CHAPTER 16

PERPETUAL LEASING OF RESERVES

16.1 Introduction

A major grievance of the Wai 145 claimants relates to the introduction of perpetually renewable leases for the Wellington tenths and Palmerston North reserves in 1895. The claimants' grievances concerning the perpetual leasing regime fall under two chronological heads: first, from the time the regime was imposed on these reserves in 1895 until 1997 and, secondly, the period since the enactment of the Maori Reserved Land Amendment Act 1997, which provides for the eventual phasing out of perpetual leases for Maori reserves. Thus, we deal first with the legislation in force prior to 1997 in sections 16.2 to 16.3 and then, in sections 16.4 to 16.6, we examine the situation after 1997.

16.2 The Perpetual Leasing Regime

As we noted in section 14.8, the Native Reserves Act 1882 provided for the leasing of reserves for agricultural and mining purposes for up to 30 years, and for building purposes for a maximum of 63 years by renewable terms of up to 21 years each, with a reassessment of rents after each term. Rural tenths suitable for agriculture could thus be leased on 30-year terms and urban tenths required for building for up to 63 years. By 1882, virtually all the rural and urban tenths were already leased under the provisions of earlier legislation, but the lessees could convert those leases to new ones under the 1882 Act once their existing terms had expired. This staggering of renewals was also to occur with subsequent amendments of the reserves legislation which altered the conditions of leases. It meant that at any one time reserves were held on a variety of leasehold conditions. We cannot follow these ramifications in detail, but we need to bear them in mind as we examine the most important change that was gradually imposed on the Wellington tenths and Palmerston North reserves: namely, the perpetual lease, sometimes called a Glasgow lease.[1]

1. As noted by Crown counsel (doc P4, p 7), the terms 'lease in perpetuity' and 'perpetual lease' are sometimes used interchangeably. However, 'lease in perpetuity' refers strictly to leases available for a term of 999 years, while 'perpetual lease' refers to a lease which contains a perpetual right of renewal. The terms 'perpetual lease' and 'perpetually renewable lease' are primarily used by the Tribunal. The term 'perpetual lease' is the form of lease prescribed by the Maori Reserved Land Act 1955.

16.2.1 Background to perpetual leasing

Much of the impetus for the conversion of leases of Maori reserved land to perpetual leases came from outside Wellington, most notably from lessees of South Island West Coast and Taranaki reserved land. Since these developments have already been examined in the Tribunal's *Ngai Tahu* and *Taranaki* reports, we need not examine them in detail here.[2]

Perpetual leases were first provided for in the Westland and Nelson Native Reserves Act 1887. In place of the 30-year and 63-year terms, a new standard term of 21 years for Westland and Nelson reserves was substituted by section 3. In all leases of these reserves, perpetual right of renewal was granted to the lessee by section 14, with the rent to be reviewed at the end of every 21-year term. The Tribunal in its *Ngai Tahu Report 1991* noted that 'Effectively the land was removed from the control, use, or occupancy of the Maori owners'.[3]

The Ngai Tahu Tribunal upheld a claim that the Crown failed to protect Ngai Tahu by passing legislation imposing perpetual leases without the consent of Ngai Tahu and without provision to protect them from economic loss.[4] As Crown historian Dr Donald Loveridge stated, 'After a thorough examination of these events, the Ngai Tahu Tribunal concluded that the perpetual lease provisions in the 1887 legislation "virtually came out of the blue", as far as the owners of the Westland reserves were concerned'.[5]

The West Coast Settlement Reserves Act 1892 empowered the Public Trustee, at his discretion, to grant perpetual leases of Taranaki reserves. A claimant witness, Neville Gilmore, noted that two public meetings, one with the Maori owners and one with the lessees, were held in Patea in January 1892. The Premier, John Ballance, asked Maori if they were agreeable to fresh leases being issued for the reserves. Ngarangi, speaking on behalf of the assembled owners, said that they opposed fresh leases being issued and requested the return of their land.[6] Dr Loveridge confirmed that, as with the perpetually renewable leasing provisions of the earlier Westland and Nelson Reserves Act 1887, it appeared that the provisions in the 1892 Act also 'virtually came out of the blue' as far as the Maori owners were concerned. He added that such tenures 'were not put to the owners as a possible alternative in January 1892, when Ballance met with them personally'. Dr Loveridge noted that it seems certain that perpetual leases would have been rejected by the owners.[7]

The Tribunal in its *Taranaki Report* noted that, by the terms of the Treaty, 'Maori were solemnly guaranteed not merely the ownership of their lands but the control and possession of them. Emphasis is given to this position when the English and Maori texts of article 2 are

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2. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Booker and Friend Ltd, 1991), vol 3, ch 14; Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), pp 257–276
3. Waitangi Tribunal, *The Ngai Tahu Report 1991*, vol 3, p 746
4. Ibid, pp 753–754, 788–789
5. Document C2, pp 29–30 (quoting Waitangi Tribunal, *The Ngai Tahu Report 1991*, vol 3, p 776)
6. Document A11, pp 77–78
7. Document C2, p 58

read concurrently.' It expressed the preliminary opinion that, among other matters, the legislative provisions for perpetual leases were contrary to the Treaty's terms and principles.[8]

16.2.2 Perpetual leasing of Wellington tenths and Palmerston North reserves

The Native Reserves Act Amendment Act 1895 extended the leasing powers of the Public Trustee where land vested in him under the Native Reserves Act 1882 was subject to a lease for a term of more than 14 years, without any right of renewal or valuation for improvements. The trustee was authorised by sections 6 and 7 of the 1895 Act, at his discretion, to grant a new perpetually renewable lease of such land as from the date of the expiry of the existing lease. The term of the new lease was to be 21 years, and rent was set at 5 per cent of the value of the land, including improvements.

