

## CHAPTER 17

### THE TAKING OF MAORI RESERVED LAND FOR PUBLIC PURPOSES

#### 17.1 INTRODUCTION

In earlier chapters, we have considered claims involving land, still in Maori customary ownership, which was taken by the Crown. Chapter 6 looked at the land taken by the Crown for public reserves (including the town belt) in the early 1840s. Chapter 10 dealt with the ‘remainder lands’ in the Port Nicholson block not allocated to the company settlers, retained as Maori reserves, or taken as public reserves: some 120,626 acres. This land was initially granted to the New Zealand Company, then, after the collapse of the company, went to the Crown. As we have indicated, we believe that this was Maori land taken without Maori consent, and without the payment of compensation. In chapter 13, we considered the taking of some 25 acres of urban tenths reserves for military, religious, educational, and hospital purposes. We have also discussed public works takings of Palmerston North reserve land in chapter 15.

In this chapter, we consider other claims by the Wai 145 claimants in respect of land that was taken by the Crown from tenths or McCleverty-assigned reserves for a variety of public purposes, including roads and railways, housing, and river protection. In the case of the taking of Waiwhetu Pa land for river protection, we heard claims brought by both the Wai 145 and the Wai 442 claimants.

#### 17.2 DISCUSSION OF PUBLIC WORKS TAKINGS IN PREVIOUS TRIBUNAL REPORTS

In discussing various takings of reserved land, we are conscious of previous Tribunal reports which have made some valuable findings on Treaty breaches relating to public works takings.<sup>1</sup> We have also had the benefit of Cathy Marr’s 1997 Rangahaua Whanui report, *Public Works Takings of Maori Land, 1840–1981*.

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1. Most notably the *Ngati Rangiteaorere Claim Report 1990* (Wellington: Brooker and Friend Ltd, 1990); *Mohaka River Report 1992* (Wellington: Brooker and Friend Ltd, 1992); *Te Maunga Railways Land Report* (Wellington: Brooker’s Ltd, 1994); *Ngai Tahu Ancillary Claims Report 1995* (Wellington: Brooker’s Ltd, 1995); and *Turangi Township Report 1995* (Wellington: Brooker’s Ltd, 1995).

There was no specific provision in the Treaty, in either the English or the Maori text, for the compulsory taking by the Crown of Maori land for public purposes. The English text of article 2 of the Treaty confirmed and guaranteed to Maori ‘the full exclusive and undisturbed possession of their Lands . . . so long as it is their wish and desire to retain the same in their possession’. Maori yielded to the Crown a sole right of pre-emption to purchase such land ‘as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon’. The Maori text was similar to this, although ‘possession’ was rendered as ‘tino rangatiratanga’, which is more properly translated as full chieftainship, thus giving Maori control as well as possession of their land. There is nothing here that sanctioned the compulsory taking of Maori land by the Crown without Maori approval. However, the compulsory taking of Maori land for public purposes has usually been justified by the Crown as an exercise of sovereignty under article 1 of the Treaty.

In previous reports, the Tribunal has held that the Crown is required to balance its article 1 authority to exercise kawanatanga or government with its article 2 responsibility to recognise Maori rangatiratanga and to protect various properties, including land. The exercise of Crown authority to make laws for the peace, order, and security of New Zealand was subject to an undertaking to protect Maori interests.<sup>2</sup> Nor could the Crown evade its obligations to Maori under the Treaty by conferring authority on another body, such as a local council, harbour board, or river board.<sup>3</sup> Although the Tribunal has been aware of the possibility that, given the article 2 guarantees, *all* compulsory takings were breaches of the Treaty, it has admitted that *some* takings might be justified. It has usually had in mind ‘last resort’ takings, or those necessary for ‘peace, security and good order’.<sup>4</sup> An example of the latter is the taking of land at Bastion Point, Auckland, for defence purposes. As the Tribunal noted in its 1987 *Orakei Report*:

On the face of it the Crown’s action in compulsorily taking this land appears to be in clear breach of Article 2 of the Treaty which requires the consent of the Maori proprietors to any disposition of land. At the same time the Preamble to the Treaty speaks of the anxiety of the Crown not only to protect the just rights and property of the Maori but also to secure peace and good order. It is arguable that the sovereign act of the Crown in taking land for defence purposes with a view to securing peace and good order is acting for the benefit of all citizens, Maori and European alike, and is not inconsistent with the principles of the Treaty.<sup>5</sup>

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2. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed (Wellington: Waitangi Tribunal, Department of Justice, 1989), p 66

3. *Ibid*, p 73

4. Cathy Marr, *Public Works Takings of Maori Land, 1840–1981*, Waitangi Tribunal Rangahaua Whanui Series, 1997, pp 23–24

5. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker and Friend Ltd, 1991), p 233

Although the Orakei Tribunal did not make a finding on this issue, it commented that, in any such acquisition of land today, the Crown might seek to lease rather than acquire ownership of the land.

