

CHAPTER 14

**MINORITY OPINION**

I agree that the Crown breached the principles of the Treaty at several points in its dealings with Tauranga Maori in the second half of the nineteenth century and that it therefore needs to remedy the prejudice it caused them. I am providing a brief minority opinion in preference to signing the full report because I believe that the report goes too far. It finds Treaty breaches that were not sustained by the evidence put before us. The report, in my view, also fails to acknowledge the very considerable efforts that the Crown made to be fair to Tauranga Maori.

**14.1 THE TRIBUNAL FINDINGS WITH WHICH I AGREE**

First, the promises made by Governor Sir George Grey to Maori at the Pacification Hui in August 1864 were not carried through in the manner in which Maori were led to believe they would be. Those Maori who attended the hui represented a large number of hapu affected by the then-recent hostilities. They surrendered the 'mana' of their lands to the Governor, and he in turn assured them that he intended to keep only 25 per cent of the area. In the process of retaining that 25 per cent and returning the other 75 per cent to Maori, there were sufficient breaches of any reasonable definition of the principles of the Treaty to warrant a finding against the Crown. The identification of the parameters of the 50,000 acres kept by the Crown was done in such an arbitrary manner as to cause insult as well as injury. Some Ngati Ranginui hapu such as Ngai Tamarawaho and Ngati Hangarau, who appear to have been living on or cultivating land that was almost exclusively within the 50,000-acre block, were inadequately recompensed for their losses. Maori were entitled to believe that all the assurances of the Governor would be fulfilled. While one cannot deny that occasionally there were administrative difficulties in delivering on those assurances, that does not alter the fact that several hapu were unreasonably disadvantaged by the Crown's actions.

Secondly, the Crown failed to ascertain and acknowledge the conditional nature of the original 1830s CMS transaction concerning the Te Papa blocks, and it wrongly granted title to those blocks to the CMS, then unfairly acquired them in 1867. The Crown's inquiry into the ownership of those blocks was, at best, perfunctory. In short, the Crown did not act in good faith towards Maori over the CMS lands.

Thirdly, the Crown's purchase of Te Puna–Katikati was initiated by a minority of Ngai Te Rangi chiefs. The interests of others were not adequately taken into account either by those chiefs or by the Crown, although officials subsequently made considerable efforts to recompense others claiming an interest in those lands. While the Crown paid Maori a sum that in total was reasonably generous for the time and place, some Maori who received later compensation appear to have been victims of a process that denied them the opportunity to make free and willing consents to sell in the first place. The failure adequately to obtain consent to the sale from all those with an interest in Te Puna–Katikati constitutes, in my view, a breach of the Treaty under article 2.

#### **14.2 FINDING**

The Crown has a duty to make amends for these Treaty breaches. In my view, it should move swiftly into negotiation with claimant groups, even if some post-1886 claims are still being heard or considered by the Tribunal. Despite my dissenting views on a number of points in the report, my conclusions do not warrant any lessening of the quantum of settlement made with Tauranga Maori. The Treaty breaches were serious, and should be acknowledged as such.

#### **14.3 THE FINDINGS WITH WHICH I DO NOT AGREE**

The assertion that Tauranga Maori 'did not behave in a way that made military operations against them by the Crown justifiable' (see sec 13.2) was not warranted by the evidence presented to us.

It was clear to me that Tauranga Maori knowingly placed hearth and home in danger when they chose to travel westward and engage in the Waikato war. Prior to the wars, Tauranga had been governed almost exclusively by Maori and was relatively untroubled by any of the impacts of colonisation. By their actions in 1863, Maori heightened the likelihood that colonial troops would be stationed in Tauranga for the purposes of cutting off Maori supply lines to the Waikato. Once the troops were in Tauranga, the evidence further demonstrated that local Maori sought to provoke an encounter with the colonial forces. By their actions in Tauranga, they brought on the battle at Pukehinahina (Gate Pa) in late April 1864, and certainly were not surprised when it resulted in bloodshed. Having taken these risks, which produced a victory for them, the prospect of a subsequent battle such as occurred at Te Ranga in June 1864 (when Maori were attacked and defeated) could never be ruled out. While Tauranga Maori suffered unduly as a result of the Crown's subsequent failure to fulfil its

promises, the choices that they had earlier made contributed to their ultimate misery. The argument advanced at the hearings that Maori had no option but to go to the Waikato was unconvincing. Tauranga Maori must accept some responsibility for their later predicament.

There is an age-old expectation by people everywhere that in the event of defeat in battle there will be reprisals. Tauranga Maori understood this, and when 'the mana' of their lands was offered to Governor Grey in August 1864, they were doing no more than acknowledging their loss on the battlefield. The real issue, as I have said above, is whether what was agreed to with the Governor after the hostilities was what was ultimately enforced. In my view, it was not, and as a result some Tauranga Maori suffered more than others because of the Crown's failures.

