Crown and tribal leaders was the establishment of tribal trust boards, with legal powers to administer tribal assets. Although there were limitations to the model, it was negotiated in a climate of Maori claims (to tino rangatiratanga) and some settler views of assimilationism and individualisation. Treasury, for example, wanted the annuities to be administered by the Native Trustee and paid out to individuals. The tribes wanted hapu autonomy, representative self-government, and collective management of the annuities for community goals. The compromise achievable in the 1920s was the tribal trust board.⁵² It was achieved in circumstances in which, as the Crown points out, incorporations had also been available (at least in theory) since the 1890s.

In the case of Lake Taupo, the Government at first wanted a board appointed by itself and on which it was represented, and that could do nothing more than distribute

money to individuals. It gave way on these three points and agreed to a board constituted entirely of tribal members, which could administer the funds for the general benefit of the tribe. Tuwharetoa, on the other hand, gave up their goal in 1926 of having the board elected directly by the tribe. It was still to be appointed by the Government, but with the compromise that the tribe would nominate the members and that they would serve for two-year terms. The board was also given some limited management of fishing.⁵³ Importantly, in the evidence available to us, no Maori leader or representation from Maori in the 1920s sought payment of those moneys by Government to individuals. Disagreement among Maori, where it existed, was not over individualisation, but about whether the annuities should be administered at a hapu or a confederation level.

In the Crown's submission, policy alternatives had to be visible (known to the Crown) and practicable. Clearly, the creation of the trust boards in the 1920s, with incorporations still at least a legal possibility at the time (though not popular at the time, for reasons we will explore in chapter 11), meets both tests. More trust boards were created in the 1940s, showing that collective management of tribal assets by representative boards was not a short-lived or one-off possibility. In the circumstances, the Crown could have negotiated agreements with Central North Island Maori to establish (or improve) legal models for the collective management of their lands. There was nothing inconceivable or impracticable about it – it was done in one instance (tribal trust boards). The question for the Tribunal is: why did governments choose not to do it in other instances? Consultation and the seeking of Maori agreement was possible. Setting up collective management mechanisms was clearly possible. The latter (through incorporations and new provisions for trusts in 1953) became an increasingly important theme in the second half of the century.

Also, given the extent of bureaucratic and ministerial interaction with Maori leaderships in the early to mid-twentieth century, it is difficult to argue, in our view, that consultation on the development and review of major

policies, including re-empowering Maori owners to act collectively, could not have been undertaken.

We will consider the Crown's actual policy choices, the reasons for them, and their consistency with Treaty principles, in chapter 11.

Consultation and negotiated agreement is thus of first importance in the Crown's attempts to remedy the effects of its tenure system and of its failure to provide community management. The Crown submitted:

Fragmentation of title was clearly a problem that the Crown had some responsibility to attempt to resolve. Initiatives were progressively taken by the Crown from the late 19th century and included such matters as development schemes, consolidation schemes and legislation pertaining to trusts and incorporations, amalgamation and access to finance. The critical issue is the adequacy of the Crown response.⁵⁴

We agree that the adequacy of the Crown's response is a key issue. In terms of Treaty standards, however, the degree to which Maori were involved in formulating, managing, and consenting to that response is equally important. We assume, for instance, that if entities were established by the Crown to manage Maori land, Maori would need to play a key role in those entities. In the first decade of the twentieth century – when the new lands administration was set up in 1900, before its massive redesign from 1905 to 1909 – it was a system decided on jointly by Maori leaderships (through Kotahitanga) and the Crown. We assume also that, as the Crown embarked on policy measures to tackle Maori title dilemmas, involvement of Maori from the outset was both crucial and known to be crucial. In 1909, it will be recalled, Native Minister Carroll described new provisions for collective management as 'practically a resuscitation of the old runanga system', an age-old method of Maori decision-making.⁵⁵ This, then, is the standard by which the 1909 initiative and its successors should be judged.

The principle of equity

We consider that the principle of equity is crucial to twentieth-century land issues. That principle, it has been

observed, derives from article 3 of the Treaty guaranteeing Maori the rights of British citizens.⁵⁶ In relation to property rights, it is axiomatic that Maori rights should be afforded no less protection than rights of other citizens. It is our view that the Crown assumed a particular obligation to protect the titles (and title-holders) created under the operation of the native land legislation. As Maori customary title was transformed, Maori lost the community protection which had always encompassed their rights to land and resources. While it is clear that the Crown could not replace the community as the protector of whanau and hapu rights, the new tenure system it introduced brought its own obligations.

Such obligations included monitoring the system to ensure that its operation was not disadvantaging Maori owners. We will review how, and to what extent, the Crown carried out this obligation in chapter 11. It needed to ensure, for example, that the new legal property rights of its Maori citizens – including the right to succeed to interests to which the law said that their heirs were entitled – were not infringed, unless with their consent. In respect of how the law protected property rights, we need also to examine the way in which the Crown used compulsion to dispossess owners of their small interests in land. We need to consider the way in which landed interests entrusted by owners to incorporations, as a way of managing their lands collectively, were transformed by law into ownership of shares in a company. Many such issues arise about how the Crown dealt with Maori land, which need to be measured against how it dealt with the property of its other citizens.

In the *Napier Hospital and Health Services Report*, the Tribunal found that an assurance of equality was implicit in the article 3 guarantees to Maori. In the context of health, the principle of equity meant that there should be 'equal standards of health care' for Maori and non-Maori citizens. In meeting this Treaty standard, the Crown might have to ensure equality of access by reducing barriers that disadvantaged Maori. In addition, equality of outcomes – in this case, for health – was one of the expected benefits of citizenship granted by the Treaty.⁵⁷

Such ideas were often expressed by politicians and leaders throughout the century, none more so than by various Labour governments. In 1939, for example, the Prime Minister, Michael Savage, told Tuwharetoa that:

the greatest moral victory the Natives could have would be an assurance that they were going to be treated like other people . . . that they were going to get the same housing facilities, the same health facilities, the same educational facilities, the same facilities for earning their livelihood. . .