However, it appears that doubts arose as to whether the 1895 Act was intended to apply to the Wellington tenths, and a further Native Reserves Act Amendment Act was passed in 1896 to clarify the position. Section 2 provided that all the Wellington urban and rural tenths listed in a schedule to the Act were deemed to have been vested in the Public Trustee under section 8 of the Native Reserves Act 1882. However, no mention was made of the Palmerston North reserves.

It is not known how many of the Wellington tenths' leases were converted to perpetual leases before further amending legislation was passed in 1917, although it is known that Pakuratahi sections 4 and 7 were so converted in 1906.[9] It appears that the Public Trustee was not authorised under the 1895 and 1896 Acts to grant perpetual leases of urban reserves leased under the 1882 Act for building purposes. The perpetual leasing provisions of the 1895 Act applied only to land which was leased under the Native Reserves Act 1882 without any right of renewal. As noted above, land leased under the 1882 Act for building purposes was subject to renewable leases (albeit for a maximum of 63 years) and therefore did not come under the provisions of the 1895 Act. As a result, further legislation was needed to bring most of the urban tenths and Palmerston North reserves under the perpetual leasing regime. This was done by making the Public Trustee a leasing authority under the Public Bodies' Leases Act 1908, which allowed leasing authorities to lease land for terms of up to 21 years, with perpetual rights of renewal.[10]

The position of the Palmerston North reserves was clarified by the Native Land Claims Adjustment Act 1913. Section 18 deemed the Public Trustee to be a leasing authority under the Public Bodies' Leases Act 1908 in respect of the Palmerston North reserves containing 71 acres 1 rood which were vested in the Public Trustee.[11] The effect of this was to empower the

8. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, p 273
9. Document I11, p 69
10. Section 5 of the Public Bodies' Leases Act 1908 (doc A21, pp 131–132)
11. Document A21, p 144

Public Trustee to convert existing leases for Palmerston North reserves to perpetual leases. The basis of conversion was the payment by the lessee of the reversionary interest of the lesssor in the improvements.[12]

The Native Land Amendment and Native Land Claims Adjustment Act 1917 closed yet another possible gap in respect of the remaining 36 acres 1 rood 13 perches of Wellington urban tenths. Section 24 deemed the Public Trustee to be a leasing authority under the Public Bodies' Leases Act 1908 in respect of those tenths. Accordingly, the trustee was authorised to convert Wellington urban tenths to the same perpetual leasing regime. Rural tenths were not affected by this legislation, but these could already be leased on perpetual terms under the Native Reserves Act Amendment Act 1895. The urban tenths were gradually converted to perpetual leases as the term of each old lease expired. We have not been able to trace this process, but Native Trust Office official Roland Jellicoe reported in 1929 that all the Wellington tenths were leased for terms of 21 years, with perpetual right of renewal.[13]

A report by researcher Kieran Schmidt demonstrates that 'The effect of the long term leases sometimes meant a sharp rise in rentals when they were renewed at expiry'. Thus, the rents for some 37 North Island (Wellington) tenths leases which expired between 1914 and 1916 increased on renewal by 204 per cent.[14] As Schmidt notes, these sharp rises indicate the extent of the increase in land value during the 21-year lease term and imply that 'the overall return for Beneficial Owners was less for long term leases'.[15]

Land tax was also a burden on the tenths beneficiaries. Schmidt reports that under the Finance Act 1917 the land tax payable for the North Island tenths took up 53 per cent (£986) of the total rental (£1859). Land tax was based on valuations made every five to six years, and the tax increased accordingly while the rents stayed the same during the 21-year term. This burden was exacerbated by the fact that, no matter how small the beneficial owners' interests, they still had to pay tax on the whole block and the £500 exemption applied to them as a group. If the exemption had been allowed for each individual owner, Schmidt notes that very few would have had to pay tax, since few had individual interests worth more than £500. The Public Trustee drafted Bills to address this anomaly in 1906, 1908, and 1918, but they were not proceeded with owing to the strong opposition of the commissioner of taxes and treasury.[16] However, the Native Trustee was successful in promoting a limitation on land tax. The Land and Income Tax Amendment Act 1922 set a maximum level of 25 per cent, and further efforts by the Native Trustee saw the maximum level reduced to 10 per cent by 1927.[17]

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12. 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, p 56
13. R L Jellicoe, 'Report on Native Reserves in Wellington and Nelson under the Control of the Native Trustee', 26 March 1929, AJHR, 1929, G-1, p 42 (doc A24, p 310)
14. The North Island tenths account did not include all of the remaining Wellington tenths: Ohariu 12 and 13, Pakuratahi 3, and Polhill Gully (Ohiro 19 and 21) had separate accounts.
15. Document G4, pp 168–169, fig 3.1C
16. Ibid, p 170
17. Ibid, p 178, fig 3.2C

It appears that rental income from the Maori reserves during the period 1921 to 1933 was constant until the Depression brought reductions. As at November 1932, the proportion of rental income to unimproved value was 3.28 per cent for the North Island tenths and 3.69 per cent for the Palmerston North reserves. These figures were below the 4 per cent for urban land specified in the legislation. Schmidt notes that Depression measures such as the National Expenditure Adjustment Act 1932 exacerbated the situation.[18] That Act required a 20 per cent reduction in the rents payable under contracts in force at the passing of the Act. The rents so reduced were not to be increased except by leave of a competent court (ss 31–32).[19] In the absence of any successful application to the court, the reduced rent would remain for up to 21 years, depending on when it was fixed prior to 1932.

The significant disadvantages to beneficial owners of Maori reserved land leased with a right of perpetual renewal are evident from the foregoing discussion.

