

# Ngai Tahu Land Report

## 14 The Perpetual Leases of Ngai Tahu Reserves

### 14.1 Introduction

Chapter 14

#### THE PERPETUAL LEASES OF NGAI TAHU RESERVES

##### 14.1. Introduction

This section of the report deals with the claimants' grievance that the Crown, in breach of the Treaty, unilaterally imposed perpetual leases containing unjust terms over lands reserved from the Arahura purchase of 1860.

We shall be referring to a number of submissions presented to the tribunal as well as a volume of other relevant evidence. Submissions were made not only by counsel for the claimants and counsel for the Crown, but also on behalf of the Maori Trustee. Comprehensive submissions were made on behalf of the West Coast (South Island), Maori Leaseholders Association Incorporation, and certain lessees of Mawhera Incorporation, by Dr Willie Young. The tribunal also had before it the overview report of Professor Alan Ward.

We received in evidence the Report of the Commission of Inquiry into Maori Reserved Land that was set up in 1973, completed its investigations by the end of 1974, and published its findings in early 1975. Evidence was also given to the tribunal by Ngai Tahu owners and by other residents of Greymouth including the mayor, Dr B Dallas. We shall be referring to the views of these various persons, bodies and organisations where relevant during this examination of the Greymouth leases. We shall be primarily concerned with the reserve known as MR 31 or the Mawhera Reserve, comprising originally 500 acres on the south bank of the river Mawhera or Grey, as this reserve highlights the main issues and events on the perpetual lease question.

During the course of a hearing held at Greymouth in September 1988 the tribunal allowed three Maori authorities to tender submissions in support of the claimants' grievance. These were lodged on behalf of:

- 1 Parininihi-ki-Waitotara Incorporation of Wanganui (N10)
- 2 Wakatu Incorporation of Nelson (N11), and
- 3 Wellington Tenths Trust and Palmerston North Maori Reserves Trust of Wellington (N12)

These three bodies have vested in them lands reserved from other deeds of sale entered into by their respective iwi with the Crown. Grievance claims have been lodged with the tribunal in respect of these other tribal areas and include inter alia similar allegations concerning imposition of perpetual leases. Although there is a

common thread between the claimants and these other three bodies in certain areas of their respective claims, nevertheless there are factual distinctions in the respective backgrounds which have an important bearing on the crucial question of whether there has been a breach of Treaty principles in each case.

One of these factual differences relates to the question of whether or not consent was given or obtained. It will therefore be necessary for the tribunal to examine separately each of the iwi claims. However, the submissions have been useful to the tribunal and indicate the wide area of dissatisfaction with the present leases. The tribunal also notes there is a difference between the claimants and the other three supporting groups on the statutory remedy sought from the Crown although no doubt this may be a reconcilable matter.

It was explained to the tribunal by counsel appearing for the Maori Trustee that government was aware of the need for statutory changes, and remedial legislation was proposed. An interdepartmental committee was set up to complete proposals for legislation by October 1988, but the Minister of Maori Affairs had indicated his intention to consult with lessees and Maori owners before enactment of legislation (N32:8).

We had hoped rather optimistically when it was stated that legislation was intended for introduction in 1988 that there would be no need to address the claimants' grievances over the reserved land perpetual leases. Despite a press statement by the Minister of Maori Affairs on 18 January 1990 that legislation would be introduced in 1990 it would seem necessary in the light of continuing delay in government action that we must deal with Ngai Tahu's grievance. Whether in due course the grievances of other iwi will need inquiry by the tribunal will depend on government moves to address the question.

We propose therefore to look at this grievance and in so doing will deal with the claim under the following headings:

- 1 A brief history of the reserves and legislation affecting them
- 2 Ngai Tahu's grievances
- 3 Ngai Tahu evidence
- 4 The response of the Crown to the claim
- 5 The response of the lessees to the claim
- 6 The response of the Maori Trustee
- 7 The tribunal's examination of the evidence and its findings
- 8 The tribunal's views on remedies

# Ngai Tahu Land Report

## 14 The Perpetual Leases of Ngai Tahu Reserves

### 14.2 History of Mawhera Reserve and Legislation Affecting It

#### 14.2. History of Mawhera Reserve and Legislation Affecting It

14.2.1 The Mawhera reserve comprising 500 acres was one of the portions of lands reserved under the 1860 Arahura deed of sale. It formed part of schedule A of the deed being one of those blocks reserved for individual allotment. The purchase was negotiated on behalf of the Crown by James Mackay who was very much aware that this reserve was the site of a future town. Because of the importance of the land to Poutini Ngai Tahu, however, he was compelled to set it aside as a reserve. James Mackay, describing the site of the reserve, had this to say:

On the 17th May, a dispute arose as to the site of a reserve of 500 acres for individual allotment at the Mawhera or Grey, I wishing the Natives to select it up the river, but they objected to do so preferring to have it near the landing place. As this spot had always been their home, and on the hill above it in a cave repose the remains of Tuhura and others of their ancestors; nothing could move them to give up this place, which I much regretted, as it enables them to retain the best landing place. I however found that further argument would have endangered the whole arrangement entered into at Poherua, on the 26th April, and therefore deemed it politic to acquiesce in their demand. It may be imagined from the position of this reserve that it would be a suitable site for a town, but the whole flat portion of it is liable to be flooded, of which we had practical demonstration by finding on our return from the south that several of the houses at the Pah had been carried away by a flood which took place in our absence. (D5:13){FNREF|0-86472-060-2|14.2.1|1}