And, he added: 'that their lands would not be bought or sold without their consent.'⁵⁸ He had made similar statements to the Maori Labour Conference the year before, emphasising that Maori were to be given 'full equality of treatment, and possibly in some cases better treatment than [their] . . . European brethren.'⁵⁹

These assurances of equal standards, equality of access, and equal outcomes may in our view aptly be applied to the Maori land administration and title system as it developed over the late nineteenth and the twentieth centuries. The Turanga Tribunal has already raised the question of whether the new system assisted Maori owners to 'extract reasonable value from their land asset, by giving them a useable title arrived at through a simple and efficient process.'⁶⁰ We will consider further in the following chapters whether the titles of generations of Maori owners, succeeded to through the Native Land Court, were as secure and useable as those of general landowners. This will assist us to answer the question of whether Maori who wished to retain their lands, and participate in New Zealand's developing economy stood on a level playing field with other citizens.

The principle of good government

In our view, the principle of equity included both the obligation to ensure that multiple owners were not disadvantaged because of the inadequate recording or survey of their titles, and the obligation to ensure security of title under the Land Transfer system. Also, the Crown was required to meet a basic standard of good government.

As the High Court found in *Registrar-General of Land v Marshall*: '[I]f there is any area of the law in which absolute security is required without any equivocation – it must be in the area of security of title to real property.'⁶¹ Put simply, the Treaty principle of good government requires the Crown to keep its own laws and not to act outside the law. In that respect, key features of New Zealand's land registration system include the establishment of a register of titles, registration as conclusive evidence of the title of the person named, and state guarantee of registered titles. From 1894, the Crown provided for the registration of Maori titles under the Land Transfer Act. The legal protection that came with registration, and requirements governing that registration, were later amended by various statutes. That gave rise to a further obligation, in our view, for the Crown to monitor the provisions it had established and to ensure that Maori titles had the full protection of the law. In chapter 11 we will consider how far this standard was met.

The principle of active protection

In its report *Te Tau Ihu o te Waka a Maui*, the Tribunal found:

The Crown's duty to protect the just rights and interests of Maori arises from the plain meaning of the Treaty, the promises that were made at the time (and since) to secure its acceptance, and the principles of partnership and reciprocity. This duty is, in the view of the Court of Appeal, 'not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable'. The Crown's responsibilities are 'analogous to fiduciary duties'. Active protection requires honourable conduct and fair processes from the Crown, and full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected.⁶²

As we discussed in part II, this principle was a cardinal one for the nineteenth century, expressed many times and on many occasions by ministers and officials in the language of the day. That remains true for the twentieth

century. We could point to many examples in the evidence available for our inquiry. These include:

- ▶ the sentiments expressed by the Government and Opposition in the debates over the Native Land Act 1909 (which veered between calls for equality and claimed intentions to protect Maori and their interests);⁶³
- ▶ the sentiments expressed by the Government and Opposition in the debates over the Native Land Amendment Bill 1913 (which veered again between concepts of equality and protection);⁶⁴
- ▶ the opposition to the Maori Purposes Bill of 1945 by the Government's Maori members (who called for the protection of Maori land interests from alienation without consent, equal rights, empowerment of Maori organisations, protection of the rights of absentees, and protection of the Maori minority);⁶⁵
- ▶ the 1956 Maori Land Court Committee of Inquiry (which saw the court's function as protecting Maori interests until they no longer needed such protection, though not as protecting Maori land per se);
- ▶ the views of Jack Hunn in the 1960s (who stated that protection would continue to be necessary until full equality and integration was achieved);
- ▶ the Maori Land Court judges of the 1960s (who saw their function as being to protect land still in Maori ownership);
- ▶ the Labour Government's White Paper of 1973 (which called for protective measures to assist Maori kin groups to retain, manage, and develop the land with which they had such important ancestral ties);
- ▶ the National Minister of Works, William Young, in 1981 (who promised that the Public Works Bill provided 'extra protection "to our Maori friends"'); and
- ▶ the many court judgments and consequent political rhetoric of the 1980s and 1990s.⁶⁶

Michael Belgrave suggests that the thinking and language was often paternalistic, and the resultant degree of protection limited and weak.⁶⁷ We will consider how well the Crown abided by the standard of active protection

required of it in the following chapters, but here we note that it was an oft-expressed goal for twentieth-century governments.

The Crown raised two issues about its protective role in the twentieth century. First, it suggested that there was always a tension between protecting land so that Maori retained it, and the rights of all citizens to decide what to do with their land (including to sell it). Secondly, it argued that there was a tension between protection (which could be paternalistic), and autonomy (which allowed people to decide for themselves what risks to take).⁶⁸ Counsel noted the evidence of Pirihira Fenwick, who stated in cross-examination:

Incorporations have advantages. Trusts have problems and they're commercially based problems, in that Te Ture [Whenua Maori] does not provide, within the, under the Maori Land Court, the format for commercial enterprise, without having to go back to the Court for approval. And that, I think, is fundamentally, well, I think it belittles the ability of those people who have the ability, knowledge and to have to go and still, with cap in hand, get permission to do it. I compare that against, you know, a Pakeha company.⁶⁹

But Mrs Fenwick added that her people were determined to protect their core lands 'so that they are never, ever in danger of being lost through bad decision-making, financial bad decision-making.'⁷⁰

There is indeed a tension if protection is applied in a paternalistic, non-consultative fashion. But protection was necessary, as many Maori informed the Crown. In 1913, when the Government proposed to allow European lessees to freehold Maori reserved land, Carroll reminded Parliament of the Crown's eternal obligation to Maori:

But in regard to tabooed [tapu] land – the land bequeathed from the past to the Natives – the position is very different. They should not be violated.

The Hon Mr HERRIES – With the consent of the Natives?

The Hon Sir J CARROLL – It is a paltry cry to say, 'With the consent of the Natives.' All Governments saw the wisdom

– though the present Government fail to see any – of reserving Native Lands for their present and future maintenance. It was a cardinal policy, and, furthermore, it was an obligation cast upon all Governments, on an understanding with the Imperial authorities when the Constitution was granted to this country, that the Maori should be protected against the utter deprivation of his lands. The Imperial authorities had the administration of Native affairs before we got our Constitution, and would not hand them over until it was thoroughly recognized that every care would be taken of the Natives, and their affairs and their interests, by the Government of the country. When the honourable gentleman says, 'With the consent of the Natives,' he tries only to put the responsibility on the weak Native. I will put this to him: He has again tried to make this House believe that his policy has received the assent of the Natives – that they are willing to sell their reserves; but he has never shown us any proof or testimony of that.⁷¹

