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PART VII

CONCLUSION

This part of the report consists of our final chapter, which sets out our concluding comments and recommendations. We reiterate the salient grievances of the raupatu, Ngati Pahauwera, and Ahuriri sections of our inquiry district, and give careful consideration to the issue of claim negotiation and settlement.

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CHAPTER 20

CONCLUDING COMMENTS AND RECOMMENDATIONS

20.1 Introduction

We now turn to our concluding comments and recommendations. In reaching this point, we have considered a large amount of evidence and submissions and made numerous findings as to breaches by the Crown of Treaty principles. Here, we attempt to pull this together into an overall picture that will be of use to the Crown and the claimants as they move into the next phase of the process – negotiations.

Our region is potentially typical of many Tribunal inquiry districts in the North Island. There were pre-1865 Crown purchases and alienations to both the Crown and private purchasers after the introduction of the Native Land Court. There was supposed rebellion followed by confiscation. Then, into the twentieth century, there were development schemes, a consolidation scheme, and still further land purchasing, particularly by the Crown. There were also major environmental and socioeconomic changes.

And, as with the majority of the other districts, most hapu finished the twentieth century with very little of their former landed estate. It also mattered little, in many ways, whether customary title was lost through sales to the Crown before 1865, through the passage of lands through the Native Land Court (and the ensuing individualisation of interests in land), or through the most grievous form of alienation, raupatu. The net result was, as elsewhere, the same. After 150 years of Crown–Maori relations in Mohaka ki Ahuriri – since the first transactions of 1851 – Maori were essentially left with the shadow of the land. Ironically, it was in the confiscated district that Maori were left with the largest holdings (although that reflected the rugged and isolated nature of that land).

So, what are the distinctive features of the Mohaka ki Ahuriri inquiry district? For a start, it is an untidy district, with one sizeable boundary that, like the purchase boundary line it follows, reflects little on the actual traditional areas of interest of the hapu of the region. Here, we are referring to the southern boundary of the Ahuriri block, which severs the takiwa of the Ahuriri–Heretaunga hapu. Within our boundary are the lands these hapu sold in their first major political engagement with the Crown in 1851; without it are the lands they retained at the time, the fate of which is crucial to any definitive assessment of their overall losses. We discussed some Hawke's Bay-wide (including Heretaunga) issues for the sake of context in the previous chapter, but in chapter 5 our focus was restricted to the subject matter of the Wai 400

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claim – the Ahuriri transaction. In other words, while the inquiry boundary was devised with sound and pragmatic administrative reasoning, it has made our job of coming to considered and definite conclusions on the overall prejudice suffered by the Ahuriri hapu difficult and hence incomplete.

In the central and northern parts of our inquiry district, the boundaries are much more sympathetic to our task of reporting fully. The central third of our region is the confiscation district, to which a distinct and separate narrative can be attached following the events of 1866. While claimant groups such as Ngati Tutemohuta have additional interests in Taupo, the confiscation district by and large encompasses the principal areas of interest of the key groups within this part of our inquiry, such as Ngati Hineuru and Ngati Tu.[1] We believe that our inquiry has shed much light on the 'forgotten raupatu', so-called because it was not investigated by the Sim commission and overshadowed by the confiscations elsewhere. That so much land was 'returned' makes the Mohaka–Waikare confiscation area different from other raupatu districts. As a result of the nature of those 'returns', the recipients of the returned confiscated land also suffered enormous disruption through crippling title disputes.

To the north-east, the blocks we have grouped together as the lands subject to claim by Ngati Pahauwera can also be addressed in a distinct narrative, although the story becomes more specific to Ngati Pahauwera from the late 1860s. Earlier events, such as the 1851 Mohaka transaction, could logically have been grouped with the other contemporaneous transactions such as Ahuriri, but we have included them with the later history of Ngati Pahauwera principally in order to report coherently on the claims before us. That history includes the operations of the Native Land Court, Crown and private purchasing, land consolidation, and development schemes. While some questions remain for us over the extent to which the interests of certain Wairoa hapu overlap with those of Ngati Pahauwera, in this part of our inquiry district we have the neatest intersection of the interests of a kin group with the history of a demarcated territory. Elsewhere, by contrast, the principal claims were by pan-hapu claimant groups and were focused on the history of specific areas of land defined by historical events rather than by tribal interests. The Ngati Pahauwera section of our report is therefore the most comprehensive coverage we can produce of one distinct group and its interactions with the Crown.

20.2 Raupatu

It remains for us to restate the salient breaches of Treaty principles we have identified in the report. First and foremost amongst these is the raupatu. In saying this, we see no contradiction with our earlier statement that land was lost regardless of the manner in which

1. We should add that we understand Ngati Hineuru are also claimants in the Taupo, Kaingaroa, and Urewera inquiries. In any event, their turangawaewae is at Te Haroto in our inquiry district.

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customary title ended. In short, the Crown's behaviour in respect of the confiscation was on many counts indefensible, as we have explained. A group of Maori we have found to be not in rebellion were abruptly ordered to lay down their arms and then attacked when they refused. The lands of the hapu with the most representation amongst that group were confiscated, as were the lands of various other hapu besides. The Crown kept several blocks without justification, and certainly not for the purpose of military settlements, as required under the New Zealand Settlements Act 1863. The Compensation Court, provided for in legislation, was not used to determine who had been amongst or who had supported the so-called rebels; instead, a deal was made between the Crown and its allies over the 'return' of the spoils. Then, the Crown proceeded to purchase half of what was given back, in large part by restricting the owners from dealing with anyone but the Crown. The other half was racked by decades of disputes over title. In a nutshell, that is the story of the Mohaka–Waikare confiscation. But it is worth pausing to stress certain matters above others.

The genesis of the raupatu is of course to be found well beyond its most immediate causes and lies in a national context of anti-land selling movements, warfare, the rise of Pai Marire, and the earlier confiscations. But that should not obscure the fact that the Mohaka–Waikare confiscation has a peculiarly Hawke's Bay flavour. To a large extent, it was born of the local circumstances that began in 1851, when, in purchasing Ahuriri, McLean left Ngati Hineuru overlooked and disaffected. In 1858, McLean moved to placate Te Rangihiroa with a belated payment. Te Rangihiroa refused the money, but it was later accepted on his behalf by three other chiefs (see sec 5.6). Further uneasy dealings occurred over the Kaweka block, which overlapped with the inland portion of the Ahuriri block, well into the 1860s. Here were the seeds of the confrontation to come.