The most recent and perhaps fullest discussion of the taking of Maori land for public purposes is in the Tribunal's *Turangi Township Report 1995*. This report reiterated the view expressed in the *Ngai Tahu Report 1991* that the cession of sovereignty to the Crown in article 1 of the Treaty was qualified by its guarantee of rangatiratanga to Maori in article 2. The Turangi township Tribunal did concede that the Crown could exercise its sovereign authority to override the 'fundamental rights guaranteed to Maori in article 2', but only in 'exceptional circumstances and as a last resort in the national interest'. These terms had been used previously in the *Ngai Tahu Ancillary Claims Report 1995*. However, they required definition. For instance, the Turangi Tribunal considered that 'reasons of convenience or economy' were 'insufficient' justification for overriding the article 2 rights of Maori. The Tribunal added that, having decided to take Maori land as a last resort in the national interest, the Crown was obliged to take the land in such a manner that Maori Treaty rights would be protected. Full consultation with Maori was necessary, and the Crown should not compulsorily acquire the freehold when a leasehold arrangement would be sufficient. The Turangi Tribunal then examined the Public Works Act 1928 and the Turangi Township Act 1964, by which the land under claim was taken, and concluded that those Acts deprived Maori owners of any protection of their Treaty rights.<sup>6</sup>

We note here two findings made by the Turangi Tribunal relating to those Acts. The first was a finding that:

the claimants have been prejudicially affected by the provisions of the Public Works Act 1928 and the Turangi Township Act 1964, in that both Acts were and are fundamentally inconsistent with the basic guarantee given in article 2 of the Treaty of Waitangi that Maori could keep their land until such time as they wished to sell it at a price agreed with the Crown.<sup>7</sup>

The second finding was that:

the claimants have been prejudicially affected by the omission of the Crown to make provision, when exercising its powers of compulsory acquisition under the Public Works Act 1928 and the Turangi Township Act 1964 over the claimants' land, for any such land no longer required for the public work for which it was taken to be returned to Maori ownership at the earliest possible opportunity and with the least cost and inconvenience to those Maori owners and that such omission was inconsistent with the Crown's Treaty obligation under article 2 actively to protect Maori rangatiratanga over their ancestral land.<sup>8</sup>

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6. Waitangi Tribunal, *The Turangi Township Report 1995*, pp 284–288, 302

7. *Ibid*, p 302

8. *Ibid*, p 320

We now consider Crown takings of Maori reserved land for various public purposes within our inquiry district.

### 17.3 ROADS AND RAILWAYS

The claimants and the Crown (which provided a very useful summary table of public works takings of reserved land) have both been unable to supply us with full details of all the land taken from Wellington Maori reserves for roads and railways.<sup>9</sup> Some takings are reasonably well documented, with details of legal requirements, consultations, and compensation, but such details are lacking for most takings. We discuss here those takings raised by the Wai 145 claimants.

#### 17.3.1 Roads

The original New Zealand Company survey plans provided for urban streets and roads linking the town of Wellington with the rural districts, including the Hutt Valley. The road which went around the western side of the harbour to the Hutt cut across the harbour access of several pa. As settlement proceeded, Maori reserved land was taken for further road works: for urban streets following the subdivision of town sections and for roads in the rural areas, which sometimes passed through Maori reserves. Some of these takings are set out in the table of public works takings prepared by Crown counsel. This table gives a good indication of the piecemeal nature of these takings and shows that Maori reserved land was still being taken for roading as late as 1986. However, we have very few details of these takings in the evidence before us.

Portions of tenths reserves 542 and 543 (on Mulgrave Street in Thorndon, near Pipitea Pa) were given to a settler called Moore, the owner of section 544, to compensate him for the loss of parts of his section when the area was resurveyed in the 1850s. The resurveying was a consequence of the setting apart of three new streets (Moore, Moturoa, and Davis). Wellington Maori were neither consulted about nor compensated for the land taken from their sections to compensate Moore.<sup>10</sup> However, this particular taking is not the subject of a claim by the Wai 145 claimants, presumably because the area of land taken appears not to have been large and perhaps because the creation of the new streets enhanced the value of Maori land through improved access.

There is also the complaint from the Wai 145 claimants that the Crown allowed Taranaki Street to be driven through Te Aro Pa.<sup>11</sup> We discussed this claim in chapter 13 and noted that there is insufficient evidence to make a finding on the matter (see s13.3.2).

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9. For the table of public works takings of reserved land, see the appendix to document Q2.

10. Document G2, p 30

11. Claim 1.2(d), para 13.17

The Wai 145 claimants have also complained about the taking of portions of rural reserves for roading. The Wai 145 fourth amended statement of claim refers specifically to the taking of parts of Hutt sections 1, 2, and 3, and Kinapora sections 7 and 8, for roading.<sup>12</sup> Claimant counsel makes the point that the acquisition of land for roads occurred in a piecemeal manner, and is therefore very difficult to trace. The specific takings referred to in the statement of claim are thus intended to be ‘indicative of a much broader picture, exemplifying the continual manner in which land has been alienated from the Maori owners’.<sup>13</sup> However, we have very little evidence even in relation to these specific takings, and as a result we are unable to make findings on the matter.

### 17.3.2 Railways

The documentation of the taking of reserve land for railway works is also incomplete, owing partly to the loss of Public Works Department files. However, there is sufficient information to indicate a pattern. This suggests that compensation was usually paid, albeit sometimes belatedly and insufficiently. With several takings of reserved land in the Hutt Valley for the Wellington–Masterton railroad in the 1870s, compensation was not paid until after work on the railway commenced. The first instance concerns 11 acres of McCleverty-assigned reserves at Petone which were required for the railway line. Petone Maori asked for compensation of £150 an acre, but this price was not accepted by the Government. An angry group of Petone Maori met with Commissioner Heaphy, telling him that they wished the Government ‘to purchase all their Reserves at the Hutt in consequence of alleged injury done by Railroad to their properties & fences’. Heaphy replied that his job was to preserve native reserves, not buy them, and that the railroad would increase the value of their reserve land.<sup>14</sup> The owners subsequently agreed to compensation of £55 per acre, although Heaphy admitted that ‘Some difficulty was experienced in causing the Native owners to comprehend a measure of compulsory land surrender for purposes of public works’.<sup>15</sup> Another block of over six acres, needed for railway workshops, was purchased for £662 in 1876 (following what Heaphy described as ‘very protracted’ negotiations), and in this instance it was apparently not necessary to invoke compulsory purchase conditions under public works legislation.<sup>16</sup> By 1919, almost a quarter of the 107 acres of flat land in Hutt sections 1, 2, and 3 had been taken for railway purposes.<sup>17</sup>