In the same debate, Tame Parata, member for Southern Maori, told the House that without protection of their land and interests from the Government, it would mean 'the crucifixion of the Maori. About 20 per cent. of them would survive; and the remainder would go to the wall.'⁷² But, in the view of some of the Maori members, the answer to the tension between equality and protection was not paternalism, but the inclusion of the 'protected' in political and administrative decision-making about their interests. Carroll called for better Maori representation and genuine political influence in Parliament. Further, Maori had to be represented on the boards and bodies that made decisions about their lands. It would only be then,

with legitimate standing-room for him [Maori], he can stand erect and face on equal terms his pakeha brethren; but insidiously, by legislation year after year, we are gradually reducing his stand till he can hardly turn – he is bereft of the name of action...⁷³

The proposed removal of Maori representation on the 'Maori' land boards was critical:

Is that right? Are you going to handle people's property without giving them a voice in the matter? Would any European tolerate such a doctrine? I ask any one on the other side whether, having landed property subject to the administration of a Board, he would like to be excluded from any voice in the administration. That is what the Government proposes to do in the case of Native lands. It is monstrous. We have this great high-sounding platitude, 'No taxation without representation' . . . Yet the Maori is denied any claim to consideration.⁷⁴

Maui Pomare, for the Government, agreed with the Opposition Maori members that Maori should be represented on the land boards.⁷⁵ But he also spoke in favour of 'equal rights and equal opportunities', and demanded:

Does the honourable gentleman mean to say, Sir, that the Native should become an everlasting minor and an everlasting lunatic, that his land should be administered for him by the Public Trustee for all time. Do you call that humanitarian legislation? Do you call that the right of British subjects?⁷⁶

'I say that the individualization of Native lands,' Pomare also told the House, 'means doing away with communism; and we all know that communism has been the death-trap of the Native race.' Apirana Ngata interjected: 'That is pakeha claptrap.'⁷⁷

If the Crown wished to know the views of Central North Island Maori on this question, there was ample opportunity for it to do so. But it seems clear to us that the view of the majority of Maori members of the House in 1913 – that protection and autonomy could be reconciled by giving Maori communities a representative voice in managing their lands at all levels – was the solution favoured in the Central North Island (and the standard required of the Crown by the Treaty).

Maori views on the degree and nature of protection required have changed with the changing circumstances of the twentieth century. The Crown points, for example, to the well-supported provision in Te Ture Whenua Maori

Act 1993 that 75 per cent of owners must agree to alienation. Maori today (more than a decade on) may feel that that threshold is too high.⁷⁸

But the point is that active protection is required of the Crown, and its nature and extent depends on the circumstances. Decisions about such protection must be made in the spirit of partnership. The Crown submitted:

The Crown considers that initiatives have been taken across the 20th century to ensure that Maori are now in a position to be able to administer their own lands, and to enable Maori themselves to strike the appropriate balance between protection and alienation. The Crown also considers that it has some obligation to provide Maori with support to do this. The responsibility of active protection however must be considered together with what is reasonable and realistic for the Crown to offer.⁷⁹

In our view, this is the correct standard and it should be applied to the whole of the twentieth century, not merely to the position today. Carroll's view in 1913, for example, was that active protection of Maori interests was a fundamental obligation for the Crown, but that it must be carried out with Maori involved in the decision-making. Maori assent, as claimed by politicians rather than as demonstrated by the deliberate representatives of the Maori people, could not be used as an excuse to abandon active protection.⁸⁰ But the 'protected' must have a voice in their own protection. We agree with the Te Tau Ihu Tribunal that the Treaty requires 'full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected.'⁸¹ This is the standard we apply in our analysis of claims about twentieth-century lands (see chapter 11).

APPLYING TREATY PRINCIPLES TO THE ALIENATION OF MAORI LAND

KEY QUESTION: WHAT TREATY PRINCIPLES (AND TRIBUNAL FINDINGS) ARE APPLICABLE TO THE CROWN'S PROVISIONS FOR ALIENATION OF MAORI LAND?

In this section, we address the application of Treaty principles to the conduct of purchases by the Crown and, from the time when it waived the right of pre-emption in 1862, by private buyers. In particular, we consider the requirements of a Treaty-compliant purchase process, including provisions made for protection of a Maori land and resource base.

The claimants' case

The claimants argued that throughout the Central North Island region, the Crown failed to protect the tribal land base of Maori and to provide for their present and future needs.⁸² The nineteenth-century Crown purchasing system as a whole in the Central North Island was in breach of its duty of active protection.⁸³ Relying on the *Report on the Orakei Claim* in particular, the claimants submitted that any Crown monopoly of purchase imposed reciprocal obligations of fairness and of ensuring that Maori retained a sufficient endowment for their needs. Article 2 of the Treaty (understood in light of Normanby's instructions to Hobson) required nothing less, and also required the Crown to ensure that it only purchased such land as Maori genuinely and freely wished to alienate, so long as it was not essential to their well-being.⁸⁴ In the claimants' submission, this was not an anachronistic or modern standard, but quite simply the standard at the time the Treaty was signed. The question for the Tribunal becomes: how well did the Crown discharge its reciprocal obligations?⁸⁵

The claimants further listed various fundamental Treaty principles as applicable to their claims:

- ▶ the protection and preservation of Maori property and taonga;

- ▶ continued rangatiratanga over lands, resources, and their management;
- ▶ the preservation for Maori of their customary title;
- ▶ the entitlement of Maori to good government;
- ▶ partnership and the duty to act reasonably and in good faith; and
- ▶ the duty of protection of sufficient resources.⁸⁶

In respect of twentieth-century alienation, the claimants argued that the Crown set up a legislative and regulatory environment which facilitated land alienation, which it then exploited to its own advantage, resulting in the alienation of a significant proportion of Central North Island Maori land to the Crown. This was in breach of the duties of partnership and good faith. Further, the claimants argued that Maori lost virtual ownership of other land because it was actually outside their control, and that the Crown did not ensure that they retained a sufficient land base. These Crown actions were, in the claimants' view, a breach of the Treaty duty of active protection.⁸⁷

The Crown's case

The Crown did not address Treaty principles appropriate to a consideration of land alienation directly. The two 'core' principles identified by the Crown – that Maori and the Crown should act honourably, reasonably, and in good faith towards each other; and that the Crown must actively protect Maori interests – are, however, clearly important in this context.⁸⁸ The Crown argued that there is nothing in the Treaty that is inconsistent with its imposition of a monopoly and its purchasing of land as cheaply as possible.⁸⁹