Giving evidence one of the Maori owners, Andrew Maika Mason, gave four reasons why the Maori owners insisted on the reservation. These were:

- a) It was the traditional site of their principal pah. It was strategically located as the gateway to the pounamu for those coming down from the North. Control of Mawhera gave control over the pounamu.
- b) There were two urupa there. The chiefs were buried in a urupa on a hill over what is now Greymouth and there was another urupa in what is now Blaketown. The bones have now been removed from the latter.
- c) It was an ideal landing place for the canoes of fishermen or travellers.
- d) Mackay and the Maori people all realized that it was the best natural site for any town in the area. The Maori certainly wished to preserve the area for the reasons given above, but they were not fools, and they could see the additional economic advantage which would accrue following any Pakeha settlement there. (D4:8)

Professor Ward had this to say about the development of the Mawhera site:

By the mid 1860s the reserve there had acquired considerable commercial value. In 1865 a new town had been founded in the wake of the discovery of gold in the Mawhera River. At the beginning of that year the small European settlement of Blaketown, on the north bank of the river had been in decline. Almost overnight the discovery of gold transformed the area and the town started spilling over on to the land on the south bank. The overflow, a commercial centre in its own right, was dubbed Greymouth. A shortage of flat land around the harbour put a premium on suitable building sites, including much of the Maori reserve. Faced with a dearth of suitable Crown land, merchants leased parts of the reserve directly from its Maori owners. By July 1865, four thousand feet of the Mawhera River frontage was occupied, 37% leased from Poutini Ngai Tahu. The majority of these leases seem to have been short term ones of no more than three years. Miners were also reported to be paying Poutini Ngai Tahu for the right to prospect on other reserves. (T1:301)

This state of affairs did not last long. In August 1865 the Native Minister instructed Alexander Mackay, the resident magistrate at Nelson, to go to Greymouth and investigate the leasing arrangements. The minister anticipated that problems would arise from the informal leases and considered intervention necessary to ensure the orderly development of the town and the provision of necessary amenities such as roads and other public services.

Mackay's trip resulted in the reserve at Mawhera being placed under the Native Reserves Act 1856 and thereafter it was administered by the government through a succession of trustee arrangements. At various times throughout the following years other Poutini Ngai Tahu lands were also placed in this category. In 1882, when the public trustee took over the administration of the reserves previously under the 1856 Act, it became responsible for 5,936 acres of Maori owned land in Westland.

#### Native Reserves Act 1856

14.2.2 This Act was passed to provide a means of efficient management of lands set aside for the benefit of Maori. The Act applied to a variety of reserves including those set aside under the New Zealand Company tenths, land that had never been sold such as the reserve at Mawhera and land granted by the government. The Act gave the governor authority to appoint commissioners, who were given extensive powers to deal with the reserves. They were empowered to exchange, sell or otherwise dispose of the lands, subject to the assent in writing of the governor, however no consent was required if the term of the lease did not exceed 21 years. The commissioners, with the consent of the governor, had power to set aside lands and administer these for special endowments for schools, hospitals and charitable purposes for the benefit of the aboriginal inhabitants. The consent of owners was required to place land under the Act. Ms Catherine J Nesus, a solicitor in the legal division of the Department of Maori Affairs, in a summary of legislation, had this to say about the 1856 Act:

There was little debate over the Bill when it passed through the Legislative Chamber and the House of Representatives. It was described as an instrument of practical good to the Native race and seen as a mechanism to ensure those reserves created by the New Zealand Company were used to the best advantage. (N36:8)

The effect of this Act was to vest land in the Crown once the owners' consent was obtained and a conveyance made. It is interesting to note in this legislation that, although the consent of owners was required to place land under the Act, there was no provision for Maori owners to take part in any matters relating to the control of the land, nor was there any provision for consultation once their land had been transferred.

#### Native Reserves Amendment Act 1862

14.2.3 The 1862 amendment to the Native Reserves Act 1856 abolished the position of commissioners created under the earlier Act and all the powers that they previously held. The administration of the reserves was put into the hands of the governor, who was given a power of delegation. One of the features of this Act was that it empowered the governor by order-in-council to declare that assent had been obtained from the owners, whereupon the land became vested in the Crown as if ceded or conveyed. The result was that management of the reserves passed from the local commissioners back to the Native Department.

#### Mawhera leases brought under 1856 Act

14.2.4 Consequent upon Alexander Mackay's investigations into the problems affecting the township leases, he reported:

that a number of persons had unadvisedly entered into arrangements with the Native owners for the occupation of the land adjacent to the river frontage, without being aware that such agreements were invalid. The agreements entered into were mostly for a short time, with a right of renewal, and as all the occupants had paid the full sum that had been demanded by the owners for the use of the land, it was considered advisable, in order to rectify any difficulties that might eventually occur if this state of affairs was allowed to continue, as well as to protect the interests of all concerned, to bring the reserve under the operation of "The Native Reserves Act, 1856". with the consent of the Native owners. (N7:30){FNREF|0-86472-060-2|14.2.4|2}

Mackay had this to say:

This proposition was willingly assented to by the Natives, as they foresaw the difficulties that were likely to ensue through the irregular occupation of their land, as well as their own incapacity to deal with the question. (N7:30){FNREF|0-86472-060-2|14.2.4|3}

The reserve was brought under the Native Reserves Act 1856 by order-in-council of the 3rd February 1866. {FNREF|0-86472-060-2|14.2.4|4} A system of leasing thereupon commenced.