The entire situation was both caused and compounded by McLean's preference to deal only with a coterie of coastal Ngati Kahungunu chiefs, such as Tareha, Te Waka Kawatini, Karaitiana Takamoana, and Paora Torototo. This alliance or – we do not think it too strong a term – collusion was apparent in the sale of Ahuriri, the fight at Omarunui, the 'return' of the confiscated land, and the passage of certain 'confiscated' blocks through the Native Land Court. Time and again, Ngati Hineuru were the main scapegoats or victims of this collaboration. As we have said, there were many alternatives available to McLean that would have avoided the bloodshed at Omarunui, but a peaceful solution was apparently not the object. The reason for this marked departure from the Crown's obligation to treat its Maori subjects impartially is to be found not just in the warfare and insecurity of the 1860s or in McLean's grand design to isolate the Kingitanga by securing the inland route to Taupo – it lies also in the vested self-interest of many of the main protagonists. On the part of the Ngati Kahungunu chiefs, this obviously related to a desire to control the sale of lands. For Crown officals, it was also largely bound up with their own glaring conflicts of interest over land. Indeed, almost without exception, the key Government agents in Hawke's Bay in the mid-nineteenth century gained personally from the Crown's land dealings. This was certainly true for

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McLean, with his Maraekakaho Station to the south, but it was also the case for Whitmore, Rhodes, Ormond, and even Park, the surveyor, who took such a shine to a part of the Ahuriri block he surveyed.

In no one was this conflict more apparent than Whitmore. His sheep run extended over Ngati Hineuru's former territory in the inland Ahuriri block, and thus their opposition to the transaction was a thorn in his side. Whitmore was not averse to advocating military action to stamp out the Pai Marire 'menace' (as McLean had referred to them), using the loss of some of his sheep as a pretext (something even Locke scoffed at). When the opportunity finally arose to tackle Ngati Hineuru and Pai Marire followers (they were viewed rather indistinguishably), not only did Whitmore get to participate in the attack but he got to lead it, as well as the punitive expedition into the interior that followed. It seems remarkable that Ngati Hineuru should have had to contend with a Government officer who stood personally to benefit so clearly at their expense.

Of course, the local officials did not act in isolation. They required the sanction of their superiors in Wellington for their actions. In the atmosphere of the time, however, this was readily given, and included the wide powers conferred by Weld upon McLean in March 1865 to make 'such arrangements as you may think most advisable' with 'friendly' chiefs to preserve peace and Stafford's February 1866 authorisation of McLean's use of an armed force to deal with reports of sheep stealing. By contrast, *ex post facto* concern was expressed about the military action in December 1866 by Lord Henry Carnarvon, the British Colonial Secretary, who pointed out to Grey that he had been left to learn of the affair through the newspapers and had no idea whether those Maori killed had been 'unoffending persons' (see sec 8.8). Grey's response was to include in his dispatch to London Samuel Williams' exaggerated account of the plot to attack Napier.[2]

The collaboration that we have mentioned of course prevailed in the 1870 agreement between McLean and various (predominantly coastal) chiefs for the return of a number of blocks. It also certainly applied in the Government's allowance of the passage of the Petane block through the Native Land Court on the eve of the confiscation to stand, and its even less justifiable agreement to Pakaututu passing through the court in 1869. Nowhere, however, was the Crown's collusion more manifest than when it gave Tareha sole ownership of Kaiwaka (complete with a Crown grant). Despite the repeated and reasonable arguments before the courts of certain (undoubtedly loyal) Maori that a trust had been intended, the Crown would not intervene on the plaintiffs' behalf by passing clarifying legislation. It seems that the Crown felt that its alliance with Tareha – or its debt to him for his services in attacking the Pai Marire party at Omarunui and for chasing Te Kooti – carried on after his death to the next generation in his family. Indeed, it must be assumed that the Crown preferred the petitioners' case to fail. That is because, when it did fail, the Crown took the opportunity to buy nearly half the

2. See doc w1, p189

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block off the Tareha brothers for the purpose of opening it for Pakeha settlement. In Treaty terms, the Crown should have bought it in order to compensate those with rightful customary claims – but it did no such thing. If the Crown today owns any land at Kaiwaka, it should now be used to settle with those descended from such claimants. If it does not, they should be offered compensation.

Kaiwaka aside, if the recipients of the seaward returned blocks were in theory the beneficiaries of an alliance with the Crown in 1870, the Crown certainly did not treat the owners as allies in due course. From about 1910 to 1930, the Crown embarked on a land-buying programme that all but obliterated Maori land-holdings in the nine blocks in question, in contravention of the prohibition on alienation in the Mohaka–Waikare Act of 1870. That purchasing was of course also facilitated by the return of the land to Maori in the form of individual undivided interests rather than in customary title. There are two matters to note about the Crown's conduct in this regard. First, absolutely no consideration was given to assisting Maori to develop and make a living from these lands; on the contrary, the object was clearly to divest them of the lands as expeditiously as possible and to make them available for Pakeha settlers, including returned soldiers. This was an example of, to coin a phrase, 'two standards of citizenship'. Secondly, we consider that the Crown's purchasing methods, which included actively purchasing individual interests over the clear objections of meetings of owners, were by and large unconscionable. But, in particular, the powers conveyed on the Crown by section 363 of the Native Land Act 1909 were draconian and completely unjustifiable in terms of the Treaty. The Crown could – and often did – place alienation restrictions on blocks of land that prevented the owners from selling to private purchasers or even letting the land (including to lessees chosen from amongst the owners themselves) for so long as the Crown chose to keep the restrictions in place. As the owners became starved of any income, sales to the Crown became inevitable. We might well ask whether this form of alienation was any better than confiscation. While we may not have been made aware in evidence of every instance in which section 363 was used, we can calculate from the examples we do know of that the amount of land lost by Maori in these circumstances in the seaward returned blocks was at least 16,000 acres.[3]

In the inland blocks, a superficial assessment shows that the majority of the land remains in Maori ownership (nearly 110,000 acres spread across the Te Haroto, Tarawera, Tataraakina, and Te Matai blocks). This, however, tells nothing of the story of the clear grievances of the traditional owners of these lands. We have already mentioned the Pakaututu block. With regard to its sister block, Te Matai, we believe that the Crown allowed the uncertainty over the title to go on for much too long. We also consider that the Crown has largely watched from the sidelines as the owners have struggled to gain practical access to their land. It seems that this is now provided for in a 2002 amendment to the Te Ture Whenua Maori Act 1993, but we

3. This includes 2711 acres of Pakuratahi, 3835 acres of Arapaoanui, 3990 acres of Te Heru a Tureia, and the full 5760 acres of Tatara o Te Rauhina.