In addition, the Crown cited comments about colonisation which had been made by Bill Oliver in the Hauraki inquiry as providing a 'useful framework' for the evaluation of Crown Treaty responsibility in relation to Crown purchasing and land alienation. Professor Oliver began from the premise that the colonisation and settlement of New Zealand was inevitable, and the question was thus not whether the Government should have prevented

colonisation, but what its responsibilities in land acquisition were. To answer this question, the Crown suggested, Crown purchase officers and Maori involved in land transactions must be judged by 'broadly the same [nineteenth-century] standard'.⁹⁰ In doing so, the Crown argued that there are two questions for the Tribunal. Should the Government have imposed the colonising policies it, in fact, adopted? And, were 'less penal alternatives, still within the overall framework of colonisation, available to Government?'⁹¹

For the twentieth century, the Crown argued that alienation (in terms of Crown purchasing) is only a significant issue for the Taupo district. There is insufficient evidence to show that its monopoly purchases resulted in unfair prices. Fundamentally, the 1909 legislation and its successors set in place a system that struck an appropriate balance between protection (restricting alienation) and the rights of owners to sell. Two key elements of the system – vetting of transactions by an independent institution, and decision-making by meetings of owners – have remained constant, even after the enactment of Te Ture Whenua Maori Act 1993. These may not have been adequate safeguards but, in the Crown's submission, there is too little evidence to tell whether the Treaty has been breached.⁹²

The Tribunal's analysis

The Tribunal has long accepted that the Treaty envisaged that Maori would alienate some land and resources; that colonists would acquire significant areas without necessarily damaging the capacity of iwi and hapu to participate in the benefits of settlement. Communities, left to themselves, might have been expected to make strategic sales for a range of purposes, including cash flow, and raising funds for development. But, the Turanga Tribunal pointed out, 'no community would choose to sell land to the point of self destruction'.⁹³

As we have noted, the Crown submitted that it would not re-litigate the 'systemic' findings of the report *Turanga Tangata Turanga Whenua*, but that it wished the Tribunal

to test their applicability in the Central North Island. In that report, the Tribunal found that a key Treaty breach lay in the creation of a 'virtual' individual title in the native land legislation. This provided for the conduct of land purchases from individuals, on each of whom the new tenure system had conferred the right to sell their undivided, paper interests in a block. It was, however, a fundamental principle of the Treaty that alienations should be made by those who actually possessed and had authority over the assets at stake – the community of owners. The native land regime was thus 'destructive of community decision making in respect of alienation and land development', and made it impossible for community leaders to rally their people around community planning.⁹⁴ Because individuals or small groups of individuals could now decide to alienate (or had to alienate) without reference to the community, sales took place at an accelerated rate. By the second generation of owners, the Turanga Tribunal found, the problem was even worse.⁹⁵

In terms of land alienation in the twentieth century, the Turanga Tribunal drew attention to three key themes:

- ▶ the introduction of state-controlled alienation through the district Maori land boards, a system in which the boards 'stood in the shoes of the owners', who in practice lost control over and access to their lands for nearly two generations;⁹⁶
- ▶ the 'strange phenomenon of uncontrolled land retention' – land became fragmented through partitions, while titles became so fractionated through individualised succession that effective control of land was not possible (making it, in some cases, a liability instead of an asset);⁹⁷ and
- ▶ controlled land retention either by or on behalf of Maori, through incorporations and trusts. In the Turanga inquiry district, the incorporations that survived were on the whole larger, with strong leadership, and managed to get access to finance.⁹⁸

In this section, we address the Treaty principles applicable in the Central North Island region to:

HE MAUNGA RONGO

- ▶ the conduct of land transactions by the Crown and private buyers; and
- ▶ Maori land retention.

The principle of active protection

The Muriwhenua Land Tribunal considered that honourable conduct and fair process were required of the Crown, as an integral part of active protection. At the outset, the British Secretary of State, Lord Normanby, spelled out how Maori interests should be protected. In 1839 he required ‘the audit of the Government’s policies and practices through the appointment of an independent Protector of Aborigines, and the assurance of adequate land reserves.’⁹⁹ We return to the latter requirement below. In elaborating on the protective role, the Secretary of State further required that:

- ▶ All dealings with Maori were to be conducted on the basis of sincerity, justice, and good faith.
- ▶ Maori must be prevented from entering into contracts which would be injurious to their interests. Thus, Government agents were not to purchase from Maori any land ‘the retention of which by them would be essential, or highly conducive to their own comfort, safety or subsistence’.
- ▶ Government purchases for land settlement were to be confined to such districts as Maori could alienate ‘without distress or serious inconvenience to themselves’.¹⁰⁰

In accordance with Imperial policy, the Crown also reserved the right of pre-emption for itself, which had long been justified on the grounds of protecting indigenous sellers. As Justice Chapman said in *The Queen v Symonds*:

the exclusive right of the Queen to extinguish the Native title . . . necessarily arises out of our peculiar relations with the Native race, and out of our obvious duty of protecting them, to as great an extent as possible, from the evil consequences of the intercourse to which we have introduced them, or have imposed upon them. To let in all purchasers, and to protect

and enforce every private purchase, would be virtually to confiscate the lands of the Natives in a very short time.¹⁰¹

In article 2 of the Treaty, Maori, for their part, agreed to sell their lands only to the Crown. Subsequently, in 1844 (briefly) and again in 1862, the Crown waived that right. The Colonial Office, considering the waiver of pre-emption in the Native Lands Bill 1862, took comfort from the fact that the power to bring the act into force rested with the Governor, Sir George Grey, who at that time still retained its confidence.¹⁰²

The Hauraki Tribunal noted that the principal protection for Maori was that the Governor was empowered to make reserves for the Maori owners, with alienation prohibited or restricted, before the Native Land Court issued a certificate of title. What had happened, however, was that Crown pre-emption had been abandoned in favour of direct dealing – an end the settlers had been anxious to achieve.¹⁰³ The settlers, in the Tribunal’s view, ‘wanted possession of most of the undeveloped Maori lands.’¹⁰⁴ The Mohaka ki Ahuriri Tribunal considered the Crown’s waiver a ‘direct violation’ of the Treaty; which was not to say that the Treaty could not be altered, but that any alteration or amendment needed the consent of both parties, the Crown and Maori.¹⁰⁵ In chapters 10 and 11, we will consider the Treaty compliance of subsequent Crown acts in reintroducing a monopoly over land purchases in our region at various times, and in various circumstances, after 1870.