16.2.3 The Maori Reserved Land Act 1955 and the Sheehan commission

The Sheehan commission on Maori reserved land discussed the perpetual leasing regime in some detail in its 1975 report. As the commission noted, the Maori Reserved Land Act 1955 was passed 'with the object of applying as far as possible the same general rules to all the reserved lands referred to in the Act'.[20] The lands falling within its ambit included the Wellington tenths and Palmerston North reserves administered under the Native Reserves Act 1882, and the Westland, Nelson, and Taranaki reserves (s 3).

Part III of the Act conferred wide leasing powers on the Maori Trustee, including the power to convert term leases to leases with a right of renewal in perpetuity. Rents for such leases of urban lands were fixed at 4 per cent of the unimproved value, as certified by the Valuer-General, and at 5 per cent for leases of rural lands.[21] Perpetual leases of Maori reserves under the Act were for terms of 21 years.

The commission summed up the position in 1975 of beneficial owners of reserves subject to the perpetual leasing regime as follows:

> The beneficial owners are not a contracting party and their role is a completely passive one. They are treated as children or persons under disability. They are not well informed upon the law or the facts concerning the lands in which they have an interest. They are not adequately consulted or indeed capable of being adequately consulted even when major changes in the law or the leases which affect their interests are contemplated. Even on occasions when they have expressed views in these matters their representations have not carried weight.

18. Ibid, p 177, fig 3.2b
19. These provisions remain in force.
20. 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, p 57
21. Sections 30–34 of the Maori Reserved Land Act 1955

. . . . .

> The equilibrium established by the tensions between Parliament and the lessees was finally expressed in the Maori Reserved Land Act 1955, but this equilibrium has in recent years been seriously disturbed by the concerns and demands of the beneficial owners who are no longer willing to play a passive part in the administration and control of these lands.
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> The beneficial owners want to be fully informed and responsibly involved. They are concerned at what they regard as the inadequate income which these lands bring in. They want the right to sell their interests if they so decide that such is the correct thing for them to do. They feel that many aspects of these leases, especially as regards the perpetual right of renewal, the method of rent fixation, and the frequency of rent reviews, are contrary to their interests and these views have been expressed frequently and forcefully before the Commission.[22]

The commission considered that 'the aims of our forebears in granting perpetually renewable leases were entirely good' and that the intention had been to encourage lessees, particularly of rural lands, to improve Maori reserved land. But it considered that a terminating lease for a long term of years offered adequate security for the maximum development of urban lands, and said it had received convincing evidence on this point. The commission also considered that perpetual leases were by no means necessary to 'secure the maximal use and development of lands, even rural lands'.[23]

While the commission was aware of the need for the Maori lessors to 'escape from the restrictions and essential inequities which arise from the right of perpetual renewal provided for in the present lease', it could find no satisfactory way of escape. It would not recommend that contracts be 'arbitrarily altered by legislation'. This would be 'completely indefensible and would certainly involve the payment of very substantial compensation' to the lessees.[24] In view of this, the commission's various recommendations, while designed to ameliorate some of the adverse conditions of the statutory provisions governing the terms and conditions of perpetual leases, fell short of proposing that the right of perpetual renewal of such leases should be abolished.

16.3 Claimants' Grievances Concerning the Perpetual Leasing Regime

16.3.1 Imposition of the perpetual leasing regime

We discuss first the claim that, in breach of Treaty principles, legislation was passed rendering the tenths reserves subject to the perpetual leasing regime without prior consultation with the Maori beneficial owners. Two statutes we have discussed above – namely, the Native

22. 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, p 62
23. Ibid, pp 64–65
24. Ibid, p 68

Reserves Act Amendment Act 1896 and the Native Land Amendment and Native Land Claims Adjustment Act 1917 – are specifically referred to by the Wai 145 claimants.[25]

Claimant counsel submitted that Maori tenths beneficiaries were never consulted over the imposition of the perpetual leasing provisions and never gave them their approval.[26] He cited Dr Loveridge's evidence that he was not aware of any consultation with the beneficial owners of the Wellington tenths about the proposed legislation and had not seen any statement in any material that consultation took place before the new regime was imposed.[27]

Dr Loveridge notes that parliamentary discussion of the possible impact of the 1895 legislation 'on the Maori owners of the reserves affected was conspicuous by its absence'. When the Bill was before the House, Sir Robert Stout proposed that the clause enabling the Public Trustee to renew leases be modified to require 'the consent of the Native owners' before a new lease could be issued. Although this proposal was supported by all four Maori members, it was defeated by 29 votes to 28, after which the Bill was passed.[28]

Crown counsel noted that, with the exception of one remark by Premier Richard Seddon, there was no discussion of the possible impact of the 1895 legislation on the Maori owners.[29] Mr Green for the claimants responded that it seemed remarkable that this legislation, 'which was to have such a marked and detrimental effect on Maori, could be passed with little comment on its possible impact on Maori'.[30] We agree.

Crown counsel conceded that, as with the Westland and Nelson and west coast legislation, it was possible that the extension of the perpetual leasing power to the Wellington reserves 'virtually came out of the blue' as far as the owners of the reserves were concerned. However, counsel submitted that the Wellington reserves were unlike those in Taranaki and Westland, in that the Wellington reserves had, since the early 1840s, been intended to be endowment lands, not lands for Maori to live on. The apparent absence of meaningful consultation with Maori should be viewed in this light, according to Crown counsel.[31] In fact, we believe that no consultation, meaningful or other, took place with Maori in respect of the Wellington tenths and Palmerston North reserves. We accept Mr Green's response to the Crown that the introduction of the perpetual leases regime effected such a dramatic metamorphosis that consultation was imperative.[32]

We have discussed the provisions of the the Native Land Amendment and Native Land Claims Adjustment Act 1917 in section 16.2.2. This Act made no reference to the rural tenths, but it authorised the Public Trustee to convert the leases of the remaining 36 urban tenths reserves in Wellington to perpetual leases. Crown counsel noted that the 'Parliamentary