At this point it should be mentioned that there were two schedules attached to the Arahura deed. Schedule A listed 39 blocks totalling 6724 acres which were set aside as "Lands Reserved for Individual Allotments", and schedule B listed seven blocks totalling 3,500 acres as "Lands Reserved for Religious, Social, and Moral Purposes". The whole of the lands in schedule B were brought under the 1856 Act but only seven

of the blocks in schedule A, including Mawhera 31 totalling 3498 acres, were similarly vested (D5:18).

It is clear from the reports of Professor Ward (T1:304-305) and the Crown researchers Messrs Armstrong and Walzl, (N6:8-24) that Alexander Mackay, who had been appointed commissioner and had day to day control of the reserves, managed those reserves in a conscientious way with the interests of the owners and lessees at heart. Mackay was undoubtedly interested in promoting the development of the town, deliberately setting low rentals to compensate lessees for the work incurred in creating commercial properties from unimproved land. In his 1873 report Mackay says:

The object in letting this land at what may be considered a low rate of rental, was to encourage settlement, and enable the occupants to reimburse themselves for the outlay expended on reclaiming land covered with a very heavy growth of timber, and on making permanent improvements, such as clearing and forming streets, etc. (N7:16){FNREF|0-86472-060-2|14.2.4|5}

Professor Ward had this to say of the position of Ngai Tahu during the 1860s and 1870s:

Poutini Ngai Tahu were comparatively well served during the 1860s and 1870s. They had come out of the initial purchase negotiations with the Crown with proportionally larger reserves than their east coast relatives and through an accident of geography, part of their land acquired considerable commercial value. (T1:305)

While Alexander Mackay managed their estate, Poutini Ngai Tahu had an administrator who was conscientious and with whom they had a long-standing personal relationship. A little further in his report Professor Ward referred to various actions of Mackay in administering the leases and said:

Poutini Ngai Tahu's regard for Mackay was such that in 1884 and 1885, following Mackay's removal from the post of Native Reserves commissioner they petitioned Parliament for his return. (T1:306-307)

At the same reference Professor Ward also said:

During the period 1865-82, Poutini Ngai Tahu may not have been permitted to manage their own land but it is not at all clear that they wished to do so. Under the trustee arrangements made with the Crown they were spared the landlessness which was the fate of other tribes who sold, or were forced to sell, land in the flurry of shady dealing which followed the passage of the 1865 Native Lands Act.

Professor Ward outlined how monies were outlaid from the rental income to help finance public works such as roads and flood protection works and said:

Apart from the question of what proportion of the income from the estate should be distributed to the beneficial owners, there was no evidence that Poutini were unhappy with the fact that the reserve at Mawhera was being leased to Europeans. However the European influx did alter their use of the area. As the European community became more dominant, that is, as Mawhera gave way to Greymouth, the town became less

congenial to Poutini Ngai Tahu. In 1869 the hapu, with the exception of Werita Tainui who stayed in Mawhera until his death, moved to Arahura. Following this shift the sections which had been set aside at Mawhera for Maori to live on were also leased. The area which Poutini Ngai Tahu had refused to abandon in 1860 because of its ancestral importance was becoming a European preserve. (T1:307)

Report of commissioner of native reserves, 1870

14.2.5 This report of Major Charles Heaphy describes fully the period of transition undergone by the Greymouth Maori on the arrival of the European. This section of the report was first published in the Report of the Commission of Inquiry into Maori Reserved Land in 1975:

Independently of the great value attaching to many of the Reserves from the discovery of gold deposits in their vicinity, the land is, from its position and fertility, of great worth. The Native estate is quite equal in value, town for town, and farm for farm, to the crown lands of the County.

In 1846, the Natives of the West Coast were about seventy in number, and, of all the tribes in New Zealand, had benefited least by the coming of Europeans to the country.

Ships had never frequented the coast, and the Dusky Bay sealers who, forty years ago, had occasionally pushed a boat through in the surf at the Teremakau or the Mawhera, had then long since disappeared. When Mr Brunner and myself walked from Nelson to Arahura, in 1846, we found the Natives at the latter place without either pigs or goats. Potatoes they had, but neither melons, cabbage, pumpkins or maize. Their clothing was the coarse Native koka, and the dog skin, and they were almost destitute of iron implements for cooking purposes, or for clearing the bush. Of boats or sea-going canoes they had none, and Dreading to be seen by the northern natives, they lived in the remote Arahura country, partly from the security it afforded, and partly to work the greenstone which was to be found in the river bed. But, poor as their condition was, they were hospitable almost to improvidence, towards their white visitors. Beyond seeking to obtain an iron pot or an axe in exchange for a meri pounamu, their life appeared to be without aim or purpose. They now derive a rental of nearly 4,000 a year from white tenants. They had weatherboarded cottages with chimneys and glass windows, and their children are educated in English schools.