The application of the Treaty principle of active protection to the alienation of land is very clear, whether it was purchased by the Crown or by private buyers through mechanisms established by the Crown. Lord Normanby explicitly enjoined the Governor to observe high standards in this respect. The same standards still applied after the Crown unilaterally altered the terms of the Treaty. In admitting private buyers into the market, the Crown had a responsibility to regulate and scrutinise private transactions. Parliament, for example, enacted the Native Lands Frauds Prevention Act in 1870. This Act provided for the

declaration of native trust districts within which trust commissioners might be appointed. The duty of the commissioners, Henry Sewell explained to the House, would be 'to inquire into the circumstances attending every alienation – the nature of the consideration, whether it has been paid, and whether the parties understood the nature of the transaction.' They were required to certify every transaction before alienation was completed. The purpose of the measure was to ensure, in all transactions between Maori and Europeans, 'a system of fair dealing'.¹⁰⁶

Sewell was at pains to point out the importance of steering a path between 'two opposite dangers'. 'We must not attempt,' he said, 'to take the Natives under our protection, controlling their free agency in dealing with their own lands' – which Europeans and Maori would both object to.¹⁰⁷ On the other hand, the same protection must be extended to Maori as settlers were accustomed to in their own tribunals. Either party, therefore, might have recourse to the Supreme Court in the case of difficulty arising from their transactions. These provisions were extended in the Native Land Act 1873, which required the Native Land Court to be satisfied of 'the justice and fairness' of any transaction, the assent of all the owners, and the payment of the stipulated price together, with any charges in relation to partition.¹⁰⁸

The Turanga Tribunal considered that:

A broad construction [of Parliament's intention in both Acts] would have gone a long way towards meeting the Crown's Treaty obligation of active protection. The questions of whether transactions were equitable and in good conscience, whether a fair price had been paid, whether the proper forms and procedures had been followed, whether consent had been properly obtained, and whether the vendors had sufficient land left for their support, were all considered necessary at the time, and could have been administered in a spirit that was genuinely protective.¹⁰⁹

But the evidence in Turanga at least was that the commissioners and the Native Land Court were under-

resourced. 'There was no spirit of generosity in how the provisions were applied.'¹¹⁰ We will consider how well the Crown met this Treaty obligation in the Central North Island in chapters 10 to 11.

The question of a fair price

The Crown submitted that its attempt 'to purchase land as cheaply as it could be, in itself, not in breach of Treaty principles' and that the claimants 'overstate the extent to which the Crown's obligations extend to ensuring a fair price'.¹¹¹ The claimants, on the other hand, argued that the Crown had a fiduciary duty neither to use its pre-emptive powers to stifle competition for Maori land nor to deprive them of a fair price.¹¹²

Strictly speaking, as the Ngai Tahu Tribunal has found, Normanby's instructions were that the Governor should buy Maori land as cheaply as possible, on the understanding that their unsold lands would appreciate enormously in value as a result of colonisation. So long as Maori retained a sufficient endowment, both for traditional pursuits and for the development of wealth in the new economy, the Crown's obligation would be met.¹¹³ We return to this point below.

Here, we note that pre-emption was waived by the Crown in 1862, although – for our inquiry region – it was reimposed selectively and extensively afterwards. From the moment there was a free market in Maori land, two strains of thinking were expressed frequently in official circles. First, direct purchase was claimed to allow Maori a fair, market-based price for their lands. The unfairness of the Crown paying lower prices than private persons was decried, often with copious examples. Secondly, auctioning of Maori land – rather than direct purchase by either the Crown or by settlers – was claimed to be the best way of getting a fair price for Maori land. Inevitably, whenever the reimposition of a Crown monopoly was discussed after 1862, one (or both) of those arguments would crop up.¹¹⁴

It seems to us, therefore, that the situation in the Central North Island had to take account of what was truly 'fair' in

providing Maori an equivalent for their lands, certainly in the post-1873 climate. The Crown's obligations of reciprocity, particularly strong whenever it reimposed a monopoly after 1862, required it to deal fairly and with honour. In 1894, for example, Stout urged that auctions were the fairest way to obtain a true equivalent for Maori, adding:

All I ask this House to do is to give the Maori people real justice; and we can give them that justice without doing any injustice to other parts of the population of this colony. We have by law – our honour itself – pledged to treat them as we treat Europeans. They have equal rights with us, and I say it is utterly unfair that we should seize their land at a less price than they can get for it from other people.¹¹⁵

This sentiment was fairly typical from the proponents of sale or lease by public auction, and also from the free traders. Any system, of course, may result in outcomes where sellers get less than the true market value of their land. But, in our view, if pre-emption was used to institutionalise that outcome, then it was inconsistent with the spirit and principles of the Treaty. 'We have no right,' said Stout, 'to seize their land at a price less than they can get for it in the open market from other people.'¹¹⁶ We agree. We will test the Crown's use of pre-emption against this standard in chapters 10 to 11.

Outside monopoly situations, the Crown and private buyers or lessees were sometimes in competition for Maori land. We note that, in its protective statutes, the Crown required an independent authority (trust commissioners or the Native Land Court) to check that private transactions were equitable (including price or rent). In the Turanga Tribunal's view, this included a requirement that prices be certified as fair.¹¹⁷ The 1873 Act prescribed specifically that the fairness of rents should be examined but did not do the same for prices.¹¹⁸ In our view, fairness of price was, however, implicit in the requirement that an alienation be certified as equitable. That was also the view of Native Minister Ballance, for example, who condemned trust commissioners for certifying 'transactions when the consideration was a mere bagatelle.'¹¹⁹ Trust commissioners, in the evidence

of Robert Hayes, did understand that they were to satisfy themselves that a fair price was being paid.¹²⁰ This was a standard set by the Crown itself. We agree that that should have been the standard and that there should have been an independent audit of it. There was, however, doubt about whether the trust commissioners really had the power to review Crown purchases. From 1883, the Crown legislated to exempt some of its purchases from trust commissioner scrutiny.¹²¹ In our view, it was not consistent with the Crown's honour that its purchase officials should be held to a lesser standard than private buyers. A 'fair price' should have been required of both.

In 1893, legislation provided for a national board to conduct the Crown's land purchases. The board was to have Maori representatives (including the Maori members of Parliament) and would commission an independent valuation of land before buying it, with one of three valuers to be selected by the owners.¹²² This legislation, however, was a dead letter. Valuation and a minimum price were not reintroduced by law for a further 12 years, until legislation in 1905 required a Government valuation to be the minimum price.¹²³

In our view, the Crown was required both to check that Maori were getting a fair price from settlers, and to pay a fair price itself. How a 'fair' price was (or should have been) calculated, however, is a complex question. Nonetheless, this was the standard set by law and by the Treaty. We will measure the Crown's actions in this respect in the following chapters.