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nevertheless believe that the Crown should have been vigilant to ensure that the owners had adequate access to their land much earlier, particularly in 1962, when the Crown acquired Pakaututu and onsold it for settlement purposes.

The worst grievances concern the Tarawera and Tataraakina blocks, however. For a start, the Crown kept a 2000-acre enclave at Tarawera that included the sites of the principal Ngati Hineuru settlements and cultivations. Then, after allowing a disproportionate Ngati Kahutapere presence amongst the lists for the main Tarawera block and the Tataraakina block in 1870, the Crown finally legislated for a reinvestigation of title in 1924. But by then it was far too late, for those who had been recipients of the theoretical security of a Crown-granted title had enjoyed over 50 years of occupation. To then allow them to be evicted was manifestly unjust, but this is indeed what happened, since the Crown refused to make its own land available to accommodate the formerly dispossessed Ngati Hineuru owners who were now put into the titles. Then, in making amends in 1951 with the appointment of a royal commission, the Crown oversaw the reinstatement of the pre-1924 titles, again without providing Crown land to compensate the new generation of owners thus dispossessed of their lands. All the while, the litigation costs and survey charges arising out of the new partitions were proving ruinously expensive to those Maori involved.

The retention of the majority of the land in Maori ownership was a saving grace. The Crown was generally not interested in purchasing the land, which it viewed as remote and unproductive. But this should not cloud the extent of the prejudice suffered by the customary right-holders as well as the descendants of those who wrongly made the ownership lists in 1870. So disruptive were the title disputes and revisions that it is a wonder that much use was made of the land at all. Development assistance arrived much later than elsewhere too, and for a long time the main income derived from the land came from the royalties paid for the milling of its native timber. The lack of consultation over, and compensation for, the placement of the 220-kilovolt transmission line over the two blocks only added insult to injury. In addition, the loss of economic opportunity caused by the protection strip beneath these lines is considerable.

Finally, we should note that the Mohaka–Waikare confiscation claimants have never been compensated. Compensation was paid in the 1940s in respect of the Waikato, Whakatohea, and Taranaki confiscations, and a small amount was paid in 1981 in respect of Tauranga. Those moneys have been put towards the general social and economic advancement of the tribes concerned. As the Ngati Awa Tribunal observed, missing out on such funds saw Ngati Awa lag behind in terms of tribal organisation, educational scholarships, and the like. The Tribunal felt that these matters should be taken into account in the Ngati Awa claim settlement, and we consider that the same must apply to the settlement of the Mohaka–Waikare confiscation claims.[4]

4. Waitangi Tribunal, *The Ngati Awa Raupatu Report* (Wellington: Legislation Direct, 1999), pp 136–137

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20.3 Ngati Pahauwera

It was argued that the 1851 Mohaka transaction was, like Ahuriri, akin to a treaty or an alliance. Certainly, we have found it to be a major political compact for Ngati Pahauwera and a yardstick by which to measure later Crown conduct towards them. At the very least, the Crown had an obligation to act thereafter in Ngati Pahauwera's interests. We have had the opportunity to assess whether the spirit of the original compact was upheld because we were able to trace the fate of all Ngati Pahauwera's lands right through to the present day. We have already said that insufficient land was reserved out of the Mohaka and Waihua purchases to meet the likely future needs of all the hapu. We have also said that the Crown was lax in its protection of Ngati Pahauwera from Te Kooti and that the failure to return the wrongly acquired 1152 acres of the Waihua block when the issue was first brought to light was singularly unacceptable. Furthermore, the native land legislation did not provide for the form of title favoured by Ngati Pahauwera in 1868, and the protracted disputes over title that followed in a number of the blocks can be attributed to this failing. But while all this is bad enough, we believe that the grievances were seriously compounded in the early twentieth century.

In 1910, Ngati Pahauwera retained more than a quarter of their former estate – some 60,000 acres. This might have just been enough to participate in the developing national economy if assistance had been provided to develop these lands. In 1907, Stout and Ngata investigated two of the remaining Ngati Pahauwera land blocks and recommended that not one acre of them be sold and that Government assistance for their development be provided. But that assistance for the development of Maori land in multiple ownership did not occur until 1930, over three decades after the same kind of assistance was made available to individual (inevitably Pakeha) landowners. Again, this was another example of two standards of citizenship and was not in accord with the spirit of the 1851 transaction. What was worse, however, was that from 1911 the Crown persisted over two decades in buying up individual interests in land, more than halving the amount of land left in Maori ownership at Mohaka in 1910. It adopted the usual tactics of employing alienation restrictions under section 363 of the Native Land Act 1909, as well as making payments on the basis of out-of-date valuations. This purchasing not only conflicted with the Stout–Ngata recommendations but seemed to serve no clear purpose. And, because the Crown had acquired so many partial interests, scattered throughout the various blocks, it decided upon a scheme to consolidate its interests. Even after this decision was made, however, purchasing continued unabated – in fact, the impetus for it increased, as the Crown tried to gain as much land as it could in the northern part of the Mohaka block, where the blackberry infestation was less, before the exchanges took place.