25. Claim 1.2(d), paras 14.5, 15.1; doc O4, pp 410–419; doc O5, pp 454–458
26. Document O4, p 417
27. Cross-examination of Don Loveridge, 3 November 1994 (see doc C7, p 230)
28. Document C2, p 72
29. Document P4, p 13
30. Document Q11, p 81
31. Document P4, p 14
32. Document Q11, p 81

debate is silent on the 1917 measure'.[33] As to consultation, the Crown conceded that there appears to be no evidence of consultation with Wellington Maori over the proposal to introduce perpetual leases under the 1895–96 and 1917 Acts. Accordingly, the Crown accepts that, in deciding to extend perpetually renewable leases to Wellington lands, there was a failure to consult meaningfully with the beneficial owners of the land.[34]

The Legislature passed four statutes in 1895, 1896, 1913, and 1917 to ensure that a perpetual leasing regime was imposed on the beneficial owners of the Wellington tenths and Palmerston North reserves without their consent. The Crown failed on each occasion to ensure that the beneficial owners or their representatives were consulted and that the effect of the legislation was explained to them. The need for this was, in our opinion, incontrovertible, because the practical effect of the leasing regime was to remove forever the possibility of the beneficial owners developing the land or, should they wish, disposing of it free of the encumbrance of a lease in perpetuity. In addition, as the Ngai Tahu Tribunal noted, there was no effective protection for the owners against economic loss.

16.3.2 Tribunal finding of Treaty breach

The Tribunal finds that the Crown, in failing to ensure that the beneficial owners of the Wellington tenths and Palmerston North reserves were consulted before the passage of legislation which imposed, without their consent, a perpetual leasing regime on their reserves, acted in breach of its Treaty duty to recognise and protect the rangatiratanga of those owners, and failed to meet its Treaty obligation to act reasonably towards them. As a consequence, the beneficial owners have been prejudicially affected by such failure.

16.3.3 Economic effects of perpetual leasing

We now consider the Wellington Tenths Trust's claim that the perpetually renewable leases limited the owners' opportunities to make a return on capital growth, thus limiting their ability to develop the land, and that such limitations were in breach of Treaty principles.[35]

Counsel for the claimants submitted that with the perpetual leasing regime the Wellington tenths' beneficial owners were doomed to be locked out of economic rentals in times of normal growth, and that only since the passing of the Maori Reserved Land Amendment Act 1997 has this been partially addressed. He stressed that, whatever advantage may have ensued as a result of the lessees obtaining security of tenure, this ignored 'the simple fact that this legislation for ever alienated these lands from Maori'.[36] The inevitable consequence of this mandatory exclusion of the beneficial owners from their land, counsel submitted, was

33. Document P4, p 16
34. Ibid, p 26
35. Claim 1.2(d), para 14.6
36. Document O4, p 435

that they were deprived of the opportunity to develop land management skills by assuming responsibility for their land.[37] He claimed that this constituted a deliberate and sustained violation of the Crown's duty both to guarantee and to protect rangatiratanga under article 2 of the Treaty.[38]

Crown counsel submitted that perpetual leasing was and is a reasonable investment form. She cited the Sheehan commission as observing that 'it is even doubtful if less secure tenure would have encouraged the development of rural lands at all'.[39] However, as Mr Green pointed out, the commission referred to 'virgin', not 'rural', lands in this quotation.[40] Mr Green noted that, far from suggesting that perpetual leases were appropriate for all rural lands, the commission went on to say that 'To secure the maximal use and development of lands, *even rural lands*, the security offered by the perpetual right of renewal *is by no means necessary*' (emphasis added by claimant counsel).[41] The commission also stated that there was no doubt that 'a terminating lease for a long term of years offers adequate security for the maximal development possible of urban lands'.[42]

Crown counsel also submitted that, for endowment lands, 'a low risk, long term form of investment is more appropriate than more active, higher risk investments' and that perpetual leases are relatively low risk, are less capital intensive, and require less revenue retention. She contended that the Wellington tenths were intended to be endowment lands, and that it was never intended that Maori would live on them.[43] However, Mr Green noted that Maori were originally encouraged to move to their reserves, although the tenths did later become trust lands to be leased for the benefit of Maori. He contested the view that perpetual leasing was a particularly sound form of investment for endowment lands, arguing that such leases 'alienated Maori from their land and attracted nothing more than peppercorn rentals, whilst the leaseholds became so valuable that they sold at freehold rates'.[44]

The Tribunal notes that, while perpetual leases might be a sound investment for charities, this would be so only if there were appropriate provisions for relatively frequent periodic rent reviews (say, every five years) to take account of inflation or other economic circumstances. In the case of Maori reserved land, the Legislature has very belatedly recognised that such leases are inappropriate.

Crown counsel sought to rely on what was seen as a factual distinction between the respective reserves considered in the Tribunal's *Ngai Tahu* and *Taranaki* reports.[45] Counsel noted in particular that the lands reserved to Ngai Tahu in the Arahura (West Coast) block fell into

37. Document O5, p 643
38. Document O4, p 438
39. Document P4, p 16. Both Crown counsel and Mr Green omitted the opening words of the sentence, which were 'In the rural lands'. We do not consider that this invalidates the point made by Mr Green.
40. Document Q11, p 82
41. 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, p 65
42. Ibid, p 64
43. Document P4, pp 17–18
44. Document Q11, p 83
45. Document P4, pp 23–26

two categories. Some 6724 acres were reserved for individual allotments (schedule A lands) and 3500 acres were reserved for religious, social, and moral purposes (schedule B lands). The schedule A lands were intended for the owners to live on, while schedule B lands were to be leased, with the rental income to be used for the benefit of Maori. All of the schedule B lands were brought under the New Zealand Native Reserves Act 1856, as were 3498 acres of the 6724 acres of schedule A lands.[46]