It may be without the limits of a Report on Reserves to touch upon circumstances of this nature, but when it has been so often written in England that the Maori suffers materially and socially by contact with the settler, it is but proper, I think, to show that even in the midst of a gold digging community-proverbially rough, and not disposed to regard a dark skin with much sentiment-the Maori has improved in social condition, and is well cared for. (N7:4){FNREF|0-86472-060-2|14.2.5|6}

Lessees' grievances leading to a report of Commissioner Heaphy 5 June 1872

14.2.6 In their submission for the Crown, Messrs Armstrong and Walzl noted that a committee of leaseholders, in a letter of January 15 1872, had complained of heavy ground rent and stated that:

after the payment of insurance premiums, taxes, and ground rent, very little profit in the best instances, and no profit at all in most instances, is realized by the owner (of the lease). (N7:8){FNREF|0-86472-060-2|14.2.6|7}

About this time the leaseholders mounted pressure for the sale of the Mawhera reserves. They claimed there was a need to replace wooden buildings with brick and stone, not only to improve the town, but to prevent fire damage and reduce insurance premiums. Heaphy reported:

On all gold fields there is a great amount of social hurry, and the absence of a lasting tenure to land must tend to increase this. Nothing that could be done by the government would conduce more to the benefit of the Town of Greymouth than the judicious conversion of the existing leases into absolute conveyances. (N7:8){FNREF|0-86472-060-2|14.2.6|8}

The Ward report also confirmed the pressure to freehold:

Equally serious was the fact that the land also became vulnerable to pressure group politics. Under the 1856 Act decisions relating to the future of the reserves were in the hands of the Governor-in-Council. During the 1870s and 1880s, the Executive Council, that is, the government of the day, was subjected to intensive lobbying with regard to the Greymouth reserve. Many leaseholders wished to buy the Maori out, or alternatively for the government to buy out the Maori and resell the land to them at 'a fair valuation'.

The lessees' campaign reached a pitch in the early 1870s, died down a little until the end of the decade and then intensified again in response to changes in the administration of the reserves. During these years Poutini Ngai Tahu consistently opposed sale, emphasising the importance of the land to them for what were described by Mackay as 'the ground of sentiment'. (T1:308)

Heaphy reported on 5 June 1872 (N7:7-10).{FNREF|0-86472-060-2|14.2.6|9} His report indicated that, as at 1872, 181 acres had been laid off in town allotments, leaving a balance of 319 acres on a steep and densely wooded hill which was unsuitable for building purposes.

In his report Heaphy discussed in some detail the attitude of the owners to selling and rejected the leaseholders' contention that Maori owners were not justly entitled to the enjoyment of the increased value that had accrued to the property as a result of the settlement. The following is an extract from the report, which indicates the Maori owners' attitude:

The resident natives participating in the revenue derived from the reserve are adverse to the idea of a sale. Some who were present at the discussion of the subject had come from so far as Bruce Bay, and all appeared much interested.

Inia, their spokesman, said, In their minds it was fixed, the present order and system had only been arrived at after considerable time, and they did not want to see it changed.

In respect to longer leases being granted, he (Inia) said, The white people get a lease at a small rent from the commissioner, then they let it at a higher rent, then again at a higher to another, and so on. And how do we gain? If longer leases were granted the price might still be increasing, but not for us. (N7:9){FNREF|0-86472-060-2|14.2.6|10}

However Heaphy noted that:

Notwithstanding the opinion of the natives it might be judicious to sell portions of the reserve, from time to time, if a sufficient price were offered—one that would yield a permanent revenue equal to, or not much less, than the present rental. (N7:10){FNREF|0-86472-060-2|14.2.6|11}

There is a further very clear indication of Heaphy's attitude embodied in his recommendation:

That it is desirable that the land in the Reserve should be made available for purchase without any restrictions by the original lessees or their representatives, at a price that would yield at 7 per cent, a revenue not less than 5/6 of the present rental. {FNREF|0-86472-060-2|14.2.6|12}

It is interesting to note that in a report dated 14 June 1872 concerning the Arahura reserve, just nine days after the report on the Mawhera lands, Heaphy considered the Arahura settlers, in asking to be allowed to purchase the freeholds did not have as strong a case as the Greymouth tenants. He recommended against sale but thought that longer terms of lease might be granted.(N7:12){FNREF|0-86472-060-2|14.2.6|13}

These two reports of Heaphy are in contrast to each other, but seem to show Heaphy was in favour of freeholding in certain situations that would not expose the Maori owners to significant pecuniary disadvantage. However, it is also significant that he was prepared to recommend freeholding even when this was against the express wishes of the Maori owners. The Heaphy reports were presented to Parliament. The government's attitude was to refuse to agree to freehold land unless the full consent of the Maori owners was first obtained. The following is a report of a statement by Mr McLean in the House:

there had been no desire on the part of the government that any alienation should take place unless it was for the benefit of the Natives, and with their full concurrence. (D5:106){FNREF|0-86472-060-2|14.2.6|14}