The question of compulsory acquisition for public works

The claimants argued that much of the administration and alienation of their land has been coercive or has contained elements of compulsion. In particular, they complained of three forms of compulsory acquisition: the confiscation of land during the New Zealand Wars; the taking of land for public works (including for scenery preservation); and the compulsory purchase of 'uneconomic' interests in the mid-twentieth century. We dealt with *raupatu* in part 11 of this

report. In part III, we consider the other two complaints of compulsory acquisition (see chapters 11 and 12).

On the face of it, the Treaty standard with regard to compulsory acquisitions is very clear. In 1945, the Maori members of Parliament complained to the Government that taking people's land interests from them:

without the consent of (or against the wishes of) the owners is bad, not British justice, and politically disastrous for the following reasons:—

- (a) It hits right into the heart and soul of Maori mental sentiment and Mana i.e. the alienation of his lands without his consent.
- (b) To the Maori it will react as a violation of the Treaty of Waitangi and is against Labour's principle of equal rights and of the protection of the minority.¹²⁴

The claimants argued that the taking of land by compulsion, especially without compensation, is a direct and blatant breach of article 2 of the Treaty. Further, they argued that the various ways in which Maori and their lands have been discriminated against, especially in public works takings, is in breach of article 3 and the principle of equity. They rely on the *Turangi Township Report* and other Tribunal reports for the relevant Treaty standards.¹²⁵ The Crown, on the other hand, argued that the *Turangi Township Report* goes too far in its finding that the Crown can only override Treaty guarantees in exceptional circumstances, as a last resort in the national interest.¹²⁶ Rather, the Crown's view is that compulsory acquisitions for public purposes are a legitimate and necessary part of its kawana-tanga responsibilities. In exercising them, it must, however, 'pay fair market compensation, consult with Maori and where possible protect Maori rights and interests in land'.¹²⁷

We will explore these issues in depth in chapter 12. Here, we note briefly the Treaty standards as found by the Turangi Township Tribunal. In its report, the Tribunal raised the question whether – in light of the 'overarching and far-reaching' importance of the key Treaty bargain – the Crown could ever be justified, when exercising its

article 1 right to govern, in overriding the rights guaranteed to Maori. Under article 2, Maori were assured of the right to keep their land until such time as they wished to sell it. In the Tribunal's view, legislation such as the Public Works Act 1928, which provided for the taking of Maori land for certain purposes without notice to, or the consent of, the Maori owners, must be assessed against that guarantee. So fundamental were the rights guaranteed to Maori in article 2, that the Crown must meet a high threshold in overriding them. Only in 'exceptional circumstances and as a last resort in the national interest' could this be appropriate.¹²⁸ A lesser test, such as a Government proposal being in the public interest or for reasons of convenience, would not suffice.¹²⁹

The Tribunal also found that the Crown had to meet several requirements:

- ▶ Maori owners must give informed consent or agreement if at all possible;
- ▶ all practicable alternatives to taking the land had to be exhausted first;
- ▶ proposals to acquire land compulsorily should be referred to independent assessment; and
- ▶ the Crown should ensure that no other suitable land is available before seeking to acquire Maori land.

In short, the Tribunal proposed a higher test than equity with other landowners because a key Treaty guarantee was at stake. If no other land was suitable, and if exceptional circumstances justified a compulsory acquisition in the national interest, even then the Crown had to infringe the tino rangatiratanga of the claimants as little as possible. For example, land should be purchased only if a lease is not possible and taken only if a purchase is not possible. Compensation, it was assumed, would always be paid, and had to reflect the true value of ancestral land (and the true hardship suffered by its owners).¹³⁰

In terms of a compulsory acquisition without compensation, the Tribunal found in its *Ngati Rangiteaorere Claim Report* that such a taking 'turned an acquisition into a confiscation'. 'Whatever the merits of compulsory acquisition, as a last resort,' stated the Tribunal, 'there can be

no justification for the failure to pay compensation.' If it was ever necessary to take land, then compensation must always be paid.¹³¹

In terms of the equitable treatment of Maori and non-Maori citizens, the *Ngai Tahu Ancillary Claims Report 1995* noted that some provisions in the public works legislation for taking Maori land differed considerably from those for taking general land, to the disadvantage of Maori. In particular, there was no serious requirement for the Crown to notify Maori owners of any proposal to take their land until as late as 1974. This was, in part, because of the Crown's own title system for Maori land, and the difficulties that officials said were insurmountable in terms of contacting or finding Maori owners for notification or negotiation. Maori were denied the opportunity given other citizens, therefore, to object to the compulsory acquisition of their land.¹³²

These, then, are the Treaty standards for the acquisition of Maori land for public purposes as found by previous Tribunals. We will test their applicability in the Central North Island, and consider the parties' arguments in detail, in chapter 12.

Retention of a Maori land and resource base

The centrality of ancestral land to Maori culture, identity, and well-being was perceived by every generation of officials in New Zealand. The Prime Minister, Savage, for example, who set such stock on equality of treatment and opportunity, noted in 1938:

The Maori is the representative of a great race of people. He has a tradition of which he is justly proud – and the pakeha as a New Zealander feels that he, too, shares in that tradition, and I am sure he desires to help the leaders of the Maori people to preserve and cherish all that is best in Maori culture on behalf of the future generations . . . Government recognised that the welfare of the Maori was inextricably bound up with his land and that the development of the Maori people could best be achieved through effective land settlement. The Government was doing all it could to encourage and assist the

Maori in whatever field he desired to apply his talents, but since it was through the land that a new form of Maori life was being created, it was in that field that the principal effort was being made.¹³³

We have referred above to the Secretary of State's instructions that the Governor should be careful to ensure that Maori did not sell land essential for their well-being. Here we consider the Crown's obligations in protecting Maori in the retention of land. The Ngai Tahu Tribunal considered that particular obligations arose from the granting of the 'valuable monopoly right' of pre-emption, and that it was a limited right: it 'was not to extend to land needed by Maori.'¹³⁴

