Ngai Tahu Land Report

21 Parliamentary Select Committees,

Royal Commissions and Commissions of Inquiry

21.1 Introduction

Chapter 21

PARLIAMENTARY SELECT COMMITTEES, ROYAL COMMISSIONS AND COMMISSIONS OF INQUIRY

21.1. Introduction

In the preceding two chapters we have related how the Crown failed in its Treaty obligations both in respect of the provision made for schools and hospitals and in the allocation of land for landless Ngai Tahu. In the course of our discussion we have referred to many, indeed most, of the parliamentary select committees, Royal commissions and commissions of inquiry appointed to consider Ngai Tahu grievances arising out of the acquisition of their land by the Crown. In this chapter we will be considering only some of these inquiries in relation to the wider grievances of Ngai Tahu for which they sought, largely in vain, remedial action by the Crown. These grievances related to the failure of the Crown to ensure Ngai Tahu were left with ample reserves for their present and future needs, to the claim for "tenths", to mahinga kai and to boundary disputes and associated matters. We will be focusing chiefly on the 1879-1880 Smith-Nairn Royal commission report; the Mackay Royal commission reports of 1887 and 1891, the intervening joint parliamentary select committee reports of 1888-1890 and the 1920 Jones commission of inquiry. We will refer only briefly to some of the background of the principal investigations. A number have already been noted in one or both of the preceding two chapters.

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21 Parliamentary Select Committees,

Royal Commissions and Commissions of Inquiry

21.2 The History of Inquiries

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Middle Island Native Affairs Committee 1872

21.2.1 The first inquiry to be noted is that of the Middle Island Native Affairs Committee of the House of Representatives constituted on 19 September 1872. It reported a month later on 21 October 1872. Its brief was to inquire into unfulfilled promises made to Ngai Tahu. Mr H K Taiaroa, member for Southern Maori, referred to the failure of the Crown to provide the reserves promised by Kemp and to Mantell's exclusion of cultivations and associated matters. The committee, which heard evidence from a few witnesses only, reported that the evidence heard, though far from complete, led them to the conclusion that the claims had not previously had the consideration they deserved. They thought the Princes Street reserve had been dealt with on a legal and technical basis rather than broader considerations of equity and good faith. The committee recommended a further inquiry by an impartial commission (C2:doc 21).{FNREF|0-86472-060-2|21.2.1|1}

Chief Judge Fenton's 1876 report

21.2.2 Following the Native Affairs Committee report of 1872 another select committee was appointed to sit during the following session. For reasons we explained in our discussion of schools and hospitals (19.2.8) no hearing took place until 1875 when the committee again recommended the appointment of a full commission of inquiry, thereby stalling consideration once more. The government, which had difficulty in finding suitable commissioners, prevailed on Chief Judge Fenton who, while unable to undertake a full commission, was willing to review the matter.

Fenton heard little evidence but it was apparently sufficient for him to hold:

- that Ngai Tahu were not promised tenths in 1844;

- that Kemp did not intimidate Ngai Tahu;

- that the boundaries (which were disputed) were part of the deeds and could not be questioned;

- that Mantell did not use threats against Ngai Tahu; and

- that the Native Land Court in 1868 (over which Fenton presided) had given "mahinga kai" a most extensive interpretation and made appropriate orders for reserves; that the court increased the reserves to 14 acres per head and, had the government suggested a much larger quantity he, Fenton, would gladly have sanctioned it (M15:178-180).{FNREF|0-86472-060-2|21.2.2|2}

The Smith-Nairn Royal commission 1879-81

21.2.3 Not surprisingly, H K Taiaroa was not happy with Fenton's 1876 report. He kept up pressure for a full inquiry. This finally resulted in the appointment on 15 February 1879 of T H Smith and F E Nairn to be a Royal commission known at the time as the Middle Island Native Land Purchases Commission, and more shortly, the Smith-Nairn commission.

The commission was required to inquire into:

- whether there were any unfulfilled promises and/or conditions relating to the Kemp purchase, including Mantell's subsequent actions;

- whether the reserves agreed to be granted in Kemp's deed had all been made; and

- the same kind of questions in respect of the purchase of the Otago block by Symonds in 1844, the Murihiku block by Mantell in 1853 and the Akaroa block by Hamilton in 1856.

21.2.4 As will have been apparent from the tribunal's discussion of these various purchases, the Smith-Nairn commission, which travelled widely throughout the South Island, received voluminous evidence from various Ngai Tahu signatories to the deeds of purchase. The commission also heard evidence from Kemp, Mantell, Hamilton, Fenton, Grey, Alexander Mackay, Reverend J W Stack and Symonds. We have already discussed the deliberations of the commission in relation to unfulfilled promises concerning schools and hospitals (19.2.12).

21.2.5 The Smith-Nairn commission held sittings, some lengthy, at Auckland, Wellington, Otaki, Christchurch, Kaiapoi, Dunedin, Port Chalmers, Waikouaiti, Akaroa and Riverton. These sittings took place over the period from March 1879 to April 1880. By January 1880 however, the government, or at least Bryce, the native minister, was becoming either impatient or anxious to find a reason for terminating the commission's proceedings. The Native Office under-secretary on 19 January 1880 wrote to the commission at Bryce's direction stating that if:

satisfactory progress has not been made as will indicate an early conclusion of the inquiry, the Government will seriously consider whether the Commission should not at once terminate. (A9:9:46){FNREF|0-86472-060-2|21.2.5|3}

The commission responded with persuasive reasons why their inquiries would need to continue.

On 12 April 1880 Bryce advised the commission that the sum voted for the commission was approaching exhaustion. He felt Parliament would not support him if

he allowed the vote to be exceeded (A9:9:46).{FNREF|0-86472-060-2|21.2.5|4} The commission responded on 14 April 1880 by saying that it considered it proper to acquiesce in the minister's suggestion that it should stop the inquiry at its present stage pending the matter being referred to Parliament. To which Bryce replied that he would review the position when all outstanding accounts came in, but:

he will not pass any vouchers in excess of the sum voted, either for the services of a secretary or for any other purpose; nor is he even prepared to say that Parliament will be asked to vote any additional sum in connection with the Commission. (A9:9:47){FNREF|0-86472-060-2|21.2.5|5}

The financial harassment of the commission continued. During May and June they worked on collating the evidence and drafting a report. On 28 June they were told that the government would not authorise any further advances and the refund of expenses was refused.

21.2.6 Labouring under the handicap of no further funding and virtual ostracism by Bryce, the commission presented a greatly abbreviated report on 31 January 1881, shortly before the expiry of their two year warrant. They explained that because their work had been suspended by Bryce they were unable to present a detailed report on their uncompleted inquiry (A9:9:52).{FNREF|0-86472-060-2|21.2.6|6}

As to the Otakou and Kemp purchases, the commission found that Symonds, Kemp and Mantell must be regarded as pledging the Crown (in the case of the Otakou block by explicit stipulation, and in the case of Kemp's block by implication) to a reservation of a large proportion of the land for the exclusive benefit of the Maori owners. On the basis of their inquiry, "so far as completed", they considered:

a reservation for the benefit of the Native sellers of a large and permanent interest in the land ceded, which would be fairly and properly represented by one acre reserved for every ten acres sold to European settlers. (A9:9:53){FNREF|0-86472-060-2|21.2.6|7}

In coming to this conclusion they were influenced by certain pre-1840 arrangements made by the New Zealand Company and by certain hearsay statements by Mantell to the Native Affairs Select Committee that, in making the Otakou and Kemp purchases, "it was clearly intended that nominally one-tenth, but virtually one-eleventh was to be reserved for the Natives" (A9:9:52).{FNREF|0-86472-060-2|21.2.6|8} The commission appears also to have relied on a posthumous letter of Matenga Taiaroa and various Ngai Tahu petitions. The commission considered that the reserves set aside by Mantell were only intended as a present provision and that once settlement had taken place and funds were available additional reserves would be made.

