

# Ngai Tahu Land Report

## 24 The Crown and Ngai Tahu Today

### 24.1 Introduction

Chapter 24

THE CROWN AND NGAI TAHU TODAY

#### 24.1. Introduction

The tribunal has found on the evidence before it that many of the claimants' grievances arising out of the eight Crown purchases, including those relating to mahinga kai, have been established. Indeed the Crown has properly conceded that it failed to ensure Ngai Tahu were left with ample lands for their present and future needs. The tribunal cannot avoid the conclusion that in acquiring from Ngai Tahu 34.5 million acres, more than half the land mass of New Zealand, for £14,750, and leaving them with only 35,757 acres, the Crown acted unconscionably and in repeated breach of the Treaty of Waitangi. The evidence further establishes that subsequent efforts by the Crown to make good Ngai Tahu's loss were few, extremely dilatory, and largely ineffectual. As a consequence Ngai Tahu has suffered grave injustices over more than 140 years. The tribe is clearly entitled to very substantial redress from the Crown. The Crown has publicly acknowledged that where breaches of the Treaty by the Crown have occurred resulting in loss to Maori it is, in the words of Sir Ivor Richardson in the New Zealand Maori Council case, "required to take positive steps in reparation". The Crown's obligation to effect redress in this case is indeed a heavy one.

The tribunal was advised by both the claimants and the Crown that they did not wish us to formulate a comprehensive set of recommendations as to the relief which should be provided by the Crown. While it was recognised that the tribunal would wish to make recommendations on some specific matters (as we have done in respect of pounamu for example), the parties preferred that they should enter into direct negotiations with each other. These negotiations would be on the basis of the tribunal's findings of fact and its consequential findings of breach of Treaty principles. For its part, the tribunal has been happy to accept this proposal. Indeed it believes it to be the preferable course to be followed. But, as will be later indicated, the tribunal will wish to be informed of the progress of such negotiations and will be prepared to give further consideration to the question of remedies should one or both parties so request. However, having said this, the tribunal proposes at this stage to indicate in a very general way the various forms of redress which it believes the parties will wish to consider.

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*Waitangi Tribunal, Department of Justice, Wellington.*

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### 24.2 Restoration of Ngai Tahu's Tribal Mana

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It is clear that if the Crown is to meet its Treaty obligation to redress its numerous and longstanding breaches of the Treaty it must restore to Ngai Tahu their rangatiratanga and hence their mana within the Ngai Tahu whenua. This extends over the greater part of Te Wai Pounamu, of which Ngai Tahu were and remain the tangata whenua.

It is equally clear that the restoration of Ngai Tahu rangatiratanga will, in today's circumstances, need to take various forms. Given the expressed wish of the parties to negotiate directly on the specific forms of redress, the tribunal proposes to comment in a general way only. It has earlier made a limited number of formal recommendations for redress on discrete matters, where this seemed appropriate or was sought by the parties.

Perhaps we should observe at the outset of this discussion that, given the nature and magnitude of the losses sustained by Ngai Tahu, no redress made almost a century and a half later will fully compensate the claimants. Generations of Ngai Tahu have suffered as a consequence of Crown Treaty breaches. Virtually all the valuable land has long since passed into private hands. Irreparable damage has been done to Ngai Tahu mahinga kai resources. And so a fair, just and practical settlement is likely to be based on a mixed set of remedies which reflect not only the nature and extent of the grievances but present day realities.

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### 24.3 Need for Appropriate Tribal Structures

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Because reparation is likely to be to the tribe, it is clear that there must be appropriate tribal structures to control and administer tribal assets, whether money, lands or other property. The tribunal understands that in June 1990 in anticipation of the passage of the Runanga Iwi Act 1990 the tribe constituted the Runanganui o Tahu. We assume the new runanganui will be incorporated under the recently enacted Runanga Iwi Act 1990. If so, it will have the necessary legal status to act on behalf of the Ngai Tahu people. The runanganui's charter will no doubt provide for its accountability to the various Ngai Tahu hapu.

The chairperson of the claimant trust board, Mr O'Regan, has stated publicly that the Ngai Tahu Maori Trust Board in its present form is not an appropriate vehicle to deliver what is going to be required next century (see *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, edited by I H Kawharu, p 255). He currently envisages a central tribal governing structure which will service the regional tribal communities through a network of regional offices. Mr O'Regan says that the proposal is for a runanganui elected by the tribal runanga which will hold the tribal assets as trustee and will decide matters of tribal policy. Mr O'Regan sees the trust board as being the executive arm of the tribe and accountable to the runanganui. He emphasises however that other tribal administrative structures, involving possible division into autonomous regions, are also being considered.