Included in these schedule A lands brought under the 1856 Act was the 500-acre Mawhera 31 block. Although this land had been reserved for individual allotments for Maori to live on, the area soon developed as the commercial part of the town of Greymouth. Evidence was given to the Ngai Tahu Tribunal that Maori saw the economic advantage that would accrue following any Pakeha settlement there. By the mid-1860s, the reserve had acquired considerable commercial value, and merchants leased parts of the reserve directly from the Maori owners. By July 1865, 4000 feet of the Mawhera River frontage was occupied, 37 per cent of it leased from Ngai Tahu.[47] This reserve was administered by the Public Trustee from 1882, and in 1887 the Mawhera Greymouth town leases became subject to the perpetual leases regime. Much of the central business district of Greymouth is built on Maori reserved land.[48] The Tribunal sees no significant distinction between the Mawhera reserve perpetual leases, which the Ngai Tahu Tribunal found to be contrary to Treaty principles, and the perpetual leasing of the Wellington tenths reserves.[49]

Notwithstanding Crown counsel's defence of the imposition of the perpetual leasing regime, the Crown very fairly accepts that perpetual leases under the terms prescribed by the Maori Reserved Land Act 1955 have been less advantageous to the lessor than other ground leases structured on an open market basis would have been. It attributed this to the combination of prescribed terms and the rampant effect of inflation during the 1980s and 1990s. Crown counsel noted that the Crown has accepted that, over time, the provisions of the Maori Reserved Land Act disadvantaged Maori owners in that their ability to receive a fair return on their assets was constrained.[50]

The Tribunal would observe that the disadvantages of the perpetual leasing regime were not confined to the high inflation of the 1980s and early 1990s. Inflation occurred earlier than 1980. We have noted above other adverse economic effects from 1914 on of various legislative measures. We accept the finding of the Sheehan commission, noted at section 16.2.3, that the perpetual leases were by no means necessary to 'secure the maximal use and development of lands, even rural lands'.[51]

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46. Waitangi Tribunal, *The Ngai Tahu Report 1991*, vol 3, p 736
47. Ibid, pp 733–734
48. Te Puni Kokiri, *A Guide to the Maori Reserved Land Amendment Act 1997*, (Wellington: Te Puni Kokiri, 1997) (doc N3(g), p 1247)
49. Waitangi Tribunal, *The Ngai Tahu Report 1991*, vol 3, pp 788–789
50. Document P4, p 19
51. 'Report of Commission of Inquiry into Maori Reserved Land', 1975, AJHR, 1975, H-3, p 65

16.3.4 Tribunal finding of Treaty breach

The Tribunal finds that the various legislative provisions imposing a perpetual leasing regime on the Wellington tenths and Palmerston North reserves were contrary to the principles of the Treaty which require the Crown to recognise and protect the rangatiratanga of Wellington tenths and Palmerston North reserves beneficial owners in their land. As a consequence, the beneficial owners have been prejudicially affected by such legislation, which prevented any rise in the fixed rents to reflect increases in land values during the 21-year currency of the leases and had the effect of permanently alienating Maori from their land, thereby depriving them of the opportunity to derive adequate benefit from the land and to develop land management skills.

16.3.5 Fixed-percentage rental formula

The Wai 145 claimants also claim that the Crown acted contrary to Treaty principles in establishing a fixed-percentage rental system which led to an erosion of the rent generated as a proportion of the land value over the term of the 21-year perpetual leases.[52]

Section 34 of the Maori Reserved Land Act 1955 instituted a fixed-percentage formula setting the rental of urban land at 4 per cent and of rural land at 5 per cent of the unimproved value of such land, as assessed by a Government valuation. Crown counsel noted, from the evidence of Crown historian Bob Hayes, various reasons advanced by the Maori Trustee in support of a fixed-percentage formula, which included:

- a desire to eliminate inconsistent outcomes in setting rent under the then existing regimes;
- a concern that arbiters tended to favour the tenant in arriving at a 'fair rent'; and
- the preference of the 1948 Myers commission on the west coast settlement reserves for a fixed-percentage formula.[53]

In submissions on whether the adoption of the fixed-percentage formula for rent setting was a breach of Treaty principles, Crown counsel stated that:

- aside from the opportunity to comment on the draft Bill, there is no evidence of separate consultation with the Wellington tenths' beneficial owners occurring whereas, in today's environment, such consultation would undoubtedly have taken place;
- with hindsight, it may be apparent that such a formula is risky, given the unpredictable nature of the market, but in the 1950s the fixed-percentage formula did not seem inherently risky, and the prescribed rentals were consistent with market rates; and
- the Sheehan commission in 1975 considered that a fixed-percentage formula might be appropriate for certain classes of land. However, as counsel for both the claimants and

52. Claim 1.2(d), para 15.4; doc O5, pp 466–469
53. Document M2, pp 7–12; doc P4, pp 27–28

the Crown noted, the Sheehan commission went on to say that, if such a formula were to be used, it should be coupled with five-yearly rent reviews.[54]

The Crown acknowledges that the rent-fixing provisions of the Maori Reserved Land Act 1955 have over time disadvantaged Maori owners in that their ability to receive a fair return on their assets was constrained.[55]

It is apparent that the problem with a fixed-percentage formula for the rent payable throughout a period as lengthy as 21 years is that it gives no assurance that the lessor will receive a fair return on the land throughout the term of the lease. Nor is there any way in which the lessor can recoup the loss of a fair return when the lease falls due for renewal. The longer the period a fixed rent remains in force, the greater any loss will be to the lessor. In the more volatile conditions which have obtained from time to time since Maori reserves became subject to the perpetual lease regime, Maori have been adversely affected by their inability to have rents reviewed on a timely basis.[56] We agree with the Sheehan commission that five-yearly rent reviews would be essential to ensure that such a system did not disadvantage the lessor.