Moreover, the two parts of article 2 must be read together and in the light of the circumstances of the time, including the importance to the chiefs of the assurance that their lands would be protected. The Tribunal found that article 2, read as a whole, 'imposed on the Crown a duty first to ensure that the Maori people in fact wished to sell [and thus to be clear who the owners were]; and secondly that each tribe maintained a sufficient endowment for its foreseeable needs.'¹³⁵ But how did the Tribunal define 'sufficiency' in this context? A wide range of factors might come into play: the size of the tribal population, the land they occupied or exercised rights over, and the principal sources of their food supplies. The tribe's future needs, however, would be different from their present needs. The Crown, intending to buy Ngai Tahu land as cheaply as possible in the 1840s and 1850s, had a 'correlative duty' to ensure that adequate good-quality land was left in their possession so that they would later enjoy the 'added-value accruing from British settlement'. The Tribunal considered that the tribe should retain land 'sufficient. . . to enable them to engage on an equal basis with European settlers in pastoral and other farming activities.'¹³⁶

The tribal base was not confined to land. The Muriwhenua Fisheries Tribunal found that the Treaty required the Crown to protect fisheries and other natural resources which Maori might wish to retain, and to

‘assure the retention of a sufficient share from which they could survive and profit, and the facility to fully exploit them.’¹³⁷ And the Taranaki Tribunal asked whether ‘adequate endowments were secured for the future support and development of the hapu.’¹³⁸ In our inquiry, the Crown admitted that it targeted key Maori-owned resources, including geothermal taonga and various scenic attractions, although it argues that claimants have overstated the extent to which it did so.¹³⁹ We agree with the Muriwhenua Fishing Tribunal that the Crown’s Treaty responsibility was the same in terms of key resources as it was for land. It had to ensure that Maori retained a sufficient endowment for the maintenance of their culture and way of life, and also – should they so choose – for use in the new economy. We will explore how well the Crown abided by this Treaty standard in the following chapters, and also in parts iv and v of this report.

In the wake of the Crown’s waiving of pre-emption and its introduction of the Native Land Court, the question arose again of its obligation to ensure that Maori who sold land retained ‘sufficient’ for themselves. In 1873 the Native Minister, Donald McLean, introducing the Native Lands Bill, drew attention to the creation of District Officers whose role would be to keep a record book of the native titles in each district and to ensure that a minimum of 50 acres ‘per head’ was reserved for Maori. The Turanga Tribunal considered that the figure ‘took no account of the size of families, location, and quality of land needed for workable farms’, given that the land requirements of pastoral farming at the time were clearly greater. Such a requirement, therefore, was ‘fundamentally misconceived.’¹⁴⁰

The preamble of the Native Land Act 1873 appeared to have a more generous object than a sufficiency of 50 acres per individual, envisaging sufficient land for the support and maintenance of the Maori people as well as landed endowments on top of that for their permanent ‘general’ benefit:

And whereas it is of the highest importance that a roll should be prepared of the Native land throughout the Colony,

showing as accurately as possible the extent and ownership thereof, with a view of assuring to the Natives without any doubt whatever a sufficiency of their land for their support and maintenance, as also for the purpose of establishing endowments for their permanent general benefit from out of such land...¹⁴¹

We would add that the Government’s mechanisms sit oddly with the stated purpose of the measure. The Government’s ‘chief object’, McLean stated:

should be to settle upon the Natives themselves, in the first instance, a certain sufficient quantity of land which would be a permanent home for them, on which they would feel safe and secure against subsequent changes or removal; land, in fact, to be held as an ancestral patrimony, accessible for occupation to the different hapus of the tribe: to give them places which they could not dispose of, and upon which they would settle down and live peaceably side by side with the Europeans.¹⁴²

Had this stated intention been carried out, many of the claims before us may have been unnecessary.

Te Waka Maori a Niu Tirani, which printed a description of the 1873 provision for reserves, in both Maori and English, seems to have taken McLean’s assurance into account when it wrote:

No man will be able to sell the land so set apart and henceforward it will not be in the power of the chief to sell all the land of the tribe and leave the tribe without any land;¹⁴³ but by the new law every man, woman, and child will be counted, and a large piece of land for the whole of them, in proportion to their numbers, will be kept for them; where they can live, and where they may die, for it will not be lawful for anyone to sell that land, or take it from them, or prevent them from living on that land and cultivating it.¹⁴⁴

Though we will examine further the extent of protection provided to Maori under this provision, the importance of McLean’s statement to us here is its recognition, 33 years after the Treaty, of the Crown’s obligation to ensure that

ancestral lands were made inalienable, and that the hapu would maintain rights of occupation.

The Turanga Tribunal concluded:

Ministers and officials knew very well that land was held communally; a principal function of the Native Lands Acts was to reverse that fact. They were also very aware of the importance of land to Maori. It follows, therefore, that a requirement for each man, woman, and child to own 50 acres was fundamentally misconceived, at least until after Maori had individual titles that they could use other than to sell or lease. Claimant counsel noted that the Crown did not attempt to ascertain and provide for sufficiency of land at a hapu level. The Crown responded that it had 'some obligation' to do so. It is instructive that the Crown's remedial attempts, providing a 4000-acre block in 1877 'in recognition of the landlessness of Rongowhakaata', and a 450-acre block to 'landless Whanau a Kai' after 1882, were both necessary and carried out at a hapu level. Too little too late does not negate the fact that the Crown was capable of conceptualising needs at a hapu level, had the land to provide for them, and needed to do so.¹⁴⁵

Some 30 years after the 1873 Act, the Crown's fiduciary duty was explained very clearly by Commissioners Stout and Ngata, as they considered the history of Maori land legislation and policy. In the first of their many reports, in which they drew attention to the 'confusion of our Native-land laws', they made a strong argument for the Crown to consider its obligations to Maori if land acquisition should resume. They cited with approval the detailed criticisms made by the 1891 Native Land Laws Commission of the individualisation of Maori title, and of the swings in the Crown's purchase policy. They commented on deep Maori unease in the 1890s, and on tribal unanimity, evident in the 1897 petition to Queen Victoria, seeking an end to Crown purchase of Maori lands.

The commissioners admitted 'the duty of the State to provide land for its increasing population', but asserted its duty also to see that in doing so, it 'does no injustice to any portion of the community, least of all to members of

the race to which the State has peculiar obligations and responsibilities.' The State and the people of New Zealand had a duty to preserve the Maori 'race', who could be active and energetic citizens. (It was a mark of public attitudes that they felt the need to say so.) And the State must therefore consider not just the theory on which its land-acquisition policies were founded, but the practical outcomes of the system. How the native land question was handled in the immediate future, the commissioners argued, was the key to discharging this obligation.