Alexander Mackay's report of 30 July 1873

14.2.7 In his report Mackay expressed his firm view against the sale of the freehold and noted:

The disposition manifested by a few of the tenants about a year ago to acquire the fee simple of the land has evidently subsided, and another cause of disquietude has been circulated. (N7:15){FNREF|0-86472-060-2|14.2.7|15}

Mackay goes on to refer to a resolution passed by the Greymouth Borough Council to borrow £7,000 by rating all property in the borough, in order to carry out certain improvements in the township. Apparently the borough council had expressed concern about the renewal of leases held by the trust and the right of the owners to ask a higher rental at the expiration of the leases (N7:15). {FNREF|0-86472-060-2|14.2.7|16} Mackay had for some years indicated to the tenants that they would get a renewal of their leases when the original leases expired. In his report he comments:

With regard to the renewal of the leases, no practical difficulty exists, and that fact must be generally known, as assurance has been given over and over again, although a right of renewal cannot be inserted in the leases, that the intention is to let the land in perpetuity for the benefit of the Natives, and that whoever is in possession at the expiration of any of the terms of the lease, provided the occupant would agree to pay an equitable rent for the premises in proportion to the increased value of the property, that an extension of lease would be granted him. (N7:15){FNREF|0-86472-060-2|14.2.7|17}

Mackay then goes on to make this significant statement:

This principle is based on an old established practice in England, where it is considered that those who are in possession of leases for lives or years, particularly from the Crown, have an interest beyond the subsisting term which is usually denominated 'the tenant's right of renewal.' This interest, although it is not a certain or contingent estate, there being no means to compel a renewal, yet it influences the price in sales and conduces to the security of the tenure beyond the fixed term.

One argument adduced in favour of the views held by the residents of Greymouth, is, that there could be no right of property in land that remained unsubdued to the purposes of man.

If this principle was maintained in regard to the right of property in land irrespective of to whom it might belong, it might possibly be admissible, but why it should be specially applied to the case of the Greymouth Reserve it is difficult to understand; and it may be argued, in opposition to this doctrine, that if the right of property go along with labour, how can the land of persons who have bestowed but little labour upon the soil, be usurped by civilized people from a distance, who have only laboured on it with the permission of its recognized owners.

The weakness and ignorance of the Native owners demand a more scrupulous fidelity from their civilized guardians, and any attempted infringement of their rights as British subjects, should be carefully guarded against.

Did the land belong to the same number of Europeans no allusion would have been made to such heterodox principles, nor would legislative intervention be continually sought to cure imaginary grievances. (N7:15){FNREF|0-86472-060-2|14.2.7|18}

Native Reserves Act 1873

14.2.8 In late 1873 an Act was passed which allowed for longer leases and more involvement by the Maori owners. Control of the reserves was reinstated to the local

district level by establishing district commissioners. Three local Maori assistant commissioners together with the commissioner formed the Board of Direction for the management of reserves in the district. Provided the board assented, the commissioner, under section 19 of the Act, could let land in any native reserve for building purposes, for any term of years not exceeding 60 years. Leases for other than building purposes continued to have the limit of 21 years imposed. In his report Professor Ward commented that Mackay was opposed to the Act because he felt it was unworkable. He objected to the commissioner being "so hampered with the restrictions that he cannot act without the consensus of the Board" (T1:313).{FNREF|0-86472-060-2|14.2.8|19}

Professor Ward commented that the provisions of this Act did not seem to have been brought into operation (T1:313).

Alexander Mackay's report of July 1877

14.2.9 In this memorandum Mackay again discloses the concern of Ngai Tahu at the move to have their land sold:

The principal cause of uneasiness that prevails among the Native owners is owing to the opinion expressed that the Governor would sell the land under the provisions of The Native Reserves Act, 1876, coupled with the efforts continually being made by the tenants to obtain the fee of the land. The feeling is also considerably augmented by injudicious statements, made by thoughtless individuals, that the government is disposed to sell the land-statements which the Natives, unfortunately, place full confidence in. The Governor, it is true, is empowered to dispose of property vested in him under the provisions of the Native Reserves Act, by absolute sale or otherwise; but the Act forbids the alienation of the land except for the benefit of the Natives interested, and, as it is not probable that adverse action would be taken against the expressed wishes of the owners, there is no real cause of apprehension that the sale of the Greymouth estate would have been sanctioned. Moreover, the Natives, if for no other reason, would oppose the alienation of the reserve on the ground of sentiment, even if the sale would actually secure to them in perpetuity an income far in excess of the amount they now receive.