Professor Alan Ward, in summing up the taking of McCleverty reserve land at Petone for railway purposes, notes that the railway probably provided employment and improved

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12. Ibid, para 18.5

13. Document 05, p 630

14. Entry dated 28 November 1872, Heaphy’s minute book, MA-MT6/14, NA (doc A36, p 30)

15. Charles Heaphy, ‘Report of Commissioner of Native Reserves’, 30 June 1873, AJHR, 1873, G-2 (doc A24, p 58)

16. Charles Heaphy, ‘Report of Commissioner of Native Reserves’, 7 July 1877, AJHR, 1877, G-3 (doc A24, p 111)

17. Document A44, p 45

transport for Maori; that land values (including the value of the remaining Maori reserve land in the area) rose with the advent of the railway; and that some prices paid to Maori were comparable with the prevailing values.<sup>18</sup> The Wai 145 claimants have alleged that ‘The taking of Maori land by the Crown for railway purposes determined that the land would become a less valuable industrial locality rather than a prime residential zone’.<sup>19</sup> However, they have provided no evidence about the effects on land values of the construction of railways through Maori reserves.

The Crown’s summary table of public works transactions lists a considerable number of takings of Maori reserve land for railway purposes, mainly in the Hutt Valley and continuing to as late as 1919.<sup>20</sup> The table provides details of the area taken, the compensation paid, and any consultation carried out, where these are known, but there is little or no information on many of the takings. We are therefore unable to comment on the adequacy of the arrangements. Other land for railway purposes was acquired through reclamation along the foreshore to the Hutt Valley. The railway was built alongside the Wellington–Hutt road and further distanced several pa, including Kaiwharawhara, Ngauranga, and Petone, from the foreshore. We discuss this under reclamations in chapter 18. Finally, in relation to the taking of reserved land for railway purposes, we note a reminder from Crown counsel that in 1993 the Wai 145 claimants accepted payment from the Crown in return for clearing for sale the railways properties in the Wellington region. Because of this, Crown counsel said, the Tribunal could make only limited findings on the offer-back of land taken for railway purposes.<sup>21</sup> In all the circumstances, we make no findings on the reserved land taken for railway purposes.

#### 17.4 HOUSING

The compulsory acquisition of reserved land in Wellington for housing purposes has been the subject of several claims, but, for the reasons outlined below, this Tribunal is unable to make findings on these claims.

The first claim by the Wai 145 claimants relates to the compulsory acquisition of land from Kinapora section 8 for housing purposes in 1937.<sup>22</sup> The only source of information about this taking in the evidence before the Tribunal is the report of Philipa Biddulph, which merely

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18. Document A44, pp 65, 71, 73–74

19. Claim 1.2(d), para 18.2. This claim is based on a comment by Professor Alan Ward in document A44: doc A44, pt B, p 71. However, Ward is referring specifically to the acquisition of land for railway workshops and yards. He does not generalise his comment to all acquisitions for railway purposes (indeed, he suggests that the railway may have increased the value of remaining Maori land), nor does he provide evidence of any adverse effect on Maori in this particular instance.

20. Document Q2, app

21. *Ibid*, p 19

22. Claim 1.2(d), para 18.7

notes, based on the *New Zealand Gazette* notification, that the land was taken.<sup>23</sup> In the absence of further information about this taking, we are unable to make a finding on the matter.

The Wai 145 statement of claim also lists the taking of Hutt sections 19 and 58 for housing purposes as Treaty breaches.<sup>24</sup> However, the taking of Hutt section 19 is also the subject of two separate claims, Wai 105 and Wai 660. These claims were severed from this inquiry by a Tribunal direction of 29 September 1998 because the claimants were attempting to negotiate directly with the Crown to settle their claims.<sup>25</sup> Owing to the severance, Crown counsel made no submissions on the taking of Hutt section 19.<sup>26</sup> Without having heard either the Wai 105 and Wai 660 claimants or the Crown, we are unable to report on the taking of this section.

The Wai 145 claimants are the only group with a claim relating specifically to the taking of Hutt section 58. However, Crown counsel made no submissions on this matter, apparently in the belief that it was also the subject of a claim by the Wai 105 and Wai 660 claimants.<sup>27</sup> In the absence of any submission from the Crown, we will make no findings and will restrict ourselves to providing a narrative of this taking, based on the evidence before us, and to making some provisional comments.

Hutt section 58 was a rural tenth reserve, 15 acres of which were assigned by McCleverty to Waiwhetu Maori. Waiwhetu's portion of Hutt section 58 was taken for public works in 1952 and 1963, but these takings have not been the subject of claims.<sup>28</sup> The bulk of the section, some 91 acres, was assigned by McCleverty to Petone Maori. All but two subdivisions of Petone's portion of Hutt section 58 remained in Maori ownership until the 1940s, although the owners were no longer living on this land. The section was evidently under consideration for housing from 1939, when the registrar of the Native Land Court wrote to the director of Housing Construction under the heading 'Land for Housing: Hutt District Native Land Taita and NaeNae'. The registrar suggested that the department take the land under the Public Works Act 1928, because it would be too difficult and expensive to obtain the agreement of all the owners.<sup>29</sup> In January 1941, the director of Housing Construction wrote to the Minister of Housing to recommend the compulsory acquisition of the Maori-owned land in Hutt section 58. He commented that:

The majority of the land is occupied by market gardeners and other farmers, and as far as can be ascertained none of the registered proprietors lives on the property. One or two of the Natives have approached the Department to purchase their interests, but in my opinion

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23. Document G2, p 19

24. Claim 1.2(d), para 18.8

25. Paper 2.200

26. Document Q2, p 23

27. Ibid

28. Document I8, p 139

29. Document G2, p 20

the whole of the Native-owned Land should be acquired by Proclamation, as it would be a protracted, if not practically an impossible task, owing to the large number of owners involved and their widely divergent places of residence, to obtain all the necessary consents for the purchase of the land.<sup>30</sup>

At the same time, the director recommended that European-owned land on the section be acquired by negotiation.