No doubt there will be further tribal debate on this question which is not a matter for either this tribunal or the Crown to determine. It is however important that if negotiations for remedies are to be satisfactorily conducted, there should first be resolution by Ngai Tahu of their internal structures. The tribunal was informed by the claimants that that process is under way.

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### 24.4 Need for Consultation

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The tribunal, in its discussion of mahinga kai in chapter 17, stressed the need for a marked improvement in the processes of consultation by the Crown and local authorities with Maori, including Ngai Tahu. The tribunal particularly emphasised the need for discussion on proposed policy changes between central and local government officials and Maori on marae. This discussion should take place on matters affecting Maori while policy is still in the formative stage, to ensure adequate Maori input. We do not propose to repeat our detailed discussion in (17.6.10).

While the tribunal was there chiefly concerned with consultation on environmental matters, we emphasise that the need for adequate consultation extends to a wider range of social, economic and cultural matters of particular significance to Maori. We were pleased to note in the submissions of the SOEs who gave evidence, willingness to enhance their level of consultation with Ngai Tahu. The director-general of the Department of Conservation gave a similar assurance.

The tribunal is concerned that whilst affirmative statements of intention to consult may be expressly made and intended by representatives of government departments, it does not always follow that these proposals are implemented.

The claimants' counsel, at a recent hearing in Wellington called to discuss future timetabling for the sea fisheries claim, informed the tribunal that the Department of Conservation, in moving to establish a draft coastal planning scheme have not involved the iwi. Ngai Tahu's standing has not been recognised by the department and the trust board is not being heard on this important measure.

If consultation offers are to be effective and meaningful there should be a clear effort made to involve Ngai Tahu in every aspect of environmental planning. It is apparent to the tribunal that statutory intervention, as proposed earlier by the tribunal in this report, is needed to ensure Maori participation in local regional council planning as well as national environmental policies.

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*Waitangi Tribunal, Department of Justice, Wellington.*

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### 24.5 A Diversity of Remedies

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24.5.1 As we have indicated, the remedies sought by Ngai Tahu are likely to take several forms. While we have not received detailed submissions from the claimants on the total range of remedies they might seek from the Crown, we are aware of their interest in various forms.

In seeking to re-establish their rangatiratanga Ngai Tahu expect to have land returned to them. The tribunal agrees with this view. There is adequate land held by the Crown and state-owned enterprises to enable land settlement to feature in any remedy. Ngai Tahu made clear, for instance, their interest in land held under pastoral leases from the Crown. Perhaps understandably the pastoral lessees opposed the suggestion that the Crown should transfer its interest in some or all of this land to Ngai Tahu. They stressed their view that the returns by way of rent to the Crown do not fully compensate the Crown for its expenses in administering the leases. This includes regular scrutiny of the land-use by lessees and a responsibility to ensure that conservation and environmental values are maintained or enhanced. Ngai Tahu might well respond that the Crown could continue to assist in these matters notwithstanding the transfer of the ownership of the land to Ngai Tahu. We heard from the Ngai Tahu people of past degradation of the environment following European settlement. The tribunal has no reason to believe that, were the Crown title to pastoral leasehold land to be vested in Ngai Tahu, they would be other than sensitive and caring for the proper conservation of this high risk land. With goodwill on all sides a workable solution should be possible.

24.5.2 Several witnesses, notably the Federated Mountain Clubs, discussed the possibility that some national parks in the South Island might be vested in Ngai Tahu. Dr Deane, for the Electricity Corporation, referred to the particular interest of Ngai Tahu in Lakes Pukaki, Ohau and Tekapo. Dr Deane made it clear that the Electricity Corporation had no wish to own the beds of these lakes. A number of the South Island national parks include mountains, lakes and landscape of particular spiritual value to Ngai Tahu. They are the repository of much Ngai Tahu mythology and tradition. Restoration of their rangatiratanga would seem unfulfilled were the return of some at least of these treasured natural features denied to Ngai Tahu.

However, Ngai Tahu have made it clear that they have no wish to change the essential character of national parks. The opposition of the Federated Mountain Clubs to any such public lands being vested in Ngai Tahu appears to be based on an apprehension that the public's access to such lands might be restricted and that fees might be charged for entry were Ngai Tahu to become the owners. These and any other concerns would be matters for negotiation between Ngai Tahu and the Crown. It

seems unlikely that a reasonable solution could not be found which suitably recognised the public interest in these lands, should some be restored to Ngai Tahu ownership.

There is provision in section 439 of the Maori Affairs Act 1953 for the setting apart of any Maori freehold land or general land for the purposes of a reserve or place of historical or scenic interest or for any other specified purpose.

Section 439(12) permits constitution of a Maori reservation to be held for the common use and benefit of the people of New Zealand.

Trustees representing the public user can be appointed as trustees along with Maori Trustees to administer the reserves. There are a number of these reserves already in existence. Transfer of ownership, or should it perhaps be stated more aptly, return of ownership to Maori, need not affect public use. Section 439 could also be further extended to provide procedures for partnership management.