16.3.6 Tribunal finding of Treaty breach

The Tribunal finds that the provisions of the Maori Reserved Land Act 1955 imposing in perpetually renewable leases for 21-year terms a uniform fixed-percentage formula for the rental of urban land of 4 per cent and of rural land of 5 per cent of the unimproved value of such land, without the consent of the beneficial owners of the Wellington tenths and Palmerston North reserves, was contrary to the principles of the Treaty requiring the Crown to recognise and protect the rangatiratanga of the beneficial owners in their land. As a consequence, they have been prejudicially affected by such legislation.

16.4 The Maori Reserved Land Amendment Act 1997

As we have seen, although the Sheehan commission made various recommendations designed to alleviate the adverse provisions of the perpetual leasing regime, it stopped short of recommending the phasing out of perpetual leases. No attempt was made by successive governments to grasp the nettle of rectifying the injustice inherent in the regime until the Ngai Tahu Tribunal reported in 1991. After a detailed consideration of the Greymouth and other West Coast perpetual leases, the Tribunal recommended that over two 21-year lease periods

54. Document P4, p 29
55. Ibid
56. See, for example, the increase in annual rental from $800 to $7400 on the renewal of the lease to Calvary Hospital in 1975: 'Report of Commission of Inquiry into Maori Reserved Land', 1975, AJHR, 1975, H-3, p 318.

the perpetual leases should be converted to term leases. It also recommended that there should be an immediate change to the rents from a fixed-percentage rental basis to one of a freely negotiated rental and to the rental review period from 21 years to a period of five years for commercial and rural land and seven years in respect of private residential land. Lastly, the Tribunal recommended that the lessees be reimbursed by the Crown for any loss as a result of the recommended legislative changes to the Maori Reserved Land Act 1955.[57]

In 1991, a ministerial review team was appointed in response to the *Ngai Tahu Report* and the 1975 Sheehan commission report. The review team's report was published in 1993 and was followed by a report from a reserved lands panel in January 1994. It in turn was followed in 1995 by a consultative working group of lessor and lessee representatives which was appointed to comment on the technical issues associated with the implementation of proposed legislative reforms. All these inquiries involved extensive consultations with owners, lessees, legal and valuation professionals, and the general public. Early in 1996, a Crown negotiator sought to gain the agreement of both lessees and landowners to legislative changes, but final agreement was not reached with the parties. Nevertheless, in 1996 the Government introduced into Parliament the Maori Reserved Land Amendment Bill.[58] It was passed on 10 December 1997 and came into force on 1 January 1998.

The Act provided for a move to market rentals of Maori reserved land.[59] After a three-year delay, market rentals were to be phased in over four years, beginning in 2001. Then, rents were to be reviewed every seven years, unless the parties negotiated an alternative agreement. Lessees retained a perpetual right of renewal during their lifetimes and could transfer this to spouses or children. Owners had a first right of refusal at market prices should a lessee wish to sell a lease; and lessees had such a right if owners wished to sell their land. The owners were to be given some $29 million compensation, which comprised $21 million for the delay in the move to market rents and right-of-first-refusal provisions; $2 million for increased transaction costs; and a $6 million lease purchase fund (ss 13, 25, 27). The compensation was to be exempt from income tax and goods and services tax. Meanwhile, the lessees were to receive some $37 million, mainly as compensation for the move to market rentals.

There was an important promise in schedule 5 to the Act whereby the then Government promised to address the issue of past losses to Maori arising from the fact that they had not been receiving fair market rents for their land. Though schedule 5 was not binding on another Government, we note that the Labour Opposition supported the 1997 Bill during its passage through Parliament. In September 2001, the Government announced that a negotiator had been appointed to begin discussions with the owners of Maori reserved land about addressing the issue of past rental losses.[60] In May 2002, the Government announced that

57. Waitangi Tribunal, *The Ngai Tahu Report 1991*, vol 3, p 793

58. Document P4, pp 78–79

59. For a plain language guide to the 1997 Act, see Te Puni Kokiri, *A Guide to the Maori Reserved Land Amendment Act 1997* (doc N3(g), pp 1244–1261).

60. *Press*, 22 September 2001

agreement had been reached with representatives of the owners of Maori reserved land to a one-off compensation payment for past rental losses. A total of $47.5 million is to be divided among the various organisations representing those owners, including the Wellington Tenths Trust and the Palmerston North Reserves Trust.

16.5 Claimant Grievances Concerning the Maori Reserved Land Amendment Act 1997

In their fourth amended statement of claim, the Wai 145 claimants make six separate allegations of Treaty breaches by the Crown in respect of the Maori Reserved Land Amendment Act 1997. In a brief submission, their counsel relied substantially on selected written submissions made by the Organisation of Maori Authorities in relation to the Bill.[61] This organisation is a body representing owners of Maori reserved land, including the Wellington Tenths Trust and the Palmerston North Reserves Trust.

16.5.1 Failure to provide for a termination point for perpetual leases

The claimants allege that 'The Crown compelled Maori to accept continuation of Reserved Land leases under a statutory regime without a termination point of 21 years from the next renewal date following enactment'.[62]

This breach is not further particularised or supported in the submissions of claimant counsel except for the statement that the 1997 Act, in effect, allows for these leases to run on for a period which may exceed 100 years.[63] As Crown counsel noted, it is not clear whether the subject of the complaint is the alleged 'compelling' of Maori to accept continuation of reserved land leases without a termination point or the fact that the Act does not provide for a termination point.[64] We assume the latter.