The most equitable mode of procedure for all concerned would be to repeal the Act empowering the Governor to sell, and pass a fresh measure enabling leases to be issued for sixty years with the assent of the owners (where such assent was necessary), to persons who are desirous of improving the land by erecting a permanent class of buildings of brick and stone, as would be the case at Greymouth if the tenants were secured in possession. (N7:31){FNREF|0-86472-060-2|14.2.9|20}

Young commission report 1879

14.2.10 Despite Alexander Mackay's assurance to Ngai Tahu that their land would not be sold, they endeavoured to protect their position by applying for a Crown title to the land (N7:31){FNREF|0-86472-060-2|14.2.10|21} and in 1879 the Young commission was set up to establish ownership of the land preparatory to the issue of a title. In his report Thomas Young stated:

that the general wish of all the Native owners, who are the persons for whose benefit the lands were set apart, is that alienation by sale or by mortgage should be absolutely prevented. (N7:34){FNREF|0-86472-060-2|14.2.10|22}

This move by Ngai Tahu to seek a Crown grant of title prompted the citizens to take a deputation to the minister of mines who was on a visit to Greymouth in September 1879. The deputation had this to say:

What we ask for, therefore, is a diminution of rent and longer leases, with a right of continual renewal; but we freely admit that, whatever arrangement is made, it should be fair to the Natives as well as to ourselves, and, as this might be a matter very difficult to adjudicate, we would suggest that perhaps, upon the whole, it might be found most just and practical that the Crown should in the first place purchase from the Natives, at a reasonable price, and then resell or let the land to us at a fair valuation. (N7:28){FNREF|0-86472-060-2|14.2.10|23}

Again we see the pressure that is being applied for the freehold to be sold, in this instance to the Crown.

Alexander Mackay's report of 14 May 1881

14.2.11 In this report Mackay commented on the difficulties being experienced by the lessees, mainly due to economic depression caused by a downturn in goldmining and its effect on trade. Mackay emphasised the need for security of tenure and suggested new terms of leasing. He says:

For instance, a twenty-one years' lease should be granted for arable or pastoral purposes, and for building purposes a lease for twenty years, renewable for two further periods of twenty years, a reassessment of the rent to be made at each renewal; the tenant to have the right to call in the aid of a neutral authority to arbitrate in cases where a difference of opinion existed as to the fairness of the rent imposed. (N7:174){FNREF|0-86472-060-2|14.2.11|24}

Native Reserves Act 1882

14.2.12 A significant change in the management of reserves came with the passing of the 1882 Act. Management of the reserves was vested in the public trustee. Other changes also occurred. The definition of reserve was extended but more importantly the public trustee was empowered to lease reserves for 30 years for agricultural or mining purposes, and 63 years in 21-year terms for building purposes. Apparently this change of administration was not universally welcomed. Professor Ward said:

The public trustee, in contrast with the commissioner of Native Reserves, had little discretionary authority with regard to the management of the reserves. Lessees were later to complain about the legalistic approach of the Trustee and the fact that the centralisation of administration frequently made it necessary to refer matters to Wellington creating extra expense and delays. (T1:315)

The Act set up a system of disposing of leases by way of public tender or auction with the rent reserved to be the best improved rent obtainable at the time. Previously, the

tenants in possession were considered to have the right of a new lease over strangers. This was not the position under the new Act. It thus became obvious to the tenants that they not only risked being outbid for their lease and losing it, but also losing the improvements that they had made to the property. It would seem therefore that neither the tenants nor the Maori owners were satisfied with the statutory provisions.

This Act brought about another important change. Under section 8 title to the reserves was vested away from the Crown to the public trustee.

#### South Island Native Reserves Act 1883

14.2.13 This Act made provision for compensation for improvements. Section 4 of the Act provided that control and management of the reserve should remain with the Public Trustee. Under this Act the leases of the Greymouth reserve were confined to a term of 21 years, whereas leases in respect of other reserves were to be 30 years or 63 years as the case might be. The effect of the 1883 legislation was to ensure that the value of improvements would be paid to tenants on the expiry of their then leases. However there was still opposition from the lessees, who said that the provision to allow the leases to be competed for by tender would prejudice their interest. We shall return a little later to discuss this 1883 legislation in order to see the reaction of Ngai Tahu owners.

In 1884 the west coast Members of Parliament endeavoured to get legislation passed which would give the existing lessees a right of renewal, and petitions were also lodged in the House seeking confirmation of rights of renewal. This activity and the general complaints of the lessees led to the Kenrick commission.

#### Report of the 1885 Royal commission

14.2.14 On 14 July 1885, Henry Kenrick, Gerhard Mueller, and James Catley were appointed commissioners to inquire into and investigate the condition of settlers on Maori reserves on the west coast of the South Island. The commission found that the lessees suffered serious damage to their interests as a result of the legislative enactments of 1882 and 1883. The commission made it clear also that it accepted the statements of the tenants that they counted upon Commissioner Mackay's assurances of a renewal of their leases. The commission examined the possibility of freeholding the land but noted that the owners unanimously and strongly protested against any such alienation and considered that:

leases for sixty-three years given at a fair rental, with a compensation clause for improvements, most, if not all, of the benefits expected to be derived from the sale of the land would accrue to the tenants under this improved tenure. The Native grantees favour this course. (N7:186){FNREF|0-86472-060-2|14.2.14|25}

Attached to the report was Alexander Mackay's translation of a letter addressed by Maori with interests in Greymouth and other Maori reserves to the native minister. It stated their opposition to the sale of these lands, and their willingness to grant long leases. The following is the text of that letter:

The Native Minister, Mr Ballance. Arahura, October, 1885

We, the persons whose names are hereto appended, desire to place this letter before you and the government in case good may be derived from it for both parties, through the continual crying of the persons occupying the reserves. The government have appointed a commission to inquire whether the reserves can be sold.