24.5.3 As we have seen, counsel for Landcorp contemplated that some lands presently owned by the corporation might be transferred into Ngai Tahu ownership. He pointed out, however, that most, if not all, of the South Island lands vested in Landcorp are marginal economic units unsuitable for individual ownership. But, should they be resumed by the Crown for transfer to Ngai Tahu, Landcorp would be entitled to compensation under the provisions of the Treaty of Waitangi (State Enterprises) Act 1988. Rather than see Ngai Tahu struggling with such properties, the corporation supported the suggestion that Ngai Tahu, not Landcorp, should receive the compensation so that Ngai Tahu could find land better suited to their own needs.

Again, these are matters for negotiation between the parties should Ngai Tahu wish to pursue this particular remedy.

24.5.4 Several state-owned enterprises, including Landcorp, Forestcorp and Electricorp, now hold substantial interests in former Ngai Tahu territory. These have been transferred to them by the Crown. The shares in these SOEs are at present wholly owned by the Crown. It may be that as part of a negotiated settlement it would be reasonable for an appropriate interest in one or more SOE involved in the Ngai Tahu whenua to be assigned to Ngai Tahu by the Crown. The basis on which such an interest was assigned would be a matter for agreement between Ngai Tahu and the Crown.

24.5.5 In chapter 14 the tribunal has discussed the claimants' grievances in respect of the West Coast leases in perpetuity. We have found that these leases were imposed on Ngai Tahu in breach of the Treaty and that Ngai Tahu are entitled to redress. The government has had these and similar leases under consideration for some time, with a view to finding an appropriate form of remedy for the greatly disadvantaged Maori owners. The tribunal considers that a satisfactory solution must be found to this serious grievance as part of a comprehensive settlement.

24.5.6 Ngai Tahu have a natural and understandable desire to have returned to them a substantial interest in the land they once owned. The restoration of their rangatiratanga depends upon this happening. But it is clear that the land which

remains in the possession of the Crown, whether high country pastoral leasehold land, national parks, or other land still vested in the Crown or Landcorp, would not provide Ngai Tahu with an economic base. Such land as is being farmed is either marginal or, in the case of the high country pastoral lease land, has a high conservation component. The value of the remainder lies in its scenic, recreational, environmental and wilderness qualities. In addition it has special and unique value to Ngai Tahu as tangata whenua. While, therefore, the return of part of this land is of importance to Ngai Tahu, its importance is as much intangible as tangible.

Yet it cannot be disputed that, as a result of the Crown's numerous Treaty breaches, Ngai Tahu has suffered grievous economic loss. Moreover much of this loss has persisted for a century or more. Ngai Tahu is plainly entitled to very substantial compensation over and above any or all of the foregoing forms of redress. Such compensation would necessarily have to be financial. It would need to be sufficiently substantial to enable Ngai Tahu, now a numerous tribe, to be able significantly to enhance the social, educational and economic well-being of its people. Whether the tribe opts for the purchase on the open market of viable farm properties in suitable locations, or for the establishment or purchase of commercial ventures offering employment opportunities for its people, or for other forms of investment or economic activity, or for a combination of some or all of these, is of course for Ngai Tahu to decide. The tribunal is conscious of the fact that Ngai Tahu, up to 1844, owned more than half the land mass of Aotearoa, yet only 20 years later it had been reduced to less than 38,000 acres. The serious and repeated breaches of the Treaty of Waitangi which so reduced Ngai Tahu to near landlessness have yet to be redressed. Ngai Tahu's loss has been great and continuing. The honour of the Crown can only be restored by a settlement which recognises the magnitude of Ngai Tahu's great deprivation, sustained over more than a century. Only a large and generous response by the Crown will suffice to redress the wrongs done to Ngai Tahu and lay their numerous grievances to rest. No less will serve to restore the honour of the Crown.

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*Waitangi Tribunal, Department of Justice, Wellington.*

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### 24.6 Financial Assistance to Ngai Tahu in Their Negotiations with the Crown

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24.6.1 Although significant financial assistance has been made available by government towards legal and research expenses incurred by Ngai Tahu in the prosecution of its claims, the tribe has been obliged to expend substantial additional sums. In the result, the Ngai Tahu Trust Board, which has borne the brunt of the financial burden, is sorely pressed financially.

#### Tribunal's recommendations

24.6.2 The tribunal is conscious that the negotiations with the Crown which will follow the release of this report on the land claims will be lengthy and intricate. Ngai Tahu will require the services (among others) of experts in accounting, taxation, valuation and law. Such professional services, given the likely magnitude and complexity of the matters in issue, will be very costly. It is not easy to estimate the likely sum involved. The tribunal is satisfied that necessary professional services will cost at least \$1 million. This may well be an underestimate. The tribunal recommends that a sum of not less than \$1 million be made available to Ngai Tahu to enable it to engage the necessary professional and related administrative services to prosecute its negotiations with the Crown.