In June 1941, a meeting of owners was held to obtain their opinions as to the proposed acquisition. Their views, as reported by the registrar of the Native Land Court, were mixed. Some were prepared to sell if the price was right, while others expressed an interest in living on the land (although they were not doing so at the time). The registrar thought that 'there would not be strong opposition to the proposal to take the land providing the price offered was adequate'.<sup>31</sup> In August 1942, the Government went ahead and compulsorily acquired almost 53 acres of Hutt section 58 under the Public Works Act 1928.<sup>32</sup> Compensation for the bulk of the land taken was assessed by the Native Land Court in November 1942. Valuations were provided by six valuers, two called on behalf of the Maori owners and four for the Crown. Each subdivision was valued separately, and the total compensation figure set by the court was £14,103 for just over 49 acres, or roughly £285 per acre.<sup>33</sup>

Wai 145 claimant counsel has alleged two specific Treaty breaches in relation to the taking of part of Hutt section 58 for housing purposes. The first is the lack of adequate negotiation or consultation with the Maori owners. The second is the calculation of compensation 'based on the subdivisions of the entire section, rather than the value of the section as a whole, resulting in the compensation being substantially less than it ought to have been'.<sup>34</sup>

The Tribunal observes that it is difficult on the basis of this evidence to accept that the compulsory taking of this land was not in breach of Treaty principles. However, in the absence of Crown submissions the Tribunal makes no findings on these claims. In the circumstances, we reserve the right of the claimants to apply further to the Tribunal.

### 17.5 RIVER PROTECTION – WAIWHETU PA

The taking of the Waiwhetu Pa reserve for river protection purposes in 1928 is the subject of a claim by the Wai 145 claimants. Their grievance is that in 1928 all of the Waiwhetu Pa and reserve was taken by the Hutt River Board for river protection and reclamation purposes.<sup>35</sup>

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30. Director of housing construction to Minister of Housing, 16 January 1941, MA29/7/1/1 (doc G2(a), p C5)

31. Registrar to under-secretary, Native Department, 10 June 1941, MA29/7/1/1 (doc G2(a), p C7)

32. *New Zealand Gazette*, 6 August 1942, p 1986 (doc G2(a), p C11)

33. Native Land Court, Wellington, minute book 34, pp 259–260 (doc G2(a), p C12)

34. Document 05, pp 633–634

35. Claim 1.2(d), para 17.10; doc 05, p 610

As noted below, not all of the Waiwhetu Pa land was so taken, the urupa being exempt. (It remains in Maori ownership today.) The pa reserve is also the subject of a separate claim (Wai 442) made on behalf of ‘descendants of the owners of the original Waiwhetu Pa’. This claim was heard by the Tribunal in the course of its ninth hearing.<sup>36</sup> The Wai 442 claimants say that the Waiwhetu Pa lands were significant to their tipuna as kainga and wahi tapu; that, when it was no longer required for the purposes for which it was taken, the land was sold into private hands rather than being offered back to the original owners; and, further, that the taking of their land and the failure to offer these sections back to the owners or their descendants were in breach of the Treaty of Waitangi.<sup>37</sup>

Tata Lawton, the author of the main report to the Tribunal on the taking of this land, describes Waiwhetu Pa as ‘the last papakainga left in Maori ownership in the 1920s in the Lower Hutt region’.<sup>38</sup> It was one of the McCleverty awards; his deed of 30 August 1847 guaranteed the ‘natives of Waiwhetu’ their pa, said to contain 3 acres 2 roods 39 perches.<sup>39</sup> However, when the ownership of the reserve was determined by the Native Land Court in 1908, the court found that the correct area for the pa reserve was 12 acres 1 rood 32 perches. At the request of the applicants, the court partitioned the reserve into four sections. Each of the three claimant groups before the court received a little over three acres, with the remainder – almost 2½ acres – set aside as an urupa under their joint ownership.<sup>40</sup> The land was later further subdivided, and sections 1B, 1C, and 1D were sold in 1927–28. By 1928, Maori were no longer living on the pa reserve. Many owners of the land were living on the nearby Hutt section 19, another McCleverty reserve, but they continued to use the shoreline of the pa land for fishing, eeling, and gathering shellfish, until pollution destroyed these food resources.<sup>41</sup>

### 17.5.1 Reclamation scheme

In 1922, the Hutt River Board developed a reclamation scheme to improve the channel of the Hutt River, including the estuary near the Waiwhetu Pa reserve, around the junction of the river and the Waiwhetu Stream. The scheme involved the reclamation of a large area of land from the sea, with a view to the future development of the Hutt district.<sup>42</sup> To this end, in 1922 the Hutt River Board entered into an agreement with the Wellington Harbour Board to obtain statutory authority for the reclamation of some 265 acres from Wellington Harbour. This authority was provided by the Hutt River Board Improvement and Reclamation Act

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36. The ninth hearing was held at Te Tatau o te Po Marae in Lower Hutt on 15 and 16 December 1997. The Wai 442 claim was brought by Sir Ralph Love and 35 others on behalf of themselves and others of Te Atiawa and Taranaki iwi and descendants of the owners of the original Waiwhetu Pa.