I do not agree that the Crown committed a Treaty breach by extinguishing customary title across the Tauranga confiscation area. Had the Crown sought to sustain the customary title of all Maori-owned land, and insisted on its retention in that state, nothing is surer than that there would have been a Treaty claim under article 3. That article guarantees Maori the rights and privileges of British subjects. The right to buy and sell the assets in which one has an interest was something envisaged in that Treaty clause. As Maori adapted their lives to the growing settler culture in their midst, and as many exercised choices by leaving the land (and not always because they were forced to do so, as the report frequently suggests), being able to trade in their real assets made good sense. The Crown correctly anticipated Maori needs in this regard, and to say otherwise is to overlook key facts. There are similar problems with those pages in chapter 11 that deal with the restrictions on the alienation of Maori land. Had the Crown rigidly enforced rules preventing land alienation, there is no doubt in my mind that there would have been Treaty objections by Maori under article 3. There was evidence placed before us suggesting that many Maori were as eager as the potential buyers were to see an end to the Government's alienation restrictions.

It follows from what I have just said that the process of individualisation of title cannot be so airily dismissed as it is in this report. The evidence provided to us showed that the Crown's agents were usually diligent in their efforts to be fair to those with an ascertainable interest in customarily held land. There were some occasions when the process was not as scrupulously handled as in others. There were also occasions when the process of granting title was rushed, sometimes because of demands from speculators keen to get access to the land. However, sometimes it was Maori who were keen to complete the sale. There was no systematic injury perpetrated on Maori throughout the process of individualisation of title, and hence no broad policy warranting a finding of Treaty breach.

The fact that a large proportion of Maori land in Tauranga was sold by Maori prior to 1886 was partly due to pressure from buyers. However, it must be remembered that for a long time after the wars Tauranga was not seen as a particularly desirable area for European settlement. The population figures in this report for the early 1870s make this clear. What was apparent to

me was that a few Maori who succeeded in obtaining title to land regarded the proceeds from its sale as a source of income. A few were shifting away from the land to work in the Coromandel and Waihi gold mines, while others became gum diggers or worked on infrastructural projects. Inter-marriage with settlers was quite common, and provided opportunities to lead a different lifestyle, sometimes away from ancestral land. For such people, the ability to realise their assets made it easier to adjust to, and make progress within, the new colonial world. It was clear to me that Maori continued exercising choices as they were entitled to do under the Treaty. The assertions in some claimant evidence that there was something akin to a Crown plot to dispossess them of their individualised titles received some endorsement in the report. For my part, I found the claimants reluctant to discuss the choices that Maori were clearly exercising in the late nineteenth century. Throughout our hearings, it suited far too many lawyers and claimants to portray Maori as naive victims, rather than active participants in late nineteenth-century history. In my opinion, this patronising line of argument was only occasionally sustained by the evidence put before the Tribunal. I cite cases above where it was.

The argument in the report to the effect that the Crown allowed Maori to alienate more of their land than was necessary for their foreseeable needs, and that that constituted a Treaty breach, requires evidence of much more careful thought. Assertions such as that Maori required more than 50 acres each if they were to survive show little appreciation of the rapidly building population pressures in New Zealand and of the changing occupational preferences being expressed by Maori in the late nineteenth century. Moreover, there is little discussion in the report about the problems of calculating likely future Maori needs when many people, Maori included, thought in the 1870s and 1880s that the race was dying out. Nor is there any discussion of whether, in Treaty terms, it would have been acceptable for the Crown to prevent Maori doing what some clearly wanted to do, and what they were entitled to do under article 2 of the Treaty – namely, sell land in which they held an interest.

Finally, in my view there is a patronising attitude towards Maori lying beneath too many parts of the report. It disturbs me, and I regret that the Crown in its cursory final submissions to the Tribunal did not make more of this failing. The problem in the report flows, I believe, from a misreading of the initial purpose of the Treaty and from a misguided attempt to visit on the past many mid-twentieth-century ideas about governance. The small three-clause document that constitutes the Treaty was not intended by the British Crown as requiring the erection of an all-powerful, regulatory, State apparatus that would govern every detail of Maori–Pakeha interaction. Nor was the Treaty intended to deny Maori those rights enjoyed by settlers. While it is clear that in the aftermath of the New Zealand Wars the Crown paid too little attention to the details of what had been promised to Tauranga Maori by the Governor, officials did try to accommodate many Maori aspirations as they understood them. They did this in the light of then-current beliefs about the obligations resulting from the Treaty and

prevalent conventions and thinking about the role of the State and the role of Maori within New Zealand society. Visiting the nineteenth century with 1960s and 1970s notions of the State's all-encompassing social responsibilities, and with some people's inflating views about the Crown's Treaty obligations, makes for bad history and indicates poor historical judgement. Sadly, it is my view that there is quite a lot of both in the report.

Dated at *Wellington* this *11<sup>th</sup>* day of *August* 20 *04*



MER Bassett, member