What the Crown deserves some credit for are the development schemes that it set up at Mohaka. Despite their various faults, they were genuine attempts both to help Maori to develop their holdings and to relieve unemployment, especially at first. In the long run, it is clear that the schemes failed, particularly because of the terrain, the small land units, and the choice of dairying as the farming practice. But they represented about the first proactive step

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on the part of the Crown to foster Ngati Pahauwera's interests. There was precious little else to commend in the twentieth century. Ngati Pahauwera have suffered the effects of isolation, poverty, and rural decline, and most of their people have been forced to leave. For those who remained, or who have now come back, the area is racked with the problems of scattered holdings in fractionated title, a lack of amenities, poor health, and woeful housing. Overall, only some 15,000 acres of Maori land remain in Ngati Pahauwera ownership, which has been calculated at roughly 6 per cent of the former estate. Much of that land lies unproductive and neglected, but it is still subject to local authority rates. The Te Ture Whenua Maori Act 1993 has gone some way towards providing an avenue for the transformation of multiple titles into communal ones, but the only incentive for this to occur is the motivation of the people. As we have said, the Crown needs to continue to develop initiatives to ameliorate the situation. Finally, despite the Crown having ignored the Tribunal's recommendations in the *Mohaka River Report 1992*, we believe that it still needs to negotiate with Ngati Pahauwera over the management of the river.

20.4 Ahuriri

Concerning Ahuriri, we cannot say whether the expectations the Ahuriri hapu had of receiving collateral benefits from the sale of land in 1851 were fulfilled. This would require a close examination of the fate of the blocks to the south, which we of course have not been able to do. But, on this point, we can say three things. First, we can confirm that these expectations were legitimate and that promises of such collateral benefits were regularly made by Government purchase agents in other parts of the country. This does not make the Ahuriri transaction a treaty, but it was a major political compact between Ahuriri Maori and the Crown, particularly since it appears that none of the vendors had signed the Treaty of Waitangi. Secondly, on the basis of the fate of the lands to the north, in which the vendors held interests, the Ahuriri sellers clearly received none of the envisaged benefits. And, with regard to the blocks to the south, Crown counsel conceded that there were serious issues there for the Crown to answer. The claimants will have to decide, therefore, whether they wish to proceed to a further Tribunal inquiry or whether they wish instead to move directly to negotiations with the Crown on all their claims. We return to this below.

What we can say about Ahuriri is that, although there were some things to commend about the way in which McLean conducted the transaction – the openness of the large meetings, for example – there are a number of matters which do not bear much scrutiny. The vendors were pressured into selling important areas they did not want to lose, such as lands around the harbour and the majority of Puketitiri Bush. In securing these areas for the Crown, McLean took advantage of the strong desire of the sellers both to have Pakeha settle on their lands and to emulate Te Hapuku in his sale of the Waipukurau block. The meagre reserves that were

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provided were soon being purchased, with the Crown relentlessly pursuing Puketitiri until it eventually secured the title. The price for the Ahuriri block was also low and less than a third of that paid for Waipukurau. Moreover, McLean's superiors had charged him with ascertaining, and paying no more than, the lowest price that Maori would accept for their land, which contradicted the supposedly protective function of the Crown's right of pre-emption. McLean was also in breach of Treaty principles by his treatment of Ngati Hineuru, essentially ignoring their objections to the inclusion of their lands in the transaction and compensating them after the event when the transaction was a fait accompli. Likewise, Ngati Tu were not properly consulted and were left disgruntled. Here, then, were a number of matters that make Ahuriri far from a model transaction, even if it compared more than favourably with the clandestine purchases that followed.

Amongst the Ahuriri claimants, Ngati Parau raised a series of specific claims concerning their lands. We identified grievances with respect to the loss of land from reserves at Waitanoa and Waiohiki. In particular, most of Ngati Parau's riparian land in the Waiohiki reserve was taken for flood control purposes in the 1930s. We found that this taking, which should have occurred only as a last resort and in the national interest, was not even necessary.

20.5 District Overview

Our inquiry district covers roughly 800,000 acres. That is approximately a third of the 2.7 million acres that McLean estimated in 1859 were contained within Hawke's Bay province. Of that amount, McLean wrote that some 200,000 to 300,000 acres (or about 10 per cent) would be required for the present and future needs of Maori.[5] Given the amount of land Maori retained in the inland confiscated blocks – and leaving aside the question of whether McLean's assessment was accurate – in our inquiry district Maori today retain more than 10 per cent of the land. But the figures are misleading. McLean also said that 500,000 acres of the province was 'waste and useless', and it seems likely that most of what Maori still have today fell under this category rather than under lands deemed necessary for their livelihood. For example, in January 1867 McLean described the confiscated district as 'the most hilly rugged and unproductive land within the Province'.[6] The following year, he said it was 'really of very little value and might almost revert to the Natives without much detriment to the Public Interests'.[7]

Thus, the leading Crown official in Hawke's Bay suggested in 1859 that Maori would require 10 per cent of the province for their needs. Instead – in our inquiry district at any rate – they were essentially left with the mountainous and remote areas – areas that the Crown did not

5. McLean to T H Smith, Assistant Native Secretary, 29 June 1859, AJHR, 1862, C-1, p 345 (doc J10, p 181)
6. McLean to Stafford, 8 January 1867, RDB, vol 131, p 50620
7. McLean to Colonial Secretary, 8 May 1868 (as quoted in doc J28, p 61)

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want to purchase. Of the better land in our inquiry district, only a small amount of Maori land remains. In the Ahuriri block, there is a tiny amount left in the Wharerangi reserve. To the immediate south, a small area remains around Waiohiki Marae. To the north, an even smaller amount remains at Petane around the marae there. In the seaward confiscated blocks, only 4500 acres were still in Maori ownership in 1930 out of a total of 123,000 acres returned, and presumably fewer than that remain today. And at Mohaka, as we have said, Maori retain 15,000 acres scattered across four blocks out of a former estate of some 230,000 acres.

The Crown raised the issue at our hearings as to whether it is really necessary to retain a rural land base to succeed in contemporary New Zealand society. Crown counsel pointed to a general decline in the fortunes of rural New Zealand and to changes in farming practice, which, he claimed, meant that rural areas would never be able to support a burgeoning Maori population. The argument was made that many Maori made personal choices to sell their rural holdings and move to the better lifestyles and opportunities offered in the cities. Crown counsel also attempted to refute the direct link that the claimants were seeking to make between landlessness and poverty. But, despite this, Crown counsel also conceded that land purchasing went on too long and that insufficient thought was given by officials as to how to maintain viable Maori communities. In short, counsel conceded, groups such as Ngati Pahauwera did not retain sufficient land for their present and reasonably foreseeable needs.