37. Claim 1.9

38. Document 16, p 3

39. Turton's *Deeds* (doc A27), p 101

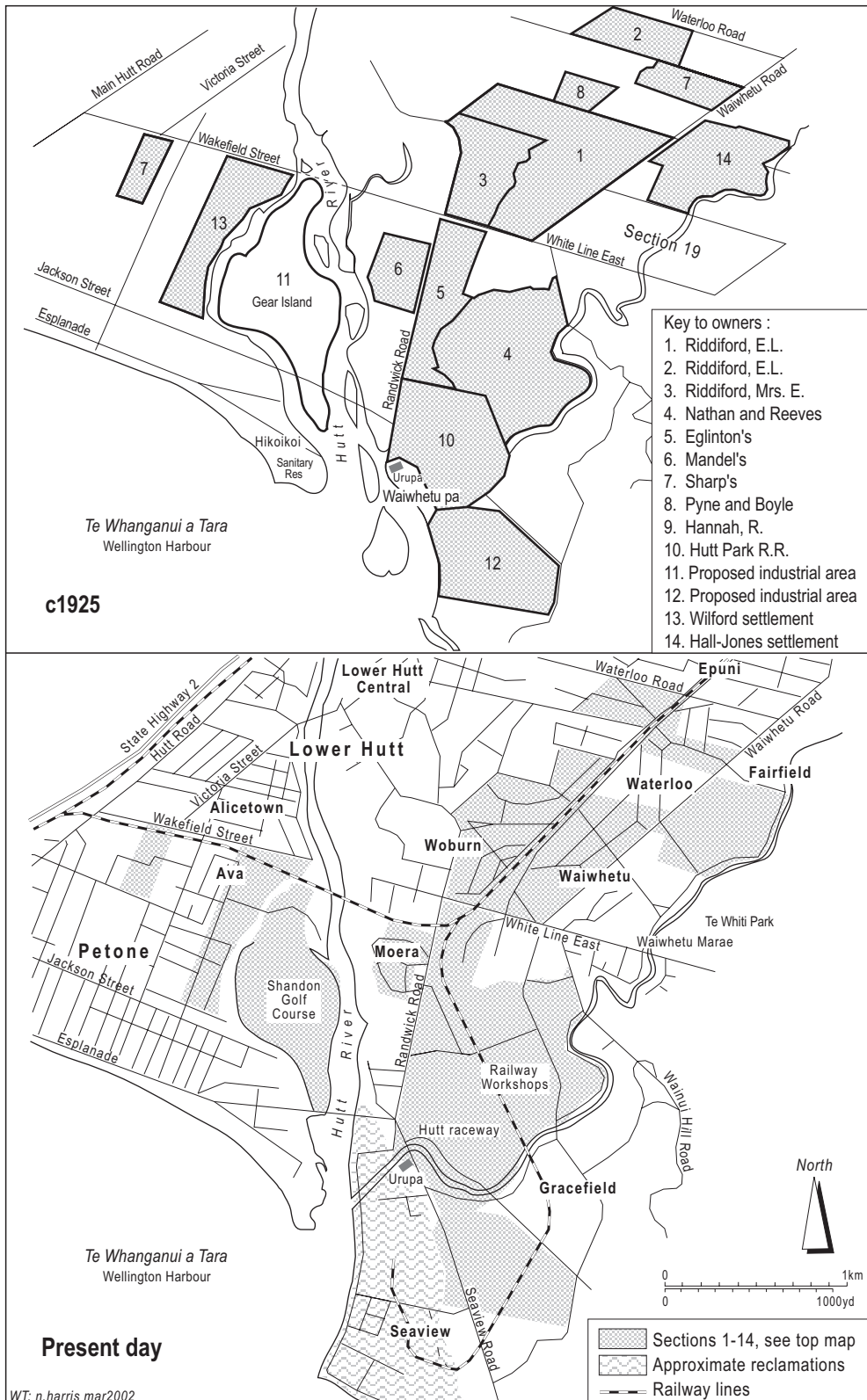
40. Document 16, pp 10–11

41. *Ibid*, pp 12–14; interview with Mohi Te One, doc 16(b)

42. Document 16, p 17

TE WHANGANUI A TARA ME ONA TAKIWA

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Map 14: Waiwhetu Pa and surrounding area before and after reclamation

1922. Map 14 shows the position of the urupa and the adjoining Waiwhetu Pa land on the Hutt River estuary at around 1925 and in relation to the subsequent reclamation. This reclamation commenced in 1936 and was undertaken by the Public Works Department and the Unemployment Board under an agreement with the Hutt River Board.<sup>43</sup>

In 1926, at the instigation of its engineer, the river board referred the question of Maori rights to reserves affected by the reclamation scheme to the board's solicitor for investigation and report.<sup>44</sup> It appears that the board wished to know who would own the reclaimed land fronting on the native reserve. In November, the board's solicitor responded, advising the board that the 'accrued land will belong to the native owners in proportion to their respective frontages, subject of course to the River Boards Statutory rights'.<sup>45</sup> Such rights were not spelt out by the solicitor.