We, the owners of the land, earnestly state that we will not sanction the sale, but are willing to consider what else can be done to improve matters for the benefit of both Maori and pakeha.

We therefore propose that the original leases should be renewed for sixty-three years and when that term is ended a further renewal of sixty-three years be granted.

It is provided by subsection (2) of section 15 of the Act of 1882 that leases be issued for a period not exceeding sixty-three years, to encourage the erection of houses on the land: let this period be enlarged.

A grant has been issued under the Act of 1883 to prevent the sale of the land.

We believe that the plan we suggest-ie, the lengthening the terms of lease, is one that will best conserve the interests of all concerned.

That is all from your friends.

Ihaia Tainui, Kinehe te Kaoho, Hoani Tainui, Moroati Pakapaka, Inia Tuhuru, Henare Meihana, Teoti Tauwhare (N7:189) {FNREF|0-86472-060-2|14.2.14|26}

14.2.15 For reasons that will become apparent later in this report we think it desirable also to set out the full text of three letters presented to the Kenrick commission at Hokitika during the course of its inquiry.

Inia Tuhuru told the commission:

I am one of the owners of the Greymouth Reserve and have also an interest in the Arahura Reserve. We object to the alienation of the freehold: we could not agree to it though the revenue derived from the purchase money were equivalent to the rent we are now receiving. We shall be agreeable to the extension of the existing leases. The tenants should have the first right of renewals before putting the leases to public competition: if they do not accept, then strangers should be admissible. If a lease goes to public competition and a stranger gets it, we feel the improvements belong to the tenant but are not prepared to say whether the incoming should pay the outgoing tenant for them. We think that while the tenant pays his rent, as fairly assessed, **ALL LAND NOT REQUIRED FOR OUR OWN USE SHOULD BE LEASED IN PERPETUITY.**

**WE SEND A COPY OF A LETTER TO THE NATIVE MINISTER RELATIVE TO THE FUTURE DEALINGS WITH OUR LANDS. (N7:322) {FNREF|0-86472-060-2|14.2.15|27} (emphasis added)**

Teoti Tauwhare also gave evidence:

I appear on behalf of my wife. We don't agree to alienate our freehold but will extend the leaseholds to 63 years on the Greymouth Reserve. We are willing at the end of the first 63 years to grant another lease of 63 years: IN FACT WE WISH THE LEASING SYSTEM PERPETUATED. Leases for agricultural and other purposes should be for a shorter period but, in regard to them also, we wish the same principle carried out. (N7:323). {FNREF|0-86472-060-2|14.2.15|28} (emphasis added)

Henare Meihana spoke briefly:

I have heard what the other witnesses who preceded me have stated and I agree entirely with what they have said, and also with the tenor of the letter we are forwarding to the Native Minister. (N7:324){FNREF|0-86472-060-2|14.2.15|29}

The Kenrick commission recommended that a special reserves commissioner be appointed with power, subject to the direction of the Public Trustee to:

- negotiate a final settlement of all conflicting interests of lessees or sublessees on the Greymouth lands; and
- appoint one or more valuers to assess the improvements effected by lessees or sublessees on their respective holdings.

The special commissioner so appointed was to be given power to decide who was entitled to a renewed lease in fulfilment of the promise or agreements reported by the Royal commissioners to have been entered into by Commissioner Mackay. {FNREF|0-86472-060-2|14.2.15|30}

Bunny report

14.2.16 Henry Bunny was subsequently appointed as a special commissioner and reported to the Public Trustee on May 29 1886 (N7:191-192).

Bunny reported that he had interviewed about 80 lessees and sublessees. On the question of acquiring the freehold, Bunny had this to say:

It may be, however, that the government might itself be able to acquire the freehold from the Native owners, and, by placing the reserve under local control, give the persons interested some voice in deciding the future management of the estate. This seems upon the whole the best course, if feasible.

When I visited the Arahura Reserve I saw some of the Native owners, and had a long conversation with them as regards selling their interests in the Greymouth Reserve, but I have found the strongest objection on their part to disposing of them. I did not fail to point out that, if they sold, the interest on the purchase-money would far exceed the amount of the rentals now received. They appeared to be entirely indifferent to the amount of rentals or interest, so long as they retained the ownership of the land. They expressed themselves perfectly willing that leases for sixty-three years should be granted, with a right of renewal for another sixty-three years. (N7:192){FNREF|0-86472-060-2|14.2.16|31}

We shall come back a little later to this portion of the Bunny report.

#### Westland and Nelson Natives Reserves Act 1887

14.2.17 There is no doubt that the Kenrick commission report and the Bunny report led to the passing of this Act in 1887. Although the Act did not put into effect directly the recommendations of either the Kenrick commission or the Bunny report, the need to address the grievances of the tenants forced the introduction of the new law. The Act repealed the South Island Native Reserves Act 1883 and largely focused on the terms of reserved land leases. In place of the old 30-year and 63-year terms a new term was substituted which was standardised at 21 years. In all leases a perpetual right of renewal was granted to the lessee. This perpetual lease fixed the rights of the parties in the original contract and gave the lessee perpetual rights of use of the land. The rent was reviewed at the end of every 21-year term. Effectively the land was removed from the control, use, or occupancy of the Maori owners. Provisions were inserted in the Act for arbitration of any questions relating to the valuation of improvements. In respect of the Arahura and Motueka reserves where buildings had been erected or the land improved, the trustee was obliged to offer a new lease to those who were in occupation and only then, if the offer was refused, were the leases to be put up for sale.