These are important concessions. Crown counsel did not go as far as we do in finding that there was, and is, a link between landlessness and poverty, or that the Crown's mindset was fixated on Maori having potential for little more than subsistence farming and wage labouring. We also concluded that Maori needed to retain not just a small fraction of their land base, such as 10 per cent, but rather a sufficiently large area to participate in the growing pastoral economy of the day. We also found that the supposedly rational and free decisions that Maori made to sell were in reality no such thing, and we were very critical of the way in which the Native Land Court system undermined chiefly authority and destabilised Maori communities. But, despite all this, the concessions are encouraging, for they show that the Crown is willing to admit its mistakes and negotiate compensation accordingly.

In sum, therefore, the Crown in its dealings in Mohaka ki Ahuriri acted frequently in breach of the following Treaty principles:

- the duty of active protection of Maori, particularly with respect to ensuring the retention by Maori communities of sufficient land holdings;
- the duty to act towards Maori reasonably and in good faith, and in a spirit of partnership with full consultation;
- the principle of reciprocity, whereby the Crown's exercise of kawanatanga needed to be constrained by respect for rangatiratanga;
- the principle of options, which required the Crown to have due respect for Maori law and customs;

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- the principle of equal treatment, which required the Crown not to favour one group of Maori over another;
- the principle of equity, whereby the Crown was to afford Maori the same rights and privileges as Pakeha New Zealanders;
- the principle of mutual benefit, whereby the Crown needed to balance the sale of land by Maori for Pakeha settlement with the provision of assistance to Maori to enable them to develop their remaining lands and to participate in the economy on an equal footing; and
- the principle of redress, which required the Crown to make amends for evident breaches of its foregoing obligations.

Now is the time for the Crown to exercise the principle of redress.

20.6 With Whom to Settle?

20.6.1 Claimant submissions

As regards the issue of settlement negotiations, we start by recording what the principal claimant groups and the Crown had to say on the topic. Counsel for Wai 299 said in closing that 'The claimant[s] in Wai 299 are ready and able to proceed to negotiation and settlement of their claim.' He sought a recommendation from the Tribunal that the Crown should not:

> defer or refuse to enter into such discussions on the basis that it will only negotiate with an iwi, or a collection of hapu wider than the Mohaka–Waikare raupatu block, and thereby defer entering into any negotiations for settlement of these claims.[8]

Counsel had also previously made the following comment in a memorandum dated 26 February 1998 (in relation to the Tarawera–Tataraakina whanau claims):

> The Wai 299 claimants are strongly of the view that the claims within the Mohaka–Waikare Confiscation area must be settled at a hapu level rather than a whanau or iwi level. This, however, is an issue that can be dealt with after the Tribunal has completed its inquiries and consideration is being given to the appropriate groups with whom the Crown is to negotiate for settlement of any claim held to be well founded within the Mohaka Confiscation area.[9]

Counsel for Wai 119 did not specifically seek a recommendation that the Crown enter into separate settlement negotiations with his clients. This was implicit, however, in his request that the Tribunal recommend that interim relief be awarded to his clients. In justifying this, he argued that it 'must be borne in mind that alone of the claimants groups in this regional

8. Document x39, pp 140, 141
9. Paper 2.264, p 3

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inquiry, Ngati Pahauwera, due to the appointment of a Section 30 committee, possesses a structure capable of accepting interim relief'.[10] Counsel for Wai 400 did not make any comment on settlement negotiations in his closing submissions.

20.6.2 Crown submissions

For its part, the Crown was categorical on the subject of settlement negotiations in its closing submissions. Counsel said that the Crown wanted to negotiate 'a comprehensive settlement' with the hapu that had claims in the inquiry. In a note following this statement, counsel added that this was 'on the basis of the Crown making an exception to its strongly preferred policy of negotiating settlements at an iwi level to negotiate with a collective of hapu who have claims in this regional inquiry'.[11]

Crown counsel also made some specific comments in separate closing submissions on the main claims before us. Perhaps in contradiction of the general submission quoted above, counsel said with respect to the Wai 119 claim that the Crown preferred the Tribunal 'to make findings of fact and Treaty consistency on these claims [Wai 119, Wai 436, and Wai 731] and recommend that, in the first instance, negotiations occur between the Crown and Ngati Pahauwera'.[12] With respect to the Wai 400 claim, counsel noted that perhaps the claimants' 'most important claims' were in the area south of the Tutaekuri River. He suggested that they could be addressed either 'by way of negotiation' or in a future regional inquiry. The Crown's preference, he explained, was 'to settle claims comprehensively'.[13] With respect to the confiscation area, counsel reiterated that the Crown sought to negotiate 'a single settlement of the claims of the hapu involved in this regional inquiry'.[14]

20.6.3 Other Crown statements on negotiation and settlement

In keeping with the Crown's concerns about the southern boundary of the Mohaka ki Ahuriri district, Crown counsel in the Wairarapa inquiry (the same counsel as in our inquiry) recently suggested that that inquiry could be extended as far as the southern boundary of the Ahuriri block to close a gap that would otherwise necessitate a further regional inquiry.[15] When the district was in fact extended only as far as the Tararua district and not to the Tutaekuri River, Crown counsel accepted that this was the wiser course, given the extra research and claimant coordination that would otherwise have been required. Counsel noted, however, that the settlement of any Wairarapa ki Tararua claims which extended beyond this

10. Document X30, p 75
11. Document X56, p 20
12. Document X55, p 55
13. Document X54, p 14, app 1, p 12
14. Document X51, p 105
15. Wai 863 ROI, paper 2.72, pp 1–5

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boundary might necessitate further research being carried out during the negotiations process. He added that the Crown's ultimate decision 'not to advocate for an expansion of the current inquiry district boundary does not indicate that the geographical or iwi coverage of any Treaty settlement would exactly match the inquiry district boundary'.[16]

The Crown's official preference is to settle with 'large natural groups'. In its negotiations guide, *Ka Tika a Muri, Ka Tika a Mua: Healing the Past, Building a Future*, the Office of Treaty Settlements (OTS) states that:

> The Crown strongly prefers to negotiate settlements with large natural groups of tribal interests, rather than with individual hapu or whanau within a tribe. This makes the process of settlement easier to manage and work through, and helps deal with overlapping interests. The costs of negotiations are also reduced for both the Crown and claimants.[17]

20.6.4 Tribunal comment

The Crown's policy, according to Crown counsel in our inquiry, is to settle with iwi. But the official OTS statement is open to a broader interpretation. This is backed up by the Crown's clear intention to have a series of sub-regional Ngati Kahungunu settlements – something we take from the explicit comments made in respect to the Mohaka ki Ahuriri inquiry and the corresponding implication of the comments made with regard to Wairarapa ki Tararua.