As to the Akaroa block they thought it would properly come under the arrangement proposed with reference to the Otakou and Kemp blocks (A9:9:54).{FNREF|0-86472-060-2|21.2.6|9} Regarding the Murihiku block they considered the wording of the deed excluded the possibility of there being any arrangement for tenths. They indicated their inquiries had not been concluded. They noted that in at least two places, Waimatuku and Piopiotahi, "reserves were promised which were not made" (A9:9:54).{FNREF|0-86472-060-2|21.2.6|10}

As will be apparent from the tribunal's findings in relation to the purchases considered by the Smith-Nairn commission, we have come to quite different conclusions on most of the issues discussed. But this tribunal, unlike the Smith-Nairn commission has had the advantage of much more detailed evidence, not only from the Ngai Tahu claimants, but also the Crown. The Crown neither called evidence nor was represented by counsel before the Smith-Nairn commission. In the result we are satisfied that this tribunal is in a very much better position to come to an informed and balanced conclusion on the matters in issue.

21.2.7 The claimants in their grievance no 9 in Kemp's purchase claimed:

That the Crown aborted the Royal Commission of Smith and Nairn and suppressed its evidence to the detriment of Ngai Tahu. (W4)

There is little doubt that the then native minister, Bryce, was not well disposed towards the Smith-Nairn commission. In 1882 H K Taiaroa requested that the evidence given by Mantell to the commission be placed before the Native Affairs Committee including a petition from Ngai Tahu. It appears this was done, the evidence being read to the committee and translated to the Maori members. In addition, H K Taiaroa "asked for a very large amount of evidence of natives which had been taken before the commission".{FNREF|0-86472-060-2|21.2.7|11} This evidence was placed before the committee but it was said that Taiaroa neither looked at it nor asked that it be read to a committee.

Finding on Kemp grievance no 9

21.2.8 The tribunal is unable to find on the very limited information placed before it that the evidence was suppressed by the Crown and is not able therefore to sustain this grievance. Given the hostility or indifference of the government of the day, and in particular its native minister Bryce, to the Smith-Nairn Royal commission, its report virtually sank without trace. Not until substantial portions of the evidence received by the commission were produced to this tribunal by both the claimants and the Crown did it again publicly see the light of day. In the intervening 110 years it had been largely forgotten or ignored.

Native Affairs Committee report 1882

21.2.9 In 1882, the year following the Smith-Nairn report, H K Taiaroa and Ihaia Tainui petitioned the House of Representatives (A9:9:59).{FNREF|0-86472-060-2|21.2.9|12} The petition referred to the work of the Smith-Nairn commission which it said was dissolved before its work was completed. The petitioners complained that they had spent thousands of pounds and much time in seeking redress, and sought relief from Parliament for their grievances. The report of the Native Affairs Committee made on 25 August 1882 summarised the complaints of the petitioners under three heads.

- First, that when the South Island purchases were made there was an agreement that, in addition to cash payments for the land, ample reserves would be made for Ngai Tahu to live on. The committee's short response was that the reserves made at a Native Land Court sitting on 7 May 1868 were given in final settlement of all claims

under this head. The Ngaitahu Reference Validation Act 1868 was invoked as confirmation of this.

- Secondly, it was said by the petitioners that in regard to the Otago and Kemp purchases it was arranged that tenths would be set aside for the benefit of Ngai Tahu. To this the committee replied that there was no evidence to show that the claim for tenths was thought of until within the last few years.

- The third complaint related to schools and medical attention. The tribunal has referred to this in its earlier chapter on this subject.

The brevity and tone of this report confirmed the negative response which a year earlier had befallen the Smith-Nairn report.

Select committee report 1884

21.2.10 This was a report, dated 16 September 1884, on the petitions of Te Maiharoa and others. One group of petitioners led by Te Wetere laid claim on behalf of South Island Ngai Tahu to all the land in Canterbury and Otago inland of certain points, "at no great distance from the Eastern Coast of the island". The select committee reported this claim as being conclusively shown to be totally unfounded. They relied on the Kemp deed which they showed to Wetere who positively denied the identity of the deed and which he said had been fabricated for the occasion. But his own signature as one of the sellers appeared both on the deed of sale and on a receipt for the purchase money and Wetere ultimately acknowledged that this was so.

The committee also referred to a complaint by Te Maiharoa and others that reserves promised them at the time of the sale to the New Zealand Company had not been made and they asked the government to give them land to live upon. The committee's response was to say that the question of reserves was finally decided by the Native Land Court in 1868 when the Ngai Tahu claims were considered. The court had awarded such reserves as appeared to be sufficient in final satisfaction of all claims. The committee said the present petitioners were fully represented at the sitting of the court and the award was made with their knowledge (B3: 6/8).{FNREF|0-86472-060-2|21.2.10|13}

Once again the committee relied, as its 1882 predecessor had done, on the alleged final and binding effect of the 1868 Native Land Court award. It had no regard to the merits of Ngai Tahu's claims.

The Mackay Royal commission report 1887

21.2.11 In the preceding chapter on the South Island Landless Natives Act the tribunal has set out the terms of reference of Royal Commissioner Alexander Mackay, who received his warrant of appointment on 12 May 1886. We largely confined our discussion of the Mackay report of 5 May 1887 to his recommendations. We now refer more fully to his discussion of the background to the Kemp, Murihiku and Otakou purchases.

As previously indicated, Mackay's terms of reference required him to investigate all cases of landless Ngai Tahu and those cases where it was said the lands previously set apart were insufficient for their needs. For the first time in over 20 years, during which courts, select committees and a Royal commission were charged with inquiring into Ngai Tahu's principal grievances, a commissioner went to considerable trouble to record the background to the purchases, especially that of Kemp. While the report is thorough, it is somewhat discursive. The tribunal has necessarily been selective in choosing certain parts for reference. The report deserves to be read in full as the considered judgment of a man, by then a Native Land Court judge, with a wealth of experience in South Island Maori affairs over a considerable period.

Mackay's discussion of the Kemp purchase

21.2.12 In his report (M17:I:doc 1){FNREF|0-86472-060-2|21.2.12|14} Mackay first discussed Kemp's purchase in considerable detail, including events subsequent to the purchase in 1848.

Mackay considered that in the light of a despatch dated 25 March 1848 from Governor Grey to Earl Grey, referring to a visit by the governor to the South Island and also to the tenor of the directions given to Lieutenant-Governor Eyre concerning the purchase of the territory within the Ngai Tahu block, that the settlement with the Ngai Tahu was intended to be made on the following terms:

That ample reserves for the present and reasonable future wants should be set apart for the claimants and their descendants, and registered as reserves for that purpose; and, after the boundaries of the reserves had been marked out, then the right of the Natives to the whole of the remainder of the block should be purchased. (M17:I:doc 1:3){FNREF|0-86472-060-2|21.2.12|15}

He then referred to the similar instructions that were given to Kemp. These, he said, were not followed. Instead of the reserves for Ngai Tahu being marked off as was contemplated, and then the remainder of the district purchased, the money was paid in the first place, and the reserves left to be determined at a future time. Mackay noted the result was that Ngai Tahu were placed:

entirely in the hands of the Government as to the quantity of land to be set apart;-a position that was taken advantage of to circumscribe the area of land allotted to them to the narrowest limits, as will be seen from extracts taken from the evidence given by the Hon. Mr Mantell before the Native Land Court in April and May, 1868, at the investigation of the ownership of the Native reserves set apart in Kemp's Purchase. (M17:I:doc 1:3){FNREF|0-86472-060-2|21.2.12|16}

Mackay then recorded an extensive quotation from Mantell's evidence and at its conclusion observed:

Sufficient evidence has been adduced in the foregoing extract to show that the Natives, instead of being consulted in respect of the land they desired to retain, were coerced into accepting as little as they could be induced to receive. (M17:I:doc 1:3){FNREF|0-86472-060-2|21.2.12|17}

Mackay then concluded:

The extent of the land ultimately reserved for the Natives in 1848 was 6,359 acres, a quantity that can hardly be considered to come within the meaning of ample reserves for the present and future wants of a population of 637 individuals, the number of Natives then to be provided for within the block. The Governor was empowered under the terms of the deed of purchase to set apart additional lands for the Natives when the country was surveyed; but even that condition was only partially fulfilled in 1868, a period of twenty years after the date of the engagement. (M17:I:doc 1:4){FNREF|0-86472-060-2|21.2.12|18}

The commissioner then proceeded to discuss the question of mahinga kai:

The Natives were under the impression that under the terms of the deed they were entitled to the use of all their "mahinga kai" (food-producing places); but they found, as the country got occupied by the Europeans, they became gradually restricted to narrower limits, until they no longer possessed the freedom adapted to their mode of life. Every year as the settlement of the country progressed the privilege of roaming in any direction they pleased in search of food-supplies became more limited. Their means of obtaining subsistence in this way was also lessened through the settlers destroying, for pastime or other purposes, the birds which constituted their food, or, for purposes of improvement, draining the swamps, lagoons, and watercourses from which they obtained their supplies of fish. Their ordinary subsistence failing them through these causes, and lacking the energy or ability of supplementing their means of livelihood by labour, they led a life of misery and semi-starvation on the few acres set apart for them. (M17:I:doc 1:4){FNREF|0-86472-060-2|21.2.12|19}

Mackay next referred to a despatch dated 7 April 1847 from Governor Grey to Earl Grey, in which the governor spoke of the need for Ngai Tahu to continue to have access to their wild lands and not be limited to lands for the purposes of cultivation as they had yet to develop sufficient agricultural skills. He pointed out that the same question was dealt with in a letter from Earl Grey to the Wesleyan Missionary Committee dated 13 April 1848.

Mackay expressed the view that it would not be possible to hold large tracts of land simply to enable the Maori to roam over them as previously, but, he said:

on the other hand the settlement of such lands would not have been allowed to deprive the Natives even of these resources without providing for them in some other way, advantages fully equal to those they might lose. (M17:I:doc 1:4){FNREF|0-86472-060-2|21.2.12|20}

Later in his report Mackay noted that the Native Land Court in 1868 had provided for certain fishery easements to be set apart for Ngai Tahu. These were 212 acres for fishery easements in Canterbury and 112 acres in Otago.

The fishery easements have for the most part been rendered comparatively worthless through the acclimatisation societies' stocking many of the streams and lakes with imported fish. These fish are protected by special legislation, consequently the

Natives are debarred from using nets for catching the whitebait in season, nor can they catch eels or other native fish in these streams for fear of transgressing the law.

Another source of injury done to their fisheries is the drainage of the country. In olden times, before the advent of the Europeans and the settlement of the country, they were at liberty to go at will in search of food, but now, should they chance to go fishing or bird-catching in any locality where they have no reserve, they are frequently ordered off by the settlers. All this is very harassing to a people who not long since owned the whole of the territory now occupied by another race, and it is not surprising that discontent prevails at the altered condition of affairs and the want of precaution observed at the outset by their civilised guardians, who could alone foresee the consequent result of colonisation on their former customs and habits of life, to have either secured them these privileges, or else provided them with additional lands as compensation for depriving them of some of the most important means of subsistence. (M17:I:doc 1:8){FNREF|0-86472-060-2|21.2.12|21}

21.2.13 The commissioner referred to certain of Lord Normanby's instructions of 14 August 1839 to Governor Hobson. These required the Crown to conduct their dealings with the Maori people on principles of sincerity, justice and good faith. Nor must they be permitted to enter into injurious contracts. Nor must any land be bought which they required for their own livelihood. To secure compliance would be one of the first duties of their official protector. These instructions, Mackay noted, appeared to have been "entirely disregarded".

Mackay then observed:

The most important consideration that arises in the colonisation of a country inhabited by an aboriginal race like the Maoris is how to give them an equivalent for the lands they surrender, as a payment in perishable articles cannot be considered a fair equivalent for a possession so valuable as the soil. The most equitable mode of payment, and one that could have been easily effected at the time when the purchases were made from the Natives in the southern provinces of the Middle Island, would have been to have appropriated a certain proportion of the land ceded by them as a provision for their advancement in the scale of social and political existence. This system would have been the means of securing to them a property continually increasing in value, as well as practically conferring on them the advantages it was anticipated they would receive through the occupation of their former territory by the European community. (M17:I:doc 1:5){FNREF|0-86472-060-2|21.2.13|22}

Next followed a quite lengthy discussion by Mackay of the New Zealand Company policy of providing for Maori reserves in the form of tenths.

After further discussion of the Imperial government's views on land purchase policy and in particular the need to ensure that Maori were left with sufficient land to enjoy the enhancement in value arising from settlement around them, a view which was shared by the New Zealand Company as evidenced by its tenths policy, Mackay continued:

A perusal of the facts already narrated will furnish ample evidence that the fundamental principles laid down were not adhered to in acquiring land in the Middle

Island, neither in the reservation of sufficient land for Native purposes, nor in compensating the Native owners for the loss of a large share of their means of subsistence through depriving them of their hunting and fishing rights.

It surely could not be considered that the enhancement in value of a few thousand acres reserved for the vendors of Kemp's Block by the introduction of capital and labour into the colony, or the small payment of œ2,000 for the cession of over twenty million acres, was a sufficient recompense for so valuable a territory, even if measured by the amount of benefit the original owners had derived from it. (M17:I: doc 1:6){FNREF|0-86472-060-2|21.2.13|23}

What should have been done at the time, Mackay said, for the protection of the welfare of Ngai Tahu, was to have set apart not only sufficient land for their use and occupation, but also for the purpose of raising an independent fund to be devoted to objects connected with their general welfare, advancement, and improvement. He then referred to the lack of a protector:

Owing to the non-appointment of an official protector for the Natives in the south, as was promised them at the cession of their land, these people have suffered a serious loss, for, had any person been clothed with the necessary authority to look after their welfare in the early days, a great deal of the irreparable neglect they have suffered from the non-fulfilment of the promises made them at the cession of their lands would probably not have occurred. (M17:I: doc 1:7){FNREF|0-86472-060-2|21.2.13|24}

Having reached the prior conclusion that the Crown had failed to provide ample reserves for the present and future needs of Ngai Tahu, Mackay recommended that 100,000 acres be set aside for endowment purposes for Ngai Tahu in the Kemp block, together with a further 30,700 acres for their individual use and occupation in addition to that already reserved.

The Murihiku, Banks Peninsula and Otakou blocks

21.2.14 Mackay next discussed the Murihiku block. He applied the principles he had developed in his discussion of Kemp's purchase and recommended the provision of 40,000 acres for endowment purposes and an additional 15,412 acres for individual use and occupation.

As to Banks Peninsula, which he referred to as the Akaroa block, he said this had been treated as a portion of Kemp's purchase and he therefore found it unnecessary to make any additional recommendation.

Finally he discussed the Otakou block, and while he did not make any express recommendation, he made it clear that the New Zealand Company intended, and as he said, "fully admitted", that Ngai Tahu should have a tenth of the land set apart for them in the Otakou block in the same manner as was carried out in other New Zealand Company settlements.

The foregoing account does not do full justice to Commissioner Mackay's painstaking and comprehensive report. But it is sufficient to demonstrate that in the view of

perhaps the best informed European of the time, grave injustices had been done to Ngai Tahu which required to be remedied.

Reports of Joint Committees on the Middle Island Native Claims 1888, 1889 and 1890

21.2.15 As we have indicated in our previous chapter (20.3.1), Commissioner Mackay's report was coolly received by the legislature. In June 1888 the House of Representatives and the Legislative Council each appointed members to a joint committee to report on the claims of Ngai Tahu on account of unfulfilled promises and on the recommendations made by Commissioner Mackay in his 1887 report. The joint committee reported on 22 August 1888. The tribunal has discussed their report in the preceding chapter and need not refer to it here except to note (a) that the committee had insufficient time to complete its inquiries and (b) notwithstanding this, it concluded that no promises of reserves of land had been made which had not been fulfilled. The tribunal notes that the joint committee paid little regard to Commissioner Mackay's well-documented and convincingly reasoned report.