24.6.3 The tribunal is hopeful that in a spirit of goodwill and with a commitment on the part of the Crown to act justly and generously towards Ngai Tahu, a settlement satisfactory to both parties will be reached without undue delay. At the end of twelve months following the release of this report the tribunal would expect to receive a report from the parties as to the progress made towards achieving a settlement. If at any time the parties are unable to reach agreement on the whole or any part of matters in issue, the tribunal would be amenable to setting a date for hearing the parties on the question of remedies and to make appropriate recommendations. The tribunal expresses the hope that this contingency will not arise and that the parties in the spirit of partnership are able to arrive at a mutually acceptable settlement.

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### 24.7 Reimbursement of Costs

#### 24.7. Reimbursement of Costs

24.7.1 At the conclusion of its final hearing on 10 October 1889, the tribunal received from the claimant Henare Rakiihia Tau a statement of costs claimed by him in prosecuting his claim. The claim detailed time involved of 5561 hours costed out at \$31 per hour and totalling \$172,391, together with travelling costs of \$14,525 also detailed, making a total amount of \$186,916. From this sum Mr Tau had deducted \$13,040 paid to him by the trust board, making a net sum claimed of \$173,876. The period covered by the statement was from July 1986 to August 1988 inclusive.

Mr Tau stated that during this period his employment with the meat industry was interrupted and his claim was based on the then ordinary employment rate of \$31 per hour.

24.7.2 The tribunal also received from the Ngai Tahu Maori Trust Board through its secretary, Mr S N Ashton, a chartered accountant in public practice in Christchurch, a detailed schedule of costs directly incurred by the board in respect of its involvement in the claim up to 6 October 1989. The total sum claimed was \$399,168.

24.7.3 The tribunal has no statutory power to award costs. The tribunal however has considered both the above claims with a view to making recommendations to government.

Dealing first with claimant Mr Tau's application, although the tribunal accepts that Mr Tau has incurred expenses and may also have suffered loss of employment, the tribunal is reluctant to recommend reimbursement of an individual claimant's costs. Although Mr Tau has brought the claim and has taken a significant part in its preparation and presentation the grievance itself is substantially on behalf of the tribe. Ngai Tahu as a tribal group in these proceedings has been represented by the trust board.

The legal costs of Mr Tau as well as the research and administrative costs in presentation have been met by the trust board and substantially refunded to the board by grants made pursuant to appointments and commissions authorised by sections 7A and clause 5A (second schedule) of the Act. To this extent Mr Tau has not been called upon to meet any legal or research costs other than his own time. The tribunal notes that a number of tribal members have been involved in the presentation of this claim and considers it would be inappropriate to reimburse an individual claimant even though that person may have made a major contribution and even though the claim is brought in his name under the statutory prescription. The tribunal considers that reimbursement of an individual's expenses must be looked at in the circumstances of

each case before it. If the grievance is personal to an applicant and well-founded there may be justification for the tribunal to consider reimbursement. On the other hand if a grievance is really brought on behalf of iwi or hapu the tribunal should regard the claim as such and consider the position of the tribal group rather than the individual.

Without encroaching into the area of iwi or hapu discretion it may well be that the iwi or hapu itself might take some steps to reimburse costs and expenses incurred by any of its members. The tribe generally is in the best position to know the respective contributions of its members. This decision may well be looked at with disappointment by Mr Tau but the tribunal considers there is a need for the tribunal to assess its position having regard to all claims that might be brought before it. There is no doubt that Mr Tau has taken a major role in this case. He has served Ngai Tahu well.

24.7.4 The tribunal has examined the schedule of costs prepared by the trust board's accountants and is satisfied these reflect the direct costs incurred by the board over the period of the claim.

As earlier noted, the board's financial position has been placed in a precarious position as a direct result of the extraordinary expenses incurred. The board has made several requests during the claim for financial assistance but the tribunal deferred making any recommendation to government until the report on the major claims was completed. The trust board has consequently been obliged to tread most cautiously in managing its affairs. The reimbursement which the board now seeks are the actual costs of the claim. The total sum involved up to 6 October 1989 is \$399,168.

The tribunal, as the report confirms, considers that the Ngai Tahu claim is well-founded and that justice requires the tribunal to recognise the tribe's request for refund of its actual expenses.

24.7.5 Accordingly there is a recommendation that the Crown reimburse to the Ngai Tahu Maori Trust Board the sum of \$399,168 in repayment of costs incurred by the board as set out in its statement presented to the tribunal on 13 November 1989.

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*Waitangi Tribunal, Department of Justice, Wellington.*