It is indeed difficult to imagine the success of one overarching tribal settlement with Ngati Kahungunu stretching from Wairoa to Wairarapa. This is the largest territorial spread of any one iwi in the North Island, and claimants at the opposite ends of it may legitimately feel that they are not part of the same claimant community as their distant relations. The Wai 201 claim was filed in May 1991 by several individuals on behalf of the 'people of Ngati Kahungunu' and covered the entire expanse of the tribal territory, but it has never been regarded as the vehicle for the tribe to pursue all its claims. Ngati Kahungunu are the third most populous tribe in the country and their constituent parts are relatively autonomous. Indeed, as can be seen from our discussion of the origins of Ngati Kahungunu in chapter 3, their existence as a political and corporate entity is a relatively recent phenomenon. Moreover, the Wairoa ki Wairarapa claims will now fall within four separate Tribunal inquiry districts, which are at differing stages of completion. The tribal district was also split into three Tribunal rangahaua whanui sub-districts (Wairarapa, Hawke's Bay, and Wairoa).

Before we go further, however, we should state that we support the Crown's general policy to settle with large natural groups of claimants, as indicated in chapter 17. This policy has

16. Wai 863 ROI, paper 2.112, pp 2–3
17. Office of Treaty Settlements, *Ka Tika a Muri, Ka Tika a Mua: He Tohutohu Whakamarama i nga Whakataunga Kereme e pa ana ki te Tiriti o Waitangi me nga Whakaritenga ki te Karauna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 2nd ed (Wellington: Office of Treaty Settlements, [2002]), p 44

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found favour with other Tribunals. In its *Pakakohi and Tangahoe Settlement Claims Report* of 2000, the Tribunal commented that:

> This is an approach with which we have considerable sympathy. There appear to us to be sound practical and policy reasons for settling at iwi or hapu aggregation level where that is at all possible. As the Whanganui River Tribunal put it, 'While Maori custom generally favours autonomy, it also recognises that, on occasion, the hapu must operate collectively'.[18]

What we have to answer, therefore – and particularly in light of the comments of counsel for Wai 299 – is whether the Mohaka ki Ahuriri claimants as a whole are a 'large natural group'. The OTS guide does not define 'large natural groups', but we understand that a variety of factors are used by OTS to determine whether a claimant community is a such a group or not. These factors include:

- whether there is descent from a common ancestor or ancestors;
- the number of functioning marae;
- the size of the territory;
- the population;
- whether the community is separately identified in the census; and
- whether the community is recognised by other groups.

In applying these criteria to Mohaka ki Ahuriri, we can see that the matter is by no means straightforward.

The claimants almost all share a Ngati Kahungunu identity and whakapapa, and origins on the Takitimu waka, although Ngati Hineuru, for example, also have strong Ngati Tuwharetoa as well as Tuhoe affiliations. The 1991 and 1996 censuses broke matters down a step further by identifying tribal members as either Ngati Kahungunu ki Wairoa (or, from 1996, Rongomaiwahine), Ngati Kahungunu ki Heretaunga, or Ngati Kahungunu ki Wairarapa. As we understand it, these three main divisions within the iwi are not historically authentic but rather constructs of administrative origin from within the Department of Maori Affairs.[19] They were, however, expanded on in the 2001 census, which listed the six district organisations, or taiwhenua, of the corporate body that represents the tribe itself, Ngati Kahungunu Iwi Incorporated. These taiwhenua are Ngati Kahungunu ki Wairoa (based in Wairoa), ki Te Whanganui a Orotu (Napier), ki Heretaunga (Hastings), ki Tamatea (Waipukurau), ki Tamakinui a Rua (Dannevirke) and ki Wairarapa (Masterton). Again, however, these are clearly administrative divisions resulting from the sheer size of the Ngati Kahungunu takiwa rather than reflections on traditional spheres of established kin groups.

So, if the census categories and tribal taiwhenua provide no useful steer on the existence of 'large natural groupings' within Ngati Kahungunu, what of our own knowledge of the kin

18. Waitangi Tribunal, *The Whanganui River Report* (Wellington: GP Publications, 1999), p13 (quoted in Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000), p65)
19. Document T18(g), p6

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groups who appeared before us? The claimants with the strongest case for their own separate negotiations are Ngati Pahauwera. They presumably identify as either Ngati Kahungunu ki Wairoa or Ngati Kahungunu ki Te Whanganui a Orotu in the census (the Mohaka River forms a boundary between the Wairoa and Te Whanganui a Orotu taiwhenua districts[20]), and their numbers are unknown. However, they have three functioning marae (Mohaka, Raupunga, and Kahungunu), distinct claims (the subject matter of our chapters 11, 12, and 13, as well as the *Mohaka River Report 1992*), and a large and relatively well-defined takiwa. If Ngati Pahauwera are not an iwi, they are certainly a hapu aggregation. Crown counsel referred to them in closing as a 'tribal group',[21] and in his evidence for the Crown before the Mohaka River inquiry, Fergus Sinclair referred to them as a 'tribe'.[22] Angela Ballara and Gary Scott also described Ngati Pahauwera as the 'major tribe' of the Waihua to Tangoio region and noted that other historians have remarked upon their 'major status'.[23] Furthermore, and the Ngai Tane claim aside, the Ngati Pahauwera Incorporated Society appears to have the support of the people, and there also already exists a section 30 committee appointed by the Maori Land Court to represent Ngati Pahauwera in claim negotiations. In all the circumstances, we consider Ngati Pahauwera to be a group of requisite standing and with sufficiently distinct claims to be deserving of separate treatment. We acknowledge that counsel for Wai 119 did not specifically seek such an observation from the Tribunal, but we are obligated to comment given the request of counsel for Wai 299 for a recommendation on the matter with respect to his own clients.