The 1889 joint committee was appointed to complete the work of its 1888 predecessor. Its conclusions are referred to in the previous chapter at 20.3.4. We simply note here that the committee concluded that promises as to residences and cultivations were fulfilled and the obligation to provide further land reserves had been substantially discharged. Notwithstanding this, it recommended a further inquiry to ascertain whether any individual Ngai Tahu had insufficient land on which to support themselves.

The 1890 joint committee, as we have earlier indicated in 20.3.5, discussed the question of tenths and again recommended further inquiry, as the evidence before it showed the existing holding of land by Ngai Tahu to be by no means sufficient.

Mackay's second Royal commission 1890-91

21.2.16 Somewhat surprisingly perhaps, in view of the Crown's cavalier attitude to Mackay's 1887 report, he was appointed a Royal commissioner for a second time on 10 December 1890. He was to carry out the inquiry recommended by the 1890 joint committee, as indicated in the preceding paragraph. In 20.4.2 of our chapter on "landless natives" we have summarised Mackay's findings. Here we note some further observations made by Mackay in his two reports. His reason for making two reports we earlier noted in 20.4.1.

21.2.17 In his first report (M17:I: doc 3){FNREF|0-86472-060-2|21.2.17|25} Mackay was critical of the observations in the joint committee's report of 10 September 1889 in which the committee suggested that the award of the Native Land Court might have reasonably met the demands arising out of the promises made in respect of the Kemp purchase. He expressed the view that "the trifling additions" made by the court "do not adequately carry out the original intention that the owners of Kemp's Block should be provided with ample reserves". He continued:

The quantity set apart in 1868 was merely a theoretical quantity, and was based on the subdivision of the Kaiapoi Reserve in 1862 into farms of 14 acres, much in the same

manner that the average quantity of 10 acres per individual was adopted by Mr. Commissioner Mantell in 1848 from an estimate furnished him by Colonel McCleverty, whom he had consulted on the matter, but this quantity was only intended for their present wants.

This was the cause that led to 14 acres being fixed in 1868, and that quantity was simply adopted for the purpose of putting all the Natives on the same footing, but the Court accepted it as a full extinguishment of the conditions of Kemp's purchase.

This view of the case, however, was not accepted by the Natives who petitioned Parliament in 1872. This petition was referred to a Select Committee, who reported as follows:- "That the evidence taken by the Committee in reference to the claim of the Natives of the Middle Island, though far from complete, leads them to the conclusion that these claims HAVE NOT HITHERTO HAD THAT CONSIDERATION WHICH THEY DESERVE."

Parliament was again petitioned by the Natives in 1874, 1875, 1876, and 1878; and in 1879 a Commission was appointed by the Governor. The Commissioners reported on the question, but no action was taken to give effect to the report. (M17:I: doc 3:3-4){FNREF|0-86472-060-2|21.2.17|26} (emphasis in original)

Mackay again referred to Lord Normanby's instructions to Hobson as to the principles to be observed to ensure Maori interests were fully protected when the Crown sought to purchase land from them. And again Mackay commented that:

a perusal of the circumstances connected with the acquisition of territory from the Natives in the South Island will indisputably prove that none of these principles were observed. (M17:I: doc 3:4){FNREF|0-86472-060-2|21.2.17|27}

The quality of the land

21.2.18 As to this Mackay reported:

The same statement was made everywhere that the land is insufficient to maintain the owners on it. Even those who owned comparatively large areas made the same complaint.

As regards the larger areas, the cause of this is attributable to several circumstances- namely, the inferior character of the soil, and the scattered manner in which the lands are situated. Only a few of the original reserves contain first-class land; nearly all the land comprised in the awards of the Court in 1868, including also the land given as compensation to the Kaiapoi Reserves for the acreage allotted out of their reserve to non-residents, is very inferior; consequently, although the acreage held by some of the Natives may appear to be large, the inferior character of the land more than counterbalances any seeming advantage they apparently possess. (M17:I: doc 3:4){FNREF|0-86472-060-2|21.2.18|28}

21.2.19 In his supplementary report of 16 July 1891 (M17:I: doc 3/2){FNREF|0-86472-060-2|21.2.19|29} Mackay expressed the mounting frustration of Ngai Tahu at the continued failure of successive governments to address their grievances:

The Natives urge that the principal part of their claim has not received the attention it deserves; and they point to the fact that the report of the Commission of 1879 established the most important points of their case, also that the report of the Commission of 1887 further supported their claims, and made certain specific recommendations for the settlement of the matter, which have not as yet been fully considered. They also pointed out that making provision for the landless portion of the community does not comprise all they are entitled to expect in fulfilment of the promises made to them in the past, nor can it be deemed to be a satisfactory compliance with the condition contained in the Ngaitahu deed-that the Governor would set apart additional land on the country being surveyed, which, according to Mr. Kemp, WAS TO BE DONE IN A LIBERAL MANNER, AND IN SUCH PROPORTIONS AS TO MEET THE WANTS AND PROVIDE FOR THE GENERAL WELFARE OF THE NATIVES.

They further urge that the expenditure they have been put to, amounting to several thousand pounds, in seeking redress for the non-fulfilment of the promises made to them, should be refunded by the Government, as it ought not in common justice to have been left to them to take action for the purpose of establishing their rights, as this duty devolved solely on the Government to perform. They state generally that this expenditure was one of the chief means of plunging them in debt, as all who had not money at command to contribute in aid of their cause sacrificed their cattle and crops for the purpose of acquiring funds.

They have never recovered from the sacrifice made on that occasion, and owing to this and other causes, is the reason why poverty is now lurking in their midst. (M17:I: doc 3/2:3){FNREF|0-86472-060-2|12.2.19|30} (emphasis in original)

Later Mackay commented further on the quality of a significant proportion of their reserves. He referred to general testimony obtained at all the settlements as to the inability of the people to maintain themselves on the land. One problem was that the land was not of a uniform quality. He annexed a return (schedule E) of the character of the soil in the reserves in Canterbury and Otago: 13,138 acres being good; 11,785 acres medium, and 8110 acres inferior. A large proportion of the lands awarded by the court in 1868 were either medium or inferior.

The Natives at Waitaki complained of the poor land reserved for them. Three sections were set apart there in 1868, comprising an area of 489 acres 2 roods 10 perches; more than two-thirds of this area is stony and unfit for cultivation. The only piece of good land has been destroyed by the encroachment of the river, and but a few acres now remain that can be utilised. The people are very badly off for food-supplies in consequence, and, to make matters more trying for them, they cannot fish in the Waitaki for eels or whitebait, owing to that river being stocked with imported fish; and the runholders will not allow them to go over their country to catch woodhens or other birds in season. Owing to this and other circumstances they are compelled to lead a life of semi-starvation. The young people find employment during the busy season, but cannot obtain work all the year round, consequently the small amount they can earn is soon exhausted in paying their debts, and nothing is left to maintain their families with while they are out of work.

The Natives of Taumutu are very badly off, owing to the poor character of the land reserved for them. A large proportion of the original reserve made in 1848 is very poor, and all the land that has been added since is decidedly inferior.

The 700 acres allotted to the residents under "The Taumutu Commonage Act, 1883," is only fit for pasturage purposes, and a very small proportion is useful even for that. (M17:I: doc 3/2:6){FNREF|0-86472-060-2|21.2.19|31}

Mackay concluded this report by saying he saw no reason to change the opinions expressed in his 1887 report, nor to change the recommendations for the settlement of the problems which he made in that report. Again, regrettably, Mackay's report of Ngai Tahu's major grievances fell on deaf ears. Instead the government, as we have seen in the previous chapter, in 1893 appointed Mackay and Smith to compile a list of landless Maori in the South Island and assign sections to them within nominated blocks. This protracted exercise, as the tribunal has shown, proved largely ineffective.