Crown counsel submitted that, in the absence of a termination point, it is anticipated that the right of first refusal (at market price) should a lessee wish to sell will achieve the same effect as a termination point. However, this right does not apply if an existing lessee sells or transfers the lease to a member of their immediate family (spouse, child, or children).[65] Crown counsel noted that a Te Puni Kokiri report to a parliamentary select committee on the Maori Reserved Land Amendment Bill stated that technically it is possible that owners might be prevented from obtaining access to their lands for over 100 years but that such a situation was likely to be an exceptional case. According to the report, 'It appears that most

61. Document o5, pp 651–655
62. Claim 1.2(d), para 14.7
63. Document o5, p 651
64. Document P4, p 89
65. Ibid, p 90

leases are placed for sale at least once every 21 years or so and this provides the opportunity for owners to purchase a lease'.[66]

16.5.2 Allegations of delay

The claimants state that the Crown delayed their Tribunal hearings, and the enactment of the Maori Reserved Land Amendment Act 1997, thereby causing them further loss and costs.[67]

As for the delays in Tribunal hearings, valid reasons existed, and the Tribunal is not satisfied that the Crown should be held responsible for them.[68]

Crown counsel responded to the claim that it delayed the enactment of the 1997 Act by accepting that Maori have for a number of years been receiving below-market rentals and that the issue of reserved land leases has taken a long time to resolve. However, the Crown pointed out that the issue was complex and required extensive consultation and negotiation.[69] Counsel elaborated on this response in her closing submissions.[70]

As Crown counsel noted, 22 years elapsed between the 1975 Sheehan report and the passage of the 1997 Act.[71] As discussed above, the Sheehan report stopped short of recommending that the perpetual leases should be abolished, and it appears that the Tribunal's *Ngai Tahu Report 1991* acted as a catalyst for action. The Tribunal report was followed by three further investigations or inquiries between 1991 and 1995 (see s16.4), all of which involved extensive consultation with owners, lessees, and others. Crown-sponsored negotiations between lessees and landowners about proposed legislative changes to the reserved land regime took place in 1996, and the Maori Reserved Land Amendment Bill was introduced into Parliament in August 1996. It was finally enacted on 10 December 1997.

It is apparent that the issues involved were both highly political and tremendously complex. The 1997 Act reflects these factors. While the delay was unfortunate, the Crown has recognised that Maori owners have been prejudiced by below-market rentals, and it has agreed to compensate the owners for their losses.

16.5.3 Crown and Crown-entity leases

The claimants' third grievance concerning the Maori Reserved Land Amendment Act 1997 is that the Crown treated itself as being of the same status as other leaseholders under the Act

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66. Te Puni Kokiri report on the Maori Reserved Land Amendment Bill 1996 to the justice and law reform select committee, 30 September 1997 (doc N3(g), p 1206)
67. Claim 1.2(d), para 14.8
68. Document P4, p 80; see also the history of this inquiry, outlined in section 1.2 above.
69. Document Q1, p 45
70. Document P4, pp 77–81
71. Ibid, pp 77–79

in terms of the terminating provisions, thereby prejudicing the interests of Maori.[72] The claimants believe that the legislation should have provided for the immediate termination of the perpetual right of renewal and an immediate move to market rents in the case of leases held by the Crown or Crown entities.[73]

Crown counsel submitted that, although no such provision was made in the 1997 Act, in practice both these shifts have largely occurred voluntarily.[74] In 1993, the Reserved Lands Panel found that most Crown agencies with Maori reserved land leases had begun to negotiate new forms of leases.[75]

Crown counsel stated that, in respect of leases subject to the Wai 145 claim, there are no Crown or Crown entity leases in Palmerston North. In Wellington, the details of Crown or Crown entity leases are as follows:

> *South Wellington Intermediate School, 145 Rintoul Street, Wellington*. Lessee – Minister of Education. The terms of the lease include a perpetual right of renewal, rent of $91,000 per annum (paid since 21 April 1995), and five-yearly rent reviews.
> *11 Pipitea Street, Wellington*. Lessee – Her Majesty the Queen (since December 1996). The terms of the lease include a perpetual right of renewal, and rent of $26,000 per annum.[76]

(We note that the leasehold of the Pipitea Street property is being held by the Crown for possible future use in Treaty settlements.)

The Tribunal agrees with Crown counsel's submission that, in light of the foregoing, this claim has no relevance to the Palmerston North Reserves Trust and is of little practical relevance to the Wellington Tenths Trust. We refer to this further in section 16.6.

16.5.4 Failure to compensate Maori lessors for past losses

Another claimant grievance concerning the 1997 Act is the Crown's failure to compensate lessors for the loss of rents caused by the statutory imposition of 21-year rent reviews.[77]

Crown counsel acknowledged that the 1997 Act does not provide redress to Maori for past losses. She stated that, during its consideration of the issue in the 1990s, the Crown consistently maintained the position that the amendments to the Maori Reserved Land Act 1955 would not address the issue of past losses. Crown counsel stressed that the principal focus of the 1997 Act is on dealing with the future of the Maori reserved land leases. She added that, as schedule 5 to the 1997 Act states, past losses will be dealt with as part of the Government's

72. Claim 1.2(d), para 14.9
73. Document O5, pp 652–653
74. Document P4, p 91
75. Document B7, p 35
76. Document P4, pp 91–92
77. Claim 1.2(d), para 14.10

consideration of historical grievances of Maori.[78] As noted above, in May 2002 the Government announced an agreement to make a one-off compensation payment for past losses.

16.5.5 Alleged Crown obligations under schedule 5 to the 1997 Act

An additional claim relating to failure to compensate Maori for past losses is that the Crown has made no payments to Maori in recognition of the schedule 5 obligations in the Maori Reserved Land Amendment Act 1997.[79]

Schedule 5 provides that:

> The present Government recognises that Maori for a number of years have not been obtaining fair market rents for their land. This is an issue that has to be addressed by the present Government in the future. It is an issue that will be dealt with by the present Government as part of its consideration of historical grievances.