In July 1927, the chairman of the river board reported to a board meeting that, because certain properties were being developed along the edge of the estuary, it would be advisable, in view of the proposed reclamation scheme, to acquire other properties with river frontages. Though the chairman did not specify who was developing properties, it seems likely, according to Lawton, that the board saw a need to acquire properties to avoid complications later.<sup>46</sup>

#### 17.5.2 Taking of the Waiwhetu Pa land by the Hutt River Board

On 10 May 1928, the Hutt River Board published a notice in the *New Zealand Gazette* announcing that it intended to take land situated at Waiwhetu Pa, apart from the urupa, for river protection works. This land included two of the Waiwhetu Pa sections (1C and 1D) recently purchased by a Pakeha, who was mistakenly regarded as a Maori owner. No other land in the vicinity was included. Owners were given 40 days to lodge written objections. An objection was lodged by one of the owners, Teo Tipene, and another person on 28 June 1928, a few days outside the 40-day limitation. The board convened a public meeting on 6 July 1928 so that Tipene could voice his objections. Tipene said that he intended to build a house on his land at the pa, but, according to the board minutes of the meeting, he was persuaded that his section was too small for this. Tipene then said that he had no further objections to the board acquiring the land and would consider compensation at a later date. There is no record of any other consultation by the board with the Maori owners.<sup>47</sup>

Having taken care of the basic legal requirements, the board prepared a memorial for the Governor-General stating its need to take the land for river protection purposes under the Public Works Act 1908. On 14 August 1928, the Governor-General signed a proclamation taking the land and vesting it in the Hutt River Board as from 29 August.<sup>48</sup>

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43. Document 16, pp 17–18; doc 19, pp 200–202, 204–207

44. Document 16, p 18

45. Hutt River Board minute book, 1924–29, pp 182–183 (quoted in doc 16, p 18)

46. Document 16, p 19

47. Ibid, pp 20–21

48. Ibid, pp 22–23. The notice was published in the *New Zealand Gazette* of 16 August 1928 at page 2464.

In January 1929, the Hutt River Board applied to the Native Land Court for an assessment of the compensation owed for the land taken for river protection works. The board offered to pay the Government valuation of £895 for the 7 acres 32 perches of Waiwhetu Pa land taken, plus up to £80 for outstanding rates, fees, and liens, and up to £150 for fencing the urupa, a total of £1125. The Maori owners objected that the Government valuation was too low, but the court accepted the board's offer as a fair level of compensation and issued an order to that effect. The court ordered that the compensation be paid to the Ikaroa District Maori Land Board for distribution to the owners after the deduction of a 2.5 per cent commission. Lawton could find no record of the payments having been made, but it seems safe to assume that they were.<sup>49</sup>

### 17.5.3 Failure to use the Waiwhetu Pa land for river protection works

Although the land had been taken under the Public Works Act 1908 for river protection works, the board did not use it for this purpose.<sup>50</sup> Following the Native Land Court's assessment of the compensation due, one of the Maori owners, Norah Jones, wrote to the Native Minister, Sir Apirana Ngata, questioning the legality of the initial taking and the amount of the compensation being offered. She said that although her land 'was taken ostensibly for protection purposes . . . I have good reason to believe that it will not be used for such purposes but that it will be subdivided for sale'. She added that Crown land adjacent to the pa blocks was valued at £1000 an acre, whereas the Maori land had been valued at only £100 an acre.<sup>51</sup> In fact, the land taken at Waiwhetu Pa had been valued at around £125 an acre. Ngata's under-secretary wrote a note on this letter:

Hon Native Minister,

This land was taken by the Hutt River Board, ostensibly for River protection purposes, but the whole of certain Sections were taken. I question if this can be legally done, but the only way of testing it is by action in the Supreme Court.<sup>52</sup>

Lawton suggests that the expense of going to court was too great for Mrs Jones, and the Native Department said that it could do no more. Compensation was within the jurisdiction of the Native Land Court rather than the Native Department, and, though the under-secretary of the latter department took the matter up with his counterpart in the Public Works Department, he was informed that the Hutt River Board had met its legal obligations. There, the matter rested. Lawton has pointed out that, whereas the Native Land Court had

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49. Document 16, pp 23–24

50. Ibid, p 28

51. Norah Jones to Apirana Ngata, 9 February 1929, MA1/1929/210, NA (quoted in doc 16, p 26)

52. Note, 28 May 1929, MA1/1929/210, NA (quoted in doc 16, p 26)

jurisdiction over compensation for Maori land taken under the Public Works Act, compensation for general land taken under the Act was awarded by a compensation court run by experts and specialists in compensation law who were familiar with the latest developments in the area.<sup>53</sup> While it may be that the Waiwhetu Pa land was not fairly valued, as Mrs Jones claimed, we have insufficient evidence to make a finding on that matter.

In the meantime, further evidence of the river board's other intentions for the land was coming to light. Soon after the land was taken and much to the dismay of the urupa's owners, an industrial building was erected beside the urupa on one of the sections taken by the board.<sup>54</sup> In the early 1950s, the board began to negotiate with the Crown for the sale of Waiwhetu Pa sections covering a total of 6 acres 1 rood 17 perches, as well as 8 acres 1 rood 25 perches of Hutt section 11. The negotiations between the board and the land purchase officer for the Ministry of Works were soon concluded. The board agreed to accept an offer of £2250 an acre, with a total of £49,197 for the full 15.5 acres (including the portion of Hutt section 11). (That price was considerably more than the value put on the land by the Native Land Court in 1929.) Having reached agreement, the Crown took both parcels of land by proclamation in the *Gazette* of 12 June 1952, stating that it was for the better utilisation of the land pursuant to the Public Works Act 1928.<sup>55</sup> Another proclamation, published on 4 June 1953, declared that the Waiwhetu Pa land which was taken for Government work but not required for that work was to become Crown land by virtue of section 35 of the Public Works Act 1928. There was no definition of what was meant by 'better utilisation' of land, but a series of boundary changes between 1954 and 1960, which in some cases grouped Waiwhetu Pa land together with portions of reclaimed land, indicate that, as researcher Damian Stone suggests, the intention may have been to 'facilitate [the] efficient sub-division of the reclaimed lands'.<sup>56</sup>