Native Land Claims commission 1920

21.2.20 On 8 June 1920 the government appointed another commission of inquiry to investigate 11 petitions and claims by Maori in different parts of New Zealand. Most were relatively recent, originating within the previous two or three years. Quite the oldest was the petition by Tiemi Hipi and 916 other Ngai Tahu to the House of Representatives with respect to the purchase of the Kemp block in 1848. It will be recalled from our previous chapter (20.5.3) that this petition was heard by the Native Affairs Committee in 1910. That committee referred the petition to the government for favourable consideration. Now, a decade later, some of Ngai Tahu's long-standing and frequently aired grievances were to be heard yet again. Seventy-two years had by now elapsed since the purchase in 1848.

21.2.21 The commissioners appointed were the then chief judge of the Native Land Court, R N Jones, and J Strauchon and J Ormsby. They reported on Tiemi Hipi's 1909 petition on 30 November 1920 (M17:II: doc 42).{FNREF|0-86472-060-2|21.2.21|32} It appears from the report that it was entirely based on the commission's reading of certain documents, principally the report and enclosures of the 1888 Joint Committee on Middle Island Native Affairs and the Mackay compendium of official documents and correspondence. There is no indication that any Maori, or indeed Pakeha, witnesses were heard or that counsel were present to assist. The commission's report therefore is not so much the result of an inquiry as a review of certain material which they chose to read. It does not appear that the commissioners read either of Judge Alexander Mackay's 1887 or 1891 reports which constituted the most comprehensive and authoritative accounts of the Ngai Tahu grievances over Kemp's purchase. We propose therefore to refer only briefly to certain aspects of the report.

21.2.22 The commission referred to the Ngai Tahu contention that they sold only the eastern seaboard. It concluded that whatever may have been intended, the deed covered all the land from the east to the west coast.

The decision of the Native Land Court in 1868 that the matter of granting reserves was purely within the discretion of the governor or the Crown, whatever the demands of Ngai Tahu, and that the court was bound by the evidence of the Crown witnesses,

was strongly criticised by the commission. "This was scarcely", they thought, "the kind of investigation contemplated by the Act of 1865." (M17:II: doc 42:36){FNREF|0-86472-060-2|21.2.22|33}

The commission held that the request of Ngai Tahu for further reserves should have been met "in a more liberal spirit". The question then, said the commission, was what would have been a liberal spirit? "Certainly not 14 acres per head." The commission went on to find:

The requisite reserves for the present and reasonable future wants of the sellers and their descendants, as arranged by Sir George Grey with the principal chiefs of the South Island; or Lieutenant-Governor Eyre's instructions to Mr. Kemp, to reserve ample portions for their present and prospective wants; or those to Mr. Mantell, that liberal provision be made both for their present and future wants, and due regard be shown to secure the interests of the Natives and meet their wishes, have never been carried out. (M17:II: doc 42:37){FNREF|0-86472-060-2|21.2.22|34}

The tribunal observes that this finding is in marked contrast to the findings of the Native Affairs Committee of 1882 (21.2.9), the select committee of 1884 (21.2.10) and the joint parliamentary committees of 1888 (21.2.15).

21.2.23 Having decided that Ngai Tahu were entitled to be compensated for this failure the commission then wrestled with the problem of the appropriate remedy. It saw the only fair way would be to put "the aggrieved party in the same position as if the contract had been fulfilled, by allotting proper reserves, ascertain what the present value of them would be, and measure loss accordingly" (M17:II: 42:37).{FNREF|0-86472-060-2|21.2.23|35} But the commission found this not to be possible:

At this date there is, however, no land which can be set apart, or, if there were, the setting of such apart would not be conducive to effective settlement of the Dominion. (M17:II: doc 42:36){FNREF|0-86472-060-2|21.2.23|36}

After deducting the Arahura block, the Banks Peninsula block, the reserves actually provided, and "absolutely valueless land", such as snowy mountain tops, waste beds of rivers, and precipitous cliffs from the 20 million acres arguably bought under Kemp's deed, the commission arrived at a figure of 12.5 million acres. They assessed this to be worth œ78,125. They then deducted the purchase price paid of œ2000 to give œ76,125; to this was added 72 years interest at 5 per cent-œ274,050-to give a sum of œ350,175. Finally, a sum was added in recognition of the heavy expenses incurred by Ngai Tahu bringing the total sum to œ354,000. This sum the commission recommended should be paid as full compensation. The tribunal notes that whereas the commission placed an 1848 value of œ78,125 on 12.5 million acres of Ngai Tahu land, Mr D J Armstrong, a valuer called by the Crown in this inquiry, placed an 1848 value of œ205,000 on only 220,000 acres of such land. There is an extraordinarily wide disparity between the two valuations.

Implementation of the 1920 commission recommendation

21.2.24 The appointment of the 1920 commission to inquire into Kemp's purchase was in response to the petition of Tiemi Hipi and 916 other Ngai Tahu in 1909. That

petition was referred by the Native Affairs Committee in 1910 to the government for favourable consideration. A decade was to elapse before the Crown took any action. This, typically, was to instigate yet another inquiry.

Once again the government received a positive recommendation. On this occasion that a lump sum of œ354,000 be paid Ngai Tahu as compensation for the Crown's failure to honour its obligation to provide "ample", or "liberal", reserves in respect of Kemp's purchase.

The tribunal notes that the 1920 commission took no account of the serious failure of the Crown to protect Ngai Tahu's mahinga kai; it ignored the failure to set aside land which Ngai Tahu wished to keep. Nor is there any indication in the report that the commissioners were aware of the impoverished condition to which generations of Ngai Tahu had been subjected by the Crown's failure to honour its Treaty obligations. The report is completely silent on the devastating effect of the Crown's failure to respect and protect Ngai Tahu's rangatiratanga over their lands and other taonga and the consequential break down in their social and economic structures, the dispersal of the tribe and their near disintegration as a people. The report makes no mention of the Treaty or the Crown's obligations under it.

21.2.25 It remained to be seen what action if any the Crown would take on this occasion to implement the commission's recommendation. Would it suffer the fate of earlier recommendations? In fact, 24 years was to pass before anything was done. In 1944 the Crown agreed to pay œ10,000 a year to Ngai Tahu for 30 years in settlement of its obligations under Kemp's purchase. In 1973 statutory provision was made for the payment of $20,000 per annum in perpetuity to Ngai Tahu as further recognition of the Crown's obligation. In the concluding part of this chapter the tribunal considers in some detail the Crown's submission to us that as a result of the Ngaitahu Claim Settlement Act 1944 and the subsequent 1973 legislation the claimants are barred or estopped from seeking any further relief in respect of Kemp's purchase. For reasons which we there give the tribunal is unable to accept the Crown's submission.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

21 Parliamentary Select Committees,

Royal Commissions and Commissions of Inquiry

21.3 The Tribunal's Findings

21.3. The Tribunal's Findings

21.3.1 In this chapter the tribunal has been concerned to relate the long history of efforts made by Ngai Tahu to persuade the Crown to meet its obligations under the various deeds of purchase. As noted, Ngai Tahu's grievances related principally to the failure of the Crown to:

- ensure ample reserves were left with Ngai Tahu for their present and future needs, including the claim for tenths;
- set aside land which Ngai Tahu made it clear they did not wish to sell;
- protect their right to mahinga kai; and
- investigate boundary and associated disputes.

The first formal inquiry was made in 1872 by a parliamentary select committee at the instigation of the newly elected member for southern Maori, H K Taiaroa, in 1871. This committee recognised that Ngai Tahu's claims had not previously had the consideration they deserved. It recommended a further inquiry. As we have seen, this was to be the dreary and unrewarding pattern for the next 50 or so years. Inquiry followed inquiry. Parliamentary inquiries were generally negative. The Crown ignored the well-documented recommendations made in 1887 and confirmed in 1891 by royal commissioner Judge Mackay. It took 10 years to follow up the favourable recommendation of the 1910 parliamentary committee. It took a further 24 years to, in part, implement the recommendation of the 1920 commission.