Schedule 5 was added to the Maori Reserved Land Amendment Act by supplementary order paper. All 120 members of Parliament voted in favour of it. It is not linked to any section of the Act itself but stands on its own.[80]

Crown counsel stated that the Crown accepts that it has a continuing obligation to meet the requirements of schedule 5.[81] However, she submitted that the schedule does not impose a legal obligation on the Crown to provide compensation for past losses. Counsel invoked section 19 of the 1997 Act in support.[82] We agree with this submission. However, Crown counsel next submitted:

> Nor in the Crown's submission does it impose a non-legal obligation to actually provide redress for past losses. Rather, there is an acknowledgment that the issue of past losses will be 'addressed' and 'dealt with' in the context of consideration of historical grievances. Thus, the most that is imposed is an undertaking to consider and address the issue in this context.[83]

Not surprisingly, claimant counsel reacted strongly to this submission, characterising it as a 'Crown betrayal' and urging that the Crown 'not be allowed to shelter behind semantics'.[84]

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78. Document P4, p 84
79. Claim 1.2(d), para 14.11
80. Ibid
81. Ibid, p 88
82. Section 19 (as amended by the Maori Reserved Land Amendment Act 1998) provides:

> **19. Compensation not otherwise payable**—(1) Except as provided in sections 13 to 16 and in sections 3 and 4 of the Maori Reserved Land Amendment Act 1998, no compensation is payable to a lessor or lessee of a lease to which this Act applies by reason of the enactment of this Act.

83. Document P4, p 88
84. Document Q11, p 90

The Tribunal expects the Crown to act honourably and in good faith in addressing the claimants' past losses. We note that the compensation payment announced in May 2002 is intended to honour the commitment made in schedule 5.

16.5.6 Ability to respond to buy-back provisions in the Act

Finally, the claimants allege that the Crown has undermined the lessor buy-back provisions in the Maori Reserved Land Amendment Act 1997 by failing to make payments to Maori in recognition of the schedule 5 obligations in the Act.[85]

Claimant counsel submitted that, by failing to make any schedule 5 payments, 'the Crown has denied claimants the ability to respond to offer-back opportunities'.[86] In response, Crown counsel first noted that the Wellington Tenths Trust and the Palmerston North Reserves Trust did receive some recompense under the Act via the compensation (s13), solatium (s25), and purchase fund (s28) payments, as shown in the table below.[87]

	Compensation and solatium	Purchase fund	Total
Wellington Tenths Trust	$1,138,970.85	$361,590.02	$1,500,560.87
Palmerston North Reserves Trust	$1,002,080.51	$348,820.71	$1,350,901.22

Crown counsel next noted that there is little information before this Tribunal on the current financial position of the Wellington Tenths Trust and none on the financial position of the Palmerston North Reserves Trust. She said that it was difficult to assess the ability of the trusts to respond to right-of-first-refusal opportunities without this information.

Crown counsel's third point was that the Wellington Tenths Trust has indicated that it intends to sell virtually all its reserved land properties.[88] Claimant counsel strongly criticised this hearsay evidence, which he said was without foundation.[89]

16.6 Treaty Compliance of the 1997 Act

Claimant counsel concluded his submissions on the six grievances by submitting that Treaty breach findings are justified.[90]

85. Claim 1.2(d), para 14.12
86. Document o5, p 655
87. Document P4, p 93
88. Ibid (referring to an article in the *Evening Post*, 8 January 1998) (doc P4(a), p 52)
89. Document Q11, pp 90–91
90. Document o5, p 655

Crown counsel strongly urged the Tribunal not to reconsider the terms of the Maori Reserved Land Amendment Act 1997. She stressed that the 1997 Act was the outcome of lengthy consultations and negotiations. It was, she submitted, the result of 'a common plea for finality', citing in support the 1993 Reserved Lands Panel, which found through extensive consultation with owners and lessees that all parties sought finality in order to bring about certainty. Counsel further submitted that the Organisation of Maori Authorities (representing *inter alia* the Wellington Tenths Trust) also sought finality. The organisation's submission to the select committee on the Maori Reserved Land Amendment Bill 1996 expressed the hope that the select committee would be the last of countless commissions, committees, petition-bearers, courts, tribunals, administrators, and legislators to consider the issue. Crown counsel advised that the 1997 Act was supported by 112 of the 120 members of Parliament and urged that the time for finality (with the exception of the issue of redress for past losses) had arrived.[91]

We recognise the force of Crown counsel's submissions. We are, however, left with two main concerns. The first relates to the failure of the Crown to make provision for the immediate termination of perpetual leases held by the Crown and Crown entities. No reasons were given by Crown counsel for the Crown making provision for the abolition of the perpetual leasing regime for all Maori reserved lands but not for such perpetual leases held by the Crown. While we can appreciate that the Crown may wish to have reasonable assurance of tenure of the South Wellington Intermediate School site in Rintoul Street, we are unaware of any compelling reason why the school site or the property at 11 Pipitea Street needs to continue to be leased in perpetuity to the Crown.

Although we refrain from making any Treaty breach finding on this grievance of the claimants', we consider that the Crown should be prepared to negotiate the early surrender, on appropriate terms, of the perpetual leases held on these two Wellington Tenths Trust properties.

Our second concern relates to the past financial losses of, and other prejudice to, the claimants arising out of the perpetual leasing regime. In the first part of this chapter, the Tribunal has found that the Crown has acted in breach of its Treaty duty in three respects (see ss 16.3.2, 16.3.4, 16.3.6). If the Crown were to accept an obligation to compensate the claimants for all historical losses and other prejudice arising from such breaches and if it were to negotiate the early surrender, on appropriate terms, of the perpetual leases held by it, the Tribunal would see no need for further amendments to the Maori reserved land legislation.

We welcome the Crown's announcement that it is to compensate the Wellington Tenths Trust and Palmerston North Reserves Trust for past rental losses. We understand that the settlement relates only to such losses, and does not extend to other Treaty breaches arising from the perpetual leasing regime.

91. Document P4, p 94 (citing doc B7, p 3; doc I5, p 3)