#### 17.5.4 Crown counsel's submissions

Crown counsel made the following points about the taking of the Waiwhetu Pa land:

- ▶ Waiwhetu Maori were not living on the land when it was taken, and therefore 'direct prejudicial effect on the Wai 442 claimants is likely to be minimal';
- ▶ the compensation paid 'does not appear to be inadequate', and the suggestion that adjoining Crown land was valued at £1000 per acre was unsubstantiated; and
- ▶ given that the land was taken by the Hutt River Board rather than the Crown, 'the ability of the Tribunal to make findings in relation to this acquisition may be limited'.<sup>57</sup>

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53. Document 16, p 27; Marr, pp 140–142, 208

54. Document 16, p 25

55. *Ibid*, p 31

56. Document 16(a), pp 24–25

57. Document Q2, pp 21–22

**17.5.5 Tribunal consideration of the compulsory taking of the Waiwhetu Pa land**

The Wai 145 and Wai 442 claimants have a common interest in the taking of the Waiwhetu Pa land, and accordingly we draw on the evidence adduced on this topic in considering whether Treaty breaches have been established in respect of the taking and the subsequent failure to return the land when it was not used for the purpose for which it was taken.

The following events appear to be significant in relation to the compulsory taking of the Waiwhetu Pa land:

- ▶ Statutory authority to reclaim land in the vicinity of the Waiwhetu Pa was obtained by the Hutt River Board in 1922.
- ▶ In 1926, a legal opinion was obtained by the board as to the rights of Maori should any reclaimed land front on Maori reserves. In November 1926, the board's solicitor advised it that such reclaimed land would belong to the Maori owners in proportion to their respective frontages.
- ▶ Less than a year later, in July 1927, the river board's chairman informed the board that, in view of the proposed reclamation scheme, it would be advisable to acquire other properties with river frontages.
- ▶ In May 1928, the river board published a notice in the *New Zealand Gazette* announcing its intention to take the Waiwhetu Pa land, other than the urupa, for river protection works. No mention was made then or in the proclamation issued by the Crown in the name of the Governor-General of the proposed reclamation of lands adjoining those being taken from Waiwhetu Maori.
- ▶ In February 1929, Norah Jones wrote to the Native Minister, Sir Apirana Ngata, questioning the legality of the taking of the pa land. Ngata's under-secretary, in a note to the Minister, commented that the land was taken by the river board 'ostensibly for River protection purposes', but, because the whole of certain sections were taken, he questioned whether this could be legally done.
- ▶ There is evidence that, shortly after the pa land was compulsorily taken, an industrial building was erected beside the urupa on one of the sections taken from Maori.
- ▶ No river protection work was carried out, but the reclamation was duly proceeded with in 1936.

The Tribunal finds it difficult to escape the conclusion that the real reason that the river board compulsorily acquired the Waiwhetu Pa land was to prevent the Maori owners from becoming the owners of the reclaimed land which fronted on their pa land. It was not until 1928 that the board announced its intention to take the land for river protection works. All this was done ostensibly pursuant to powers vested in the board under the relevant provisions of the Public Works Act 1908 and the River Boards Act 1908 (which authorised river boards to take land under the Public Works Act).<sup>58</sup> Had the river board been concerned that

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58. Sections 2, 18, 19, 22, 183 of the Public Works Act 1908 and like provisions in the Public Works Act 1928; sections 73, 74 of the River Boards Act 1908

the Maori Waiwhetu Pa land would have been in danger of being injuriously affected by any river protection works, section 2 of the River Boards Amendment Act 1910 provided that a river board could purchase or otherwise acquire such land, 'but not by compulsory taking'. That course was not followed. Moreover, it soon became apparent that the land was not in fact going to be used for river protection purposes.

The Hutt River Board was not an agent of the Crown or acting by or on behalf of the Crown. This, however, is not material to the question of whether the legislative provisions under which it purported to act, which were approved and promulgated by the Crown, were consistent with Treaty principles. The Waitangi Tribunal has found on various occasions that the Crown's duty of active protection of Maori property interests is not avoided by legislative or other delegation. If the Crown chooses to delegate, it must do so in terms that ensure that its Treaty duty of protection is fulfilled.<sup>59</sup> No such terms were contained in the River Boards Act 1908 or in the Public Works Act 1908, under which the land was declared taken by the Governor-General on 14 August 1928.<sup>60</sup>

We adopt the finding of the Turangi township Tribunal that, in the absence of 'exceptional circumstances and as a last resort in the national interest', the Crown was obliged to ensure that land was acquired from Maori in such a manner that Maori Treaty rights would be protected.<sup>61</sup> There were no such provisions in the Public Works Act 1928 or in the 1908 Act which it repealed. We consider the following statement by the Turangi Tribunal to be equally applicable to the relevant provisions of the Public Works Act 1908 and the River Boards Act 1908:

they are not merely inconsistent with the terms of the Treaty and relevant Treaty principles; they are tantamount to a unilateral abrogation of article 2 . . . Far from actively protecting the Maori owners' right not to be deprived of their land without their consent and at an agreed price, they have been denied such protection by the powers vested in the Crown in [these Acts].<sup>62</sup>

We would add that, although the legislative provisions are clearly inconsistent with the Treaty duty of the Crown to ensure that the rangatiratanga rights of Maori to their land are actively protected, the Crown was also a party to the Hutt River Board's action in invoking the provisions of the 1908 Act. For no such taking could be legally effective until and unless the Crown, in the person of the King's representative, the Governor-General, formally declared that the necessary proclamation should take effect. This, he did.