As far as the confiscation district is concerned, we note the presence of only three functioning marae within its borders. These are Te Haroto, Tangoio, and Petane, although we should bear in mind that Petane was not treated as confiscated land and that the hau kainga, Ngati Matepu, are not claimants in the confiscation district.[24] That leaves only two marae and their constituent hapu within the confiscation area. The relative absence of marae, however, undoubtedly reflects on the gravity of the prejudice suffered by the hapu of the district. We can well imagine, for instance, that, had the hapu retained sufficient land to nurture viable communities, marae would exist at Tarawera (where previously were located the main Ngati Hineuru settlements), Tutira, Arapaoanui, and other places. So, how should the grievances be settled? As noted, claimant counsel sought a recommendation that the Wai 299 claimants be accorded their own Treaty settlement. Indeed, a case could probably be made that a 'large natural group' is to be found in the very community of claimants with raupatu grievances. While the confiscation claim is pursued principally by affiliates of Te Haroto and Tangoio

20. See Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 29, map 2
21. Document x55, p 46
22. For example, see doc c5, pp 3, 9
23. Document 11(15), pp 3, 5
24. This is despite the fact that the Wai 299 claim encompasses Petane and the Wai 400 claim – in which Ngati Matepu are claimants – does not. See also section 3.5.

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Marae, their claims are largely contained within the confiscation district, and such is the severity of the prejudice they have suffered that we believe they are also deserving of separate consideration. Thus, one option could be for the Crown to negotiate with a body that is representative of the descendants of both the original 1870 grantees and – in the case of Tarawera and Tataraakina – those with customary rights who were left out then but reinstated to title subsequently, if temporarily, between 1924 and 1951. Broadly speaking, such a body would be representative of Ngati Kahutapere and Ngati Hineuru and has been foreshadowed by the hapu claiming together under Wai 299 (although we note that Ngati Pahauwera should of course pursue their confiscation claims in their own negotiations).

That is only one option, however. In terms of the OTS criteria, there appear to be grounds for Ngati Hineuru to receive separate consideration. They have strong connections to coastal Ngati Kahungunu through whakapapa, but their links are also with other tribal groups, and they could as easily stand with Ngati Tuwharetoa. To some extent, they exist at the margins of several iwi and thus in a sphere of their own. As Ballara and Scott put it, Ngati Hineuru's territory was:

> a buffer zone between geographical regions, and only a people who could claim relationships with all of those regions could survive there, given the tendency in Maori society to punish the whole of a descent group for the offence of a part, provided they were not kin. Ngati Hineuru was such a people.[25]

While Ngati Tuwharetoa historian John Te H Grace had written that many members of Ngati Hineuru were 'so closely connected with Ngati Tuwharetoa that they come under the name of that tribe',[26] Ballara and Scott considered that Ngati Hineuru were in fact 'a separate people'.[27] Furthermore, Ngati Hineuru probably suffered worse than other groups in the confiscation, and to that extent their historical grievances are relatively distinct. Moreover, they have issues in three other inquiries, and these matters would need to be addressed in their Mohaka–Waikare negotiations in order that the Crown could achieve a comprehensive settlement. Already, therefore, the concept of a raupatu district settlement would be negated at an early stage by the need to introduce fresh issues. That said, however, the Wai 299 closing submissions were the last official word to us on this subject on behalf of Ngati Hineuru, so we cannot be too prescriptive.[28] We simply draw the Crown's attention to the need for discussion and agreement on these important decisions.

Before leaving the confiscation district, we need to remember that it is the subject of a proliferation of smaller whanau claims. As we have indicated in both our comment at the end of chapter 10 and our discussion of the Kupa whanau claim in chapter 13, we believe that

25. Document I1(15), p 8
26. John Te H Grace, *Tuwharetoa* (Wellington: AH and AW Reed, 1959), p 189 (doc I1(15), p 8)
27. Document I1(15), p 8
28. We are unofficially aware, however, that more recently Ngati Hineuru have also been considering negotiating alongside Ngati Tuwharetoa in the central North island inquiry or attempting to stand independently.

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settlements should be made with representatives of the entire class of people who suffered losses instead of with every smaller group that has happened to file a claim. That is not to say that individual claimants and whanau do not have real grievances; rather, that it would be inappropriate to compensate only those who have filed a separate claim when others who could have done the same were content to put their weight behind the overarching claims such as Wai 119 or Wai 299. It is in this very context that the Crown's preference to settle with large natural groups is clearly sound policy. And, if there were concern about the representivity of those prosecuting the larger claims (which acted as the catalyst for the filing of the 'undergrowth' claims), then we would trust that such matters could be satisfactorily resolved in the OTS mandating process.

In saying this, we draw a distinction with the suggestion of the Ngati Awa Tribunal that historical claims subject to a global settlement should be distinguished from claims within living memory (which was said to be 75 years). That Tribunal said that it would be 'contrary to sound principle and patently unjust . . . if . . . individuals unjustly deprived of specific blocks through more recent Crown actions . . . were made as competitors with the tribe as a whole for a share of compensation proceeds'.[29] While we support this logic, we believe that it is unworkable in the context of the Tarawera and Tataraakina blocks, where every landowner has been affected by events within living memory. The global settlement we propose is intended to cover this general class of beneficiaries. Moreover, the grievances from within living memory have their roots in the confiscation itself, and any separation between 'historical' and 'living memory' claims would be artificial. That said, however, there remain certain matters which will require specific redress. One example is the power lines grievance, which is of relatively recent origin and directly affects only certain landowners.

We have thus recommended separate negotiations and a separate settlement for Ngati Pahauwera and we have suggested two options for settling with the confiscation claimants. If these groupings do not seem sufficiently large to the Crown, we might add that, similarly, the idea of settling with the Mohaka ki Ahuriri claimants as a whole does not seem intrinsically 'natural'.