21.3.2 The tribunal cannot reconcile the Crown's failure for more than 140 years to meet its obligations to Ngai Tahu with its duty to act towards its Treaty partner reasonably and with the utmost good faith. Its record of prevarication, neglect and indifference over so long a period, in facing up to its obligations, cannot be reconciled with the honour of the Crown. Nor can the decision in 1944 to pay œ10,000 for 30 years and the later decision to continue a payment of $20,000 be regarded as more than a small contribution to its obligations to Ngai Tahu. The Crown's failure to meet its Treaty obligations to provide ample reserves, to protect Ngai Tahu's right to mahinga kai, to return or make compensation for its failure to leave with Ngai Tahu land they did not wish to sell, to reinstate Ngai Tahu's rangatiratanga in appropriate ways, has continued down to the present day, greatly to the detriment of the Ngai Tahu people.

Ngai Tahu Land Report

21 Parliamentary Select Committees,

Royal Commissions and Commissions of Inquiry

21.4 The Ngaitahu Claim Settlement Act 1944

21.4. The Ngaitahu Claim Settlement Act 1944

21.4.1 In her closing address for the Crown, Mrs Kenderdine submitted that the 1944 settlement with Ngai Tahu and the subsequent 1973 adjustment to that settlement, constitute a full and final settlement to claims arising from the Kemp purchase. Crown counsel relied on the submissions made earlier in our hearings by the then senior counsel for the Crown, Mr A Hearn, QC (M22).

We now consider Mr Hearn's lengthy submissions, on the Ngaitahu Claim Settlement Act 1944 (the 1944 Act). Although nowhere stated explicitly, the burden of Mr Hearn's submissions was that the claimants are in some way estopped or barred from seeking any further relief in respect of Kemp's purchase by the provision of the 1944 Act (M23).

21.4.2 In his submissions Mr Hearn briefly outlined the background circumstances or "factual matrix" in which the 1944 Act is said to have been enacted. His starting point was that part of the Report of the Native Land Claims Commission 1920 which, as we have seen concerned Kemp's purchase, and which resulted in a recommendation that Ngai Tahu be paid œ354,000 as full compensation.

The 1920 commission report did not attempt to chronicle the outcome of the many hearings by the various parliamentary select committees, Royal commissions and commissions of inquiry which we discuss elsewhere, (of which the 1920 commission was simply the last in a long series). Nor did the report so much as mention the Treaty of Waitangi.

While purporting to outline the "factual matrix" to the 1944 Act counsel ignored virtually all the relevant facts which date in a continuum from the time of the Kemp purchase, (some only of which are described in the 1920 commission report and which we have earlier related in considerable detail). Instead he took as his starting point the recommendation of the 1920 commission. He did not discuss the contents of the 1920 commission report. Thus, while quoting from an English case, Reardon Smith v Hansen [1976] 1 WLR 989, involving a contract for a charter party and sub-charter party to the effect that what the court must do is to place itself in thought in the same factual matrix in which the parties were, counsel has not himself attempted to do this.

Rather, he emphasised events subsequent to that report, and commented that the 1920 commission report recommendation "was not IMMEDIATELY given effect to..." (M22:2 emphasis added). This comment perhaps unconsciously reflects the sense of

time in Crown dealings with Ngai Tahu. The 1920 commission recommendation was not given effect to for 24 years, and then only in part.

21.4.3 Lengthy delays occurred while the Native Land Court determined the Ngai Tahu beneficiaries. Section 21 of the Native Land Amendment and Native Land Claim Adjustment Act 1928 stated that a decision had not yet been made as to whether the recommendations of the 1920 commission would be given effect to, but nevertheless constituted the Ngaitahu Trust Board "for the purpose of discussing and arranging the terms of any settlement of the claims for relief that may be come to".

In March 1930 Treasury advised the Prime Minister of the day that liability should not be admitted by the government but that, given the "false hopes" raised by the 1920 commission report, an ex-gratia payment of one lump sum of œ15,000 might be paid. In October 1935 discussions were held between representatives of Ngai Tahu, G W Forbes (Prime Minister and Minister of Native Affairs), H G Coates (Minister of Finance) and Sir Apirana Ngata, following which the coalition government made an offer of œ100,000 in full settlement. This was rejected by Ngai Tahu (M17:II: doc 43:9).{FNREF|0-86472-060-2|21.4.3|37}

In March 1938 F Langstone (acting Minister of Native Affairs) met a further Ngai Tahu delegation led by Mr E T Tirikatene, Member of Parliament. In his opening remarks the minister pointed out that:

we [the government], are not responsible for what has taken place in the past and my effort has been ...to try and get the people to stop looking backwards and forget the past and get their faces towards the future... (M17:II: doc 43:1){FNREF|0-86472-060-2|21.4.3|38}

At this meeting there was some discussion as to how the government might meet its obligation. Mr Langstone concluded by saying that:

when the Government has made up its mind it will take some legal form. You (Tirikatene), as the member will be informed and you will be able to inform your Maori people.(M17:II: 43:27){FNREF|0-86472-060-2|21.4.3|39}

This suggests that the government would unilaterally decide the amount and form of relief (if any) and then simply advise the Southern Maori member.

21.4.4 In fact, nothing further was done until 1944 when, on 4 December H G R Mason, Minister of Native Affairs, gave instructions for a Bill to be prepared providing for 30 successive annual grants of œ10,000 each. In introducing the Bill in the House of Representatives, Mr Mason said any approach to a settlement must involve fairly arbitrary estimates:

Therefore, a compromise of some sort is all that is open to us; and this compromise embodied in the Bill is satisfactory to the Maoris and to the Government. (M17:II, doc 49:755){FNREF|0-86472-060-2|21.4.4|40}

The Ngaitahu Claim Settlement Act 1944 was passed on 15 December 1944. Its long title was "An Act to effect a Final Settlement of the Ngaitahu Claim". Its preamble recited that:

WHEREAS the members of the Ngaitahu Tribe and their descendants have from time to time made certain claims in respect of the purchase of the Ngaitahu Block by Mr Kemp on behalf of the Crown in the year eighteen hundred and forty-eight; And whereas the persons now interested in the claims have agreed to accept the payment of the sum of three hundred thousand pounds in the manner hereinafter appearing in settlement of the aforesaid claims:

Section 2 of the Act provided:

In settlement of all claims and demands which have heretofore been made on His Majesty's Government in New Zealand and for the purpose of releasing and discharging His Majesty's said Government from any claims or demands which might hereafter be made on it in respect of, or arising out of, the purchase of certain lands in the South Island belonging to the Ngaitahu Tribe (the purchase aforesaid being that referred to under the heading of "South Island Claims-Kemp's Purchase" in the report of a Native Land Claims Commission contained in paper G.-5 of the Appendices to the Journals of the House of Representatives for Session I of the year nineteen hundred and twenty-one), there shall be paid to the Ngaitahu Trust Board, being the Board referred to in section sixty-five of the Native Purposes Act, 1931, without further appropriation than this Act, in each year for a period of thirty years and no longer, the annual sum of ten thousand pounds, payable on the first day of April in each year, commencing with the first payment on the passing of this Act as for the first day of April in the year nineteen hundred and forty-four.