In particular, the commissioners pointed to the responsibility of the Crown not just to the present generation, but to those who followed; and not just to individual owners, but to the community of owners. The settlement of their lands by Maori themselves was the first consideration – and provision must be made for the descendants and successors of the present owners as well. The State's assumption that revenue from the minimum amounts of land set down would be sufficient for a Maori owner 'without providing in any way for his descendants' was not adequate. But, in any case, there was more involved than ensuring minimum individual portions of land. Native lands, because they were tribal, were different from individually held property: 'in one sense they may be said to be impressed with a trust. To allow the present possessors to destroy the tribal land means that they should destroy the tribe.'¹⁴⁶ That, it seems to us, could not have been a clearer statement of the nature of the Crown's fiduciary duty. It was a duty to a tribal people. It was thus a duty to ensure that individuals were not empowered to alienate what remained of the tribal land base.

In our view, these findings of the Stout–Ngata commission in 1907 provide a standard by which the Crown's actions should be assessed with regard to Maori land for the rest of the twentieth century. The commissioners gave an unequivocal answer to the question of the 'freedom' of the individual to alienate, weighed against the wider community good. As we discussed at the beginning of this chapter, the Crown referred in this inquiry to its duty not to restrict

Maori freedom of choice. The Hauraki Tribunal, which considered the Crown's submission on that point in its own inquiry, considered this a 'poor argument'. 'Protection of Maori', the Tribunal stated, 'should have meant the making of inalienable reserves.'¹⁴⁷ We agree, noting also our discussion above of how this very issue was seen by Carroll and Herries in 1913. Maori leaders had a range of views on such a crucial matter. Tame Parata perhaps summed up the position best – and indicated the basis of the different views Maori held – when he argued that putting Maori and Pakeha 'on the same plane' in respect of looking after their land interests would mean the 'crucifixion of the Maori'. About 20 per cent, he said, would survive; the rest would go to the wall.¹⁴⁸

It has seemed to various Tribunals that the scale and speed of land alienation in districts where they have examined the evidence indicates that the Crown was not exercising its duty of active protection of Maori land and resources. The Hauraki Tribunal found it 'perfectly obvious

that the Crown never embraced the responsibility of making certain core lands absolutely inalienable'. The Crown's defence in that inquiry that it was avoiding 'inappropriate paternalism' had little validity in the Tribunal's view, given evidence that Maori were 'constantly driven by the pressure of debt or day-to-day needs for money to sell almost all the patrimony of their forebears and the needful inheritance of their children.'¹⁴⁹

In the Hauraki Tribunal's view, the duty of active protection 'certainly extended to the need to preserve a substantial proportion of the patrimony for future generations, notwithstanding the immediate needs of nineteenth century owners.'¹⁵⁰ In any case, the argument about 'inappropriate paternalism' vis-à-vis protections was unjustified:

The insistence of settler politicians and officials that it would be better for Maori if they divested themselves of the bulk of their land was itself paternalistic, as was the repeated refusal to comply with Maori requests to return the real control over the land to their tribal organisations.¹⁵¹

We will examine these issues further, in terms of the

SUMMARY

- ▶ The essence of the Treaty 'bargain' was that Maori agreed to the Crown's kawanatanga, which gave it the right to make laws, in return for the active protection of their own authority (tino rangatiratanga), including the authority of communities over the land held in their collective possession.
- ▶ Maori and settlers required certainty in their dealings with each other over land, which in turn required some security of title. The Crown, however, should not have introduced a new tenure system for Maori land, a matter so fundamental to their rangatiratanga, without their consent.
- ▶ The Crown's imposition of a British court to allocate title, and its individualisation of that title, disempowered Maori and was – in the finding of many Tribunals – a serious breach of the Treaty. Maori communities wanted to decide their own entitlements and to manage them collectively, both of which were reasonable and possible in the circumstances of the nineteenth and twentieth centuries.
- ▶ In many ways, the alienation of land and resources was bound up with the new title system, which created a saleable individual interest outside the community's control and in many ways useless to each 'owner' other than for sale.

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- ▶ The twentieth-century title system was, in the findings of various Tribunals, an offshoot of the nineteenth-century one. Maori have struggled with fractionating titles and fragmented individual interests. The Crown has accepted ‘some’ responsibility for this, and its actions to remedy the situation must be measured against the Treaty principles of partnership, autonomy, equity, and active protection.
- ▶ The principles of autonomy and active protection are (and have always been) perfectly reconcilable. The Crown must give effect to Maori autonomy while actively protecting Maori interests by ensuring that Maori are fully empowered to represent, define, and protect their own interests in any bodies or systems established to manage their lands and affairs. This was evident in 1913 to Carroll and others, and it is still evident today.
- ▶ The essential Treaty ‘bargain’ also anticipated the alienation of land for settlement, in which Maori would retain a sufficient land and resource base for their customary lifestyle and – as they chose – for development in the new economy. Both peoples were expected to prosper and benefit.
- ▶ In its dealings for Maori land – whether directly, or in regulating private transactions – the Treaty requires the Crown to actively protect Maori iwi and hapu in retention of a sufficient base, to act scrupulously and with utmost honour, to deal fairly and equitably, and to obtain full, free, and informed consent to any transactions. These principles were enunciated throughout the nineteenth and twentieth centuries, in the language of the times, and were both reasonable and achievable. These are the standards by which the Crown’s purchase of Maori land, and its regulation of private alienations, must be measured.
- ▶ If Maori land is to be taken compulsorily, it must be exceptional, in the national interest, and as a last resort.

Notes

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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, pp 124–125
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8. Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 2, p 777
9. *Ibid*, pp 662, 777
10. Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001), p 144
11. *Ibid*, pp 144–151
12. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, pp 416–417
13. *Ibid*, p 535
14. *Ibid*, vol 1, p xxviii

15. Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 2, p 671
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17. *Ibid*, p 778
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22. *Ibid*, p 213
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24. Waitangi Tribunal, *Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 159
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27. *Ibid*
28. W L Rees (as quoted in Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pp 1561–1562)
29. W L Rees, Memorandum on the Native Land Laws, AJHR, 1884, sess 2, G-2, p 5
30. R Stout, 28 September 1894, NZPD, vol 86, 1894, pp 387
31. *Ibid*, p 388
32. Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 2, p 896
33. Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001), pp 196–197
34. 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 258
35. *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 683, per Richardson J
36. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 68
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