This brings us to the Ahuriri claimants: Ngati Matepu, Ngai Te Ruruku, Ngati Parau, Ngati Hinepare, and Ngati Tu. The latter are, of course, also claimants in the confiscation. If the raupatu claimants are treated as a large natural group, then we consider that Ngati Tu's Ahuriri claims should also be settled as part of those negotiations. Ngati Tu's turangawaewae at Tangoio is, after all, in the confiscation district. If Ngati Hineuru are treated with separately, however, we believe that Ngati Tu, Ngai Tatara, and Ngati Kurumokihi should have their claims settled alongside their whanaunga in Ahuriri. We believe that they and the Ahuriri hapu could be said to constitute – along with Ngati Mahu, Ngai Tawhao, and other hapu of the Ahuriri–Heretaunga district – another 'large natural group'. However, we think that it is clear that any settlement of the claims of all these hapu will need to include their Heretaunga

29. *The Ngati Awa Raupatu Report*, p139

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grievances. The Crown's preference for comprehensive settlements dictates this, but it is also a conclusion that makes sense for the claimants. Quite simply, the history and claims of Ahuriri are inextricably linked to the history and claims of Heretaunga. Furthermore, these groups have already demonstrated their readiness and ability to come together in dealings with the Crown over Treaty settlements in the Te Whanganui-a-Orotu claim.

We can see that, if there were to be just one Mohaka ki Ahuriri settlement, Ngati Pahauwera and either Ngati Hineuru or the confiscation claimants as a whole would be handicapped by the need to first carry out additional research into the claims of the Ahuriri–Heretaunga hapu. We note in this context that other Tribunals have reported on just part of the grievances affecting particular tribes but have none the less recommended the settlement of all those groups' claims on the basis of the contents of their partial reports. For example, the Muriwhenua Tribunal reported on claims up to 1865 only and, while it noted that the Tribunal would proceed with a post-1865 inquiry if that were the claimants' wish, it added that the impact of the pre-1865 policies and practices entitled the claimants to 'a very large compensation' and it did not consider that 'the proof of further wrongs after 1865 could add anything to the relief that might now be given'.[30] In 1999, the Ngati Awa Tribunal reported that it had been unable to investigate the Native Land Court's awarding of lands outside the confiscation boundary and the Crown's acquisition of some of those lands. It felt, however, that since 'an exact equivalence cannot be expected for historical losses beyond living memory . . . these matters should be included in a lump-sum settlement of the raupatu'.[31] Similarly, the Taranaki Tribunal reported on historical Taranaki claims in advance of the completion of its full inquiry in the hope that this would 'hasten a settlement'. It said that a second report on each group's particular history and associated ancillary claims would be forthcoming, 'unless matters are resolved earlier'.[32]

There is an essential difference between these examples and Ahuriri. In each of these cases, the Tribunal considered that the aspects of the claims not reported on were minor in importance compared with the matters covered in the report, which it believed were significant enough to merit substantial compensation in their own right. We are faced with the opposite situation in regard to the Ahuriri hapu. We have reported on only part of their claims, but we consider that their most significant grievances remain to be addressed by the Tribunal. We therefore cannot recommend a settlement of their claims on the basis of our findings on the Ahuriri transaction alone.

We also note that the Ngati Parau claim is quite specific in certain regards. We consider that, rather than be dealt with in a separately negotiated settlement, the Waiohiki grievances should be specifically addressed within a broader Ahuriri–Heretaunga settlement, since the Waiohiki claim so clearly belongs within this context.

30. Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), p 407
31. *The Ngati Awa Raupatu Report*, p 1
32. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), pp xi, 311

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20.7 How to Settle

Our general recommendation is that the Crown and the claimants should negotiate for the settlement of the claims in the light of our findings as to breaches of the Treaty set out in the conclusions of chapters 5 to 19. We also believe that such negotiations should be arranged broadly on the basis that we have outlined above, although we accept that we did not call for submissions on the matter and that the claimants' current views must be taken into account. In addition to our general recommendation, we have a number of specific recommendations to make.

As we have said, if the Crown has reacquired any land in the Kaiwaka block since it purchased Kaiwaka 1 and 2A in 1911 and opened them for selection, it should be returned to the descendants of those with rightful customary claims. We put particular emphasis on Kaiwaka, but of course the Wai 299 claimants may consider that any Crown land in other blocks should also be returned to Maori as a matter of principle. That will be a matter for negotiation. As noted in chapter 10, however, various parts of the confiscated Waitara block remain in Crown ownership either as parts of the Esk Forest or as Landcorp farms or conservation areas managed by the Department of Conservation. It seems to us that some of this land could be used in part settlement of the Wai 299 claim. In recommending such a solution, particularly with respect to the Tarawera and Tataraakina blocks, we note that the Crown in its final submissions stated that, when the opportunity arose, Crown land should have been used to compensate those with legitimate rights who were earlier left out of the titles. From time to time, officials recommended the use of Crown land in the district for such ends. We endorse that recommendation.

We also recommend with respect to the confiscation district that the Crown:

- take steps to facilitate a settlement of the Te Matai access issue, either on the basis of mediating between the parties or by supporting an application through the Maori Land Court and paying the costs associated with such an application; and
- provide specific and additional redress to those landowners prejudiced by, and not previously compensated for, the power lines across the Tarawera and Tataraakina blocks. If it is convenient to do so, this compensation could also encompass the Pohokura block owners.

With respect to Ngati Pahauwera, we recommend that the Crown take steps to negotiate a settlement of the Mohaka River claim, which settlement should include an acceptance of the Mohaka River Tribunal's recommendation that it pay compensation to Ngati Pahauwera for the extraction of gravel from the riverbed. With regard to that part of the 1152 acres of land wrongly acquired as part of the Waihua transaction that the Crown owns today as part of the Mohaka Forest, we hope that direct negotiations will lead to a satisfactory resolution of the matter. If not, however, we will entertain a request for a binding recommendation for the land's return. Finally, we recommend that, in consultation with Ngati Pahauwera, the Crown continue to explore policy initiatives on how to turn the patchwork of small, multiply held

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fragments of land, such those comprising Ngati Pahauwera's remnant holdings, into a useable land base.

Lastly, we note the Crown's admissions in relation to various breaches of the principles of the Treaty. We express our hope that the Crown will be able to resolve any resulting prejudice to the claimants in the same spirit of reconciliation that has prompted its admissions.

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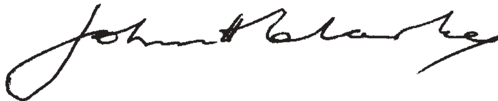
Dated at Wellington this 11th day of May 2004

W W Isaac, presiding officer



J Clarke, member

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