21.4.5 There is very real doubt as to how much, if any, consultation with Ngai Tahu preceded the enactment of this legislation in 1944. Mr Tirikatene, during a later debate in 1946, is reported as saying:

The fund...was agreed upon during the dying hours of the 1944 session of Parliament. An amount of œ300,000 was offered, and I gave a promise to my people that whatever I was able to achieve in the way of a settlement offer would be submitted to them for THEIR acceptance. I have done that. Two proposals were put before the beneficiaries. I was not in the position of my predecessors of going out with a promise only. An amount of œ300,000, to be paid over a period of thirty years, had actually been provided for by statute, and the money was transferred to the Native Trustee to be held in trust until a second examination had been made by my people and an answer given....; I said that if they thought the amount was insufficient they could pass a motion accordingly, and we would return the money, but if they considered that they should accept the money and set up some form of administration to disperse it, they should move accordingly. I said that I wanted a majority opinion from my people. (M17:II: doc 51:49){FNREF|0-86472-060-2|21.4.5|41}

It is apparent from this statement by the minister that his consultation with the Ngai Tahu people took place after the passage of the Act. This is confirmed by the affidavit dated 13 October 1971 sworn by Mr R J Taylor, who was private secretary to the minister from 1943 to mid 1946. He recounted in detail the discussion between the

Prime Minister (Mr Fraser) and Sir Eruera Tirikatene which took place in his presence in the later stages of the 1944 parliamentary session, and states that, when consulted by the Prime Minister, he indicated that he (Taylor) considered the minister's proposal of 30 annual payments of œ10,000 would be unacceptable to the Ngai Tahu people (M23:49).{FNREF|0-86472-060-2|21.4.5|42} Mr Taylor went on to testify that he was unaware of any meetings held subsequent to such meeting with the Prime Minister and prior to the passing of the 1944 Act. In his capacity as private secretary to the minister, Mr Tirikatene, he did not attend any meetings called in connection with the claim. He expressed his certain opinion that at the time of enactment of the 1944 settlement Act there had not been acceptance of the settlement by the Ngai Tahu people (M23:49-50).{FNREF|0-86472-060-2|21.4.5|43}

It does appear, however, that during the period 1944-46 Tirikatene did consult with Ngai Tahu in their various localities, and that a majority gave retrospective approval to the 1944 settlement which by then of course was a fait accompli. The comments of Mr Matiu Rata, Minister of Maori Affairs, in 1973 during the debate on clause 3 of the Maori Purposes Bill, which provided for a payment to the Ngai Tahu Maori Trust Board of $20,000 per annum in perpetuity, are of interest. This Bill was the government's response to a petition by Mr Frank Winter, on behalf of the Ngai Tahu Maori Trust Board, and representations by the Ngai Tahu people.

Arising from a petition heard last year it became obvious to members of the present Government that the SO-CALLED SETTLEMENT OF 1944 WAS BY NO MEANS TO BE REGARDED AS A FAIR AND FINAL SETTLEMENT. Members of the then Maori Affairs Committee heard leaders from the Ngaitahu people explain how, when the settlement was proposed, they had accepted it on the basis that in years to come a more enlightened determination would prevail. The committee heard valuation and statistical evidence in relation to the claim. Taking into account the fluctuation in purchasing power, and more particularly the view expressed in 1921 by a Royal Commission headed by Chief Judge Jones of the Maori Land Court, the Government considers that the matter ought to be settled in a more reasonable way. (M23:54){FNREF|0-86472-060-2|21.4.5|44} (emphasis added)

Later, during the debate on the second reading of the same Bill Mr Rata said this:

The other matter concerns the continuation of payments to the Ngaitahu Trust Board. By agreement in 1944, the payment ceased as from 1 April this year. After considerable thought it was felt that there was a case, and, while the board members, and in particular the beneficiaries, may feel that this of itself can never be considered final and absolute payment, it is nevertheless a realistic attempt to meet what has been a long outstanding problem and one that needs to be resolved in the interests of people concerned and of the country generally. (M23:59){FNREF|0-86472-060-2|21.4.5|45}

Several points emerge from the minister's statements:

- the government accepted that the "so-called settlement of 1944" was by no means to be regarded as a fair and final settlement;

- Ngai Tahu accepted it on the basis that in the years to come a more enlightened determination would prevail. As indeed proved to be the case;

- such acceptance was given after the passage of the Bill and at a time when Ngai Tahu's only option was to reject it and have the Act repealed, thereby subjecting Ngai Tahu to very considerable pressure to agree and making it difficult, if not impossible, to exercise a free choice in the matter;

- taking into account fluctuation in purchasing power and the views expressed in the 1920 commission report the government considered the matter ought to be settled in a more reasonable way; and

- the minister recognised that neither the board nor the beneficiaries might feel that the new proposal would be considered a final and absolute payment. Nevertheless he saw it as a realistic attempt to meet a long outstanding problem.

21.4.6 It was against this limited "factual matrix" that Mr Hearn submitted that in some way Ngai Tahu should be irrevocably bound by the provisions in the 1944 Act and the Maori Purposes Amendment Act of 1973 (the latter providing the payment of $20,000 per annum in perpetuity), and that Ngai Tahu are estopped or barred from making any claim for further or other relief under the Treaty of Waitangi Act 1975. Thus, he submitted, there can be no escape from a finding that it was the intention of the parties that such provision (the payment of $20,000 in perpetuity) should be in full and final settlement (M22:18).

At least two observations should be made on this submission. First, it is clear that the minister in charge of the legislation in fact recognised that the board, and in particular the beneficiaries, might not consider the new proposal to be "a final and absolute payment". While doubtless the government of the day hoped it had found a final solution to a long-standing grievance, it did not enact a new provision making the 1973 payment a full and final settlement. Second, and more importantly, there was no suggestion that the provision was intended to be a settlement of the Crown's obligations under the Treaty of Waitangi. The Treaty was not in issue. It was not even mentioned. It is not referred to either in the 1920 commission report, or by any of the ministers. The Treaty of Waitangi Act 1975 which confers the jurisdiction for the present claims before the tribunal, was to be two years in the future.

What in fact happened was that a unilateral settlement was reached in 1944 which was later retrospectively accepted as a fait accompli. Subsequent events, and submissions of the Ngai Tahu people, showed that settlement to be inadequate. The government changed its terms. The responsible minister, far from characterising it as final and irrevocable, recognised that the Ngai Tahu board or the beneficiaries might not consider it to be a "final and absolute payment", although no doubt the government hoped they had heard the last of it.

21.4.7 Mr Hearn, in dealing with the 1944 Act, did so on the footing (without necessarily accepting) that there was a breach of Treaty principles arising out of the Kemp purchase, in that the Crown did not ensure that the people were left with sufficient land for their maintenance, support and livelihood. He thought it fair to accept this as having been recognised by subsequent events. The question he proceeded to address was whether the principles of the Treaty have any relevance to, or can be said to be breached, by the 1944 Act and subsequent events.

However, he then proposed that an appropriate way might be first to consider all the transactions without bringing the Treaty principles into account. Counsel suggested the broad issue to be whether it could be said there was equitable fraud or whether there was an unconscionable bargain between the parties. We would say at the outset that this question, assuming it is useful and relevant, could only be decided after a comprehensive review of all the events, from and including the Kemp purchase in 1848, and not from the arbitrary point of a commission report in 1920, and even less so from the passage of an Act in 1944.

The tribunal was referred to certain dicta from two commercial cases. One, Blomley v Ryan (1956) 99 CLR 362, involved the court in setting aside a contract for the sale and purchase of a grazing property on the grounds that it was an unconscionable bargain and such that a court of equity would not enforce. In the other, Commercial Bank of Australia v Amadio (1983) 57 ALJR 358, an order was made setting aside a mortgage and a guarantee. The factual situations in each of these cases, involving as they do commercial contracts, are far removed from the present, which is not concerned with a contract but with legislative enactments.