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59. See, for example, Waitangi Tribunal, *The Whanganui River Report* (Wellington: GP Publications, 1999), pp 330, 332

60. The Public Works Act 1908 was in force at the time. It was repealed on 6 October 1928 by the Public Works Act 1928. The relevant 1908 provisions continued in force.

61. Waitangi Tribunal, *The Turangi Township Report 1995*, p 300

62. *Ibid*, p 302

The Tribunal is not satisfied that it was essential that the Waiwhetu Pa land should have been compulsorily acquired pursuant to the Public Works Act 1908 and the River Boards Act 1908. The pa land surrounding the urupa was clearly of considerable historical and cultural significance to the Waiwhetu Maori from whom it was summarily acquired.

#### **17.5.6 Tribunal finding**

The Tribunal finds that the Maori owners of the Waiwhetu Pa reserve land<sup>63</sup> were prejudicially affected by the taking of most of the reserve under the provisions of the Public Works Act 1908 and the River Boards Act 1908, in that both Acts were fundamentally inconsistent with the basic guarantee in article 2 of the Treaty that Maori could keep their land until such time as they wished to sell it at a price agreed with the Crown.

#### **17.5.7 Failure to return the Waiwhetu Pa land**

As noted earlier in section 17.5, the Wai 442 claimants alleged that the Waiwhetu Pa land should have been offered back to the original owners when it was no longer required for the purpose for which it was taken.

It appears to the Tribunal very doubtful that the land which was compulsorily taken was needed for river protection works. Had it been required for this purpose, it is highly unlikely that an industrial building would have been erected on it some six months after its taking. The Tribunal was advised that no river protection works involving the pa land were undertaken. In short, it appears that the river board could have offered back the land, or some part of it, to the former Maori owners. However, we accept Crown counsel's submission that the Tribunal received little in the way of documentary evidence as to what happened to the remainder of the pa site.<sup>64</sup> In the circumstances, given the lack of a sufficient evidential base, we are unable to make any finding on this aspect of the Wai 442 claim. The Wai 145 claimants made no such claim.

#### **17.6 OTHER OFFER-BACK CLAIMS**

The Wai 145 claimants allege that the Crown failed to offer back land when it was no longer needed for the purpose for which it was originally taken.<sup>65</sup> This breach is particularised in relation to the taking of Hutt Valley reserve land for public housing purposes, discussed

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63. Represented in this inquiry by Wai 442 and Wai 145.

64. Document Q2, pp 22–23

65. Claim 1.2(d), para 18.13

above, but the Tribunal has been unable to make findings on these takings for the reasons outlined at section 17.4. Since the claimants have not referred to any other specific cases, the Tribunal is unable to make a finding on this general claim.

The Wai 145 statement of claim also states that the claimants have been unable to respond to offer-back opportunities under the Public Works Act 1981 because Crown policies have ‘rendered tangata whenua impecunious’.<sup>66</sup> In closing submissions, Wai 145 claimant counsel said that it was a Treaty breach for the Crown to require claimants, who had been impoverished by Crown policies, to pay current market values when land taken for public works was offered back to Maori.<sup>67</sup> In response, Crown counsel made a number of points:

- ▶ there is limited information before the Tribunal about the financial position of the Wai 145 claimants;
- ▶ the Wellington Tenth Trust has proved itself able to respond to offer-back opportunities in some recent cases, such as those of the former defence land in Taranaki Street and the Buckle Street museum site;
- ▶ it is reasonable for Maori to whom land is being returned to pay something towards the value of improvements created by ‘the capital and energies of the national community’;
- ▶ in many cases, the owners were compensated at the time of the taking, so offering the land back at less than current market value could mean the owners would be compensated twice; and
- ▶ there are legislative provisions for the Crown to offer land back at less than current market value where it is reasonable to do so.

In conclusion, Crown counsel stated that there is insufficient evidence for the Tribunal to make a finding on the claim of inability to respond to offer-back opportunities.<sup>68</sup>

In all the circumstances, the Tribunal considers it inappropriate to make any finding.

### 17.7 MISCELLANEOUS TAKINGS

The Wai 145 fourth amended statement of claim also lists the following public works takings as Treaty breaches:

- ▶ 93 acres of Ohiro 19 and 21 taken in 1976 for a rubbish dump;
- ▶ 464 acres of Korokoro reserve taken in 1904 and 1911 for waterworks;
- ▶ 182 acres of Parangarahu block taken for lighthouse purposes between 1865 and 1939; and
- ▶ 25 acres of Parangarahu taken in 1964 for a sewer outfall.<sup>69</sup>

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66. Ibid, para 18.14

67. Document 05, pp 637–638

68. Document Q2, pp 18–19

69. Claim 1.2(d), paras 18.6, 18.9, 18.10, 18.11, 18.12

Crown counsel's response to all these claims is that 'There is insufficient evidence on compensation, consultation, consideration of other sites, consideration of alternative forms of tenure, sufficiency of remaining lands, and benefits accruing from the public work to reach any findings on Treaty breach'.<sup>70</sup> The Tribunal agrees with Crown counsel. While the overall reduction of the area of reserved land left to Wellington Maori is regrettable, the Tribunal has insufficient evidence about these particular cases to make findings.

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70. Document Q1, pp 61–63; doc Q2, pp 13–16, 23