Mr Hearn contended, from what he described as the vantage point of the Crown, that the parties reached an agreement in 1944 and a statute was drawn up and passed reflecting that agreement "as the Crown saw it" at the time. As indicated earlier, the weight of evidence strongly suggests that there was not, in fact, an agreement with Ngai Tahu at the time the 1944 Act was passed. While the Crown may have thought that to be the position, we believe that view was mistaken. Be that as it may, Mr Hearn further pointed to the subsequent petition by Mr Winter on behalf of the Ngai Tahu Maori Trust Board, and the consideration by parliamentary committees, and contended that, "what was asked was given and that arrangement was reflected in a statutory amendment passed by members of the House of Representatives" (M22:26). He submitted that "in ordinary circumstances" there could be no grounds whatsoever for setting aside such a transaction and a party could be estopped from further claims. Mr Hearn cited from two further commercial cases in which parties to contracts were held to be estopped from attempting to escape from certain contractual provisions (Charles Rickards Limited v Oppenheim [1950] 1 KB 616 and Coupe v J M Coupe Publishing Limited [1981] 1 NZLR 275). We do not find these contract cases helpful in considering Mr Hearn's submission that Ngai Tahu are in some way estopped by the 1944 Act or the 1973 amendment from pursuing a claim under the Treaty of Waitangi Act 1975 and in particular its 1985 amendment.

21.4.8 While the 1944 Act purported to release and discharge the Crown from any further claims and demands, it was clearly not regarded as binding on the Ngai Tahu people. On the contrary, the Crown subsequently conceded, and it was explicitly stated by the responsible minister, M Rata, "that the so-called settlement of 1944 was by no means to be regarded as a fair and final settlement." The same minister when speaking to the 1973 amendment explicitly recognised that the board members, and in particular the beneficiaries, might feel that this of itself could never be considered a final and absolute payment. We are not dealing here with a contract but with an attempt by government to right past wrongs for which there was, at the time, no legal remedy. As events showed, equity and justice required the Crown in good conscience to review the 1944 Act. Who can say (the Treaty apart, for purposes of this discussion), that the Crown might not be persuaded to do so again. Consider for

instance, the quite unforeseen high rates of inflation since 1973 which must have seriously devalued the real worth of the provision made in that year and in perpetuity. We see no possible basis on which Ngai Tahu may be held to be estopped by either the 1944 Act or the 1973 amendment.

We have dealt with the foregoing argument from Mr Hearn, which ignored Treaty principles, because he raised them. The tribunal considers they are lacking in substance and of no real assistance to us. Our duty is to apply Treaty principles.

21.4.9 Counsel chose to address a very brief argument only on the Treaty principles as such. In this context the only Treaty principle to which he appeared to advert is the duty of Treaty partners to act reasonably and in the utmost good faith towards each other. Directing attention to the 1944 settlement and subsequent events, including the granting of relief on the 1973 petition, he asked where in the evidence before the tribunal is there material to suggest any lack of good faith on the part of the Crown?

There is a basic fallacy in this approach to which we have already adverted. Mr Hearn has sought to isolate his whole discussion of the 1944 Act and subsequent legislative acts from all that happened before 1920. In short, he has excluded more than 70 years of relevant historical events. These we have dealt with at length in an earlier chapter.

But if we confine our consideration to the limited "factual matrix" proposed by counsel the following facts are pertinent:

The 1920 commission report found there to be a clear case for a substantial award to the Ngai Tahu people. It took the Crown almost 25 years to decide to take some action on it. It is legitimate to ask whether this was consistent with a Treaty partner's obligation to act reasonably and in good faith towards the other. Was it reasonable to procrastinate for a quarter of a century (a depression and war intervening notwithstanding) before providing some relief? Is that consistent with good faith? But the inordinate delay was compounded by a refusal to implement the commission's recommendations. Ngai Tahu had been deprived of the sum of œ354,000 ($708,000) for some 24 years. No interest was paid. Instead the government decided to pay 30 annual instalments of œ10,000 ($20,000). The 1944 value of such an arrangement being substantially less than the nominal amount of œ300,000 ($600,000), which in turn was substantially less than the œ354,000 ($708,000) awarded by the 1920 commission, and even less had interest been paid on that sum over the 24 year period. Since 1973 inflation has severely eroded the value of the annual payments of $20,000.

Mr Hearn overlooked"as did the 1920 commission"that an important part of the Ngai Tahu complaint about the Kemp purchase related to mahinga kai. Is the so-called settlement of 1944 and its modification in 1973 to be conclusive of that claim also when it was never considered? Is it to be conclusive of the claim for reserves and the return of Crown land? Is the Crown acting reasonably and in good faith in seeking to bar the Claimants from any relief under the Treaty of Waitangi Act 1975, an Act which was not even in existence when the events of 1944 and 1973 occurred? Can Ngai Tahu be estopped from making a claim under an Act of Parliament which, for the first time in 1985 conferred on them a right to make claims based on breaches of the Treaty going back to 1840, by events to which they were a party before those statutory rights were conferred? In our view such a proposition, which seems to be

implicit in Mr Hearn's lengthy submissions, is not only untenable but difficult to reconcile with good faith on the part of the Crown. We confirm what we said in the Orakei Report (1987) 184:

it would be contrary to equity and good conscience for the Crown to rely on undertakings given at the time on behalf of the elders as foreclosing the possibility of claims being made for the remedy of grievances for which no legal provision existed in 1978 but for which provision was later made in 1985.

Counsel submitted that, whatever happened before, "what happened in 1944 and subsequently, was not or is not, inconsistent with the principles of the Treaty" (M22:29). He argued that the claim then made (in 1944 and presumably later) was not treated as if no legal right existed to make such claim. Accordingly, he submitted the circumstance that such a claim can legally be made now does not alter the position. In our view these submissions are also untenable.

- They suggest that it is appropriate to deal with the 1944 Act and later events in total isolation from events originating in 1848 and continuing since then.

- We do not accept that the Ngai Tahu claim for action by the Crown on the 1920 commission was made in pursuance of a legal right to make such a claim. This assumes that in some way their claim was enforceable at law which clearly it was not. Nor indeed was it enforceable in a court of equity. The Crown, after a quarter of a century, finally granted some relief because it found the will to do so, having long recognised that in equity and good faith it should so do.

21.4.10 We should perhaps consider one final point made by Mr Hearn in this context. He asked if it is not possible for a claim to be settled as purported to be done in 1944 and subsequently, how is it within the power of this tribunal to make a recommendation, which if accepted by the Crown, could be a settlement of this claim? (M22:30)

Let us accept for the purposes of the argument that there was a settlement in 1944 and subsequently which was intended to be binding and irrevocable. Our first observation is that if it is later shown to have been inequitable then the Crown, in good conscience, may well decide to re-open it. In the same way, if Crown implementation of a tribunal recommendation is later shown to be inequitable, the Crown might subsequently be persuaded to grant further relief. We suggest there is a clear distinction between a "settlement" made before the enactment of the Treaty of Waitangi Act 1975, and without reference to or in pursuance of the principles of the Treaty on the one hand, and actions of the Crown which fully implement recommendations of the tribunal following findings and a report by the tribunal under the 1975 Act. Assuming the tribunal bases its findings on thoroughly researched evidence and the correct application of Treaty principles, and the Crown implements those findings, they are likely to be invoked by the Crown as a complete answer to a subsequent claim on the same set of facts. There may be an exceptional case when new and highly relevant facts are discovered or new or extended Treaty principles are developed which might justify a review. In that event, the Crown might refer the matter back to the tribunal. We would expect such cases to be rare. Given the virtual impossibility of ensuring that all material facts have been discovered in all cases at a

particular point of time the need for a review cannot be altogether excluded, unless, of course, the Crown chose to legislate to this end. But we would expect the need for a review in such circumstances to arise only infrequently. In those cases where a settlement based on tribunal findings is freely negotiated between claimants and the Crown we would anticipate such settlements, except in rare instances, to be binding on both parties.

21.4.11 We have found that Ngai Tahu is not barred by the Ngaitahu Claim Settlement Act 1944 or the Maori Purposes Amendment Act 1973 from pursuing its claim in respect of Kemp's purchase. But, when seeking compensation from the Crown for the loss arising from breaches of Treaty principles which this tribunal has found, clearly full regard must be had to the payments made by the Crown since 1944 to the present time. It will be a matter for negotiation between Ngai Tahu and the Crown as to how far such payments have gone to compensate the iwi for the Crown's failure to meet its obligations in respect of this purchase and the consequential ongoing and cumulative loss suffered by Ngai Tahu since 1848.

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