The new law continued the administration by the Public Trustee. Professor Ward gave a very useful summary of the passage of the Act:

The legislative history of this Act is rather complicated. It began in May 1887 as the South Island Native Reserves Bill. The Bill was introduced in the House of Representatives by the Premier, Sir Julius Vogel, on 17 May. On 8 June it received its second reading and was considered in Committee on the 9th. The Bill was reported on the same day and read for a third time. It then went to the Legislative Council where it lapsed because an election was called. A similar measure titled this time the Westland and Nelson Native Reserves Bill was introduced in the new Parliament in November 1887. The Bill was read in the House for a first time on the 9th of November. No further action appears to have been taken until the pre-Christmas legislative rush had started. The Bill was read for a second time, committed, reported on, the report considered and the third reading given all on the 20th of December. During this week the House was sitting after midnight every night, including a marathon effort to 2.50am on the 20th. On the 21st the Bill was amended by the Legislative Council and the amendments approved by the House. The Bill was amended again by the Governor on the 22nd, and the amendment agreed to by the House and the Legislative Council. It then became law. (T1:322)

This then was the legislation which introduced the perpetual lease with its 21-year terms of renewal, and with review of rent at the expiration of each 21 years.

We will shortly be looking at the debate in Parliament on the passage of the Bill and in particular the reactions of the Maori Members of Parliament and Legislative Council.

In addition to the rights of perpetual renewal and 21-year rental review, the Act also contained provisions for the valuation of improvements and the fixing of rentals. The Ward report stated that:

In practice this arrangement does not seem to have resulted in fair rents being set. Because such a high proportion of the Greymouth community were leaseholders it was difficult to get real competition for the leases. Lessees were effectively enabled to set their own rent. (T1:326-327)

The 1909 petition and the Poynton report

14.2.18 In 1909 Felix Campbell and 476 other residents of Greymouth petitioned Parliament over the Greymouth reserves. They complained of having to pay heavy ground rent and as well having to meet capital improvements. The lessees again demanded to acquire the freehold of the sections and proposed that steps be taken to buy out Maori owners at a fair valuation. During examination by a committee of the House, Mr Joseph William Poynton, Public Trustee, produced a brief history of the reserve which strongly criticised the lessees' complaints. His report tabled a schedule of the annual amounts collected from the Greymouth rents from 1874 to 1909, a period of 36 years. This table showed that the tenants were paying no more in 1909 than they had in 1874. Poynton said:

The concessions from time to time given to the lessees in allowing them their improvements, security of tenure, and an equal voice in fixing the rents, though of enormous benefit to the receivers, have brought no corresponding advantage to the givers.

The Natives particularly desire me to impress upon the members of the Committee that this Reserve differs from most others in the Dominion. Many of these were set apart by the Crown out of lands purchased from the owners. But this was never parted with at all. (N7:207){FNREF|0-86472-060-2|14.2.18|23}

Following the examination by the Public Trustee, four of the Maori owners gave evidence to the committee. They were Piripi Tauwhare, John Tainui, John Uru and Tu Meihana. These were the same persons who signed a letter on behalf of the owners of the Greymouth reserves objecting to the statements made by the Mayor of Greymouth to Apirana Ngata who was then Member for Eastern Maori.

The letter signed by these four owners was produced to the tribunal in evidence. In their letter the four Maori owners said this about the leases granted under the 1887 Act:

the leases are exceptionally fair, and could not be bettered without injustice to the owners. The tenants own absolutely all improvements, and their leases are perpetual, with an adjustment of ground-rent every twenty-one years, which is a reasonable term. (N40:70){FNREF|0-86472-060-2|14.2.18|33}

The letter went on to say:

The Greymouth lessees have nothing to complain about. The only thing they lack is an appreciation of the advantages they enjoy. The naive admission in the circular, The Lessees wish to acquire the freehold of their sections, and propose that steps should be taken to buy out the Native owners, at a fair valuation, explains everything.

In considering this demand these facts should be borne in mind:

a) To give the tenants the right to convert their leases into freehold would be a violation of the promise to the Native owners, given that this Reserve would be for them and their descendants for ever.

b) The Reserve is not in the same position as Crown lands leased to tenants. The Crown and the tenants only are concerned in that case, and the contract can be varied when both parties are agreed by allowing the tenant to acquire the freehold instead of continuing to hold the lease. In this case third parties, the Native owners, are concerned, and no alteration should be made without the consent of a majority of them. At present they are unanimously opposed to giving the freehold, but on further consideration may be disposed to consider the proposal favourably.

(N40:71){FNREF|0-86472-060-2|14.2.18|34}

This was a plea from those four owners, on behalf of the wider group, that the small remnant of land which they still held should be specially excluded from sale to the Crown. We make the observation that this letter, written ostensibly by those four owners, appears to this tribunal to have been actually written by the Public Trustee himself. We shall be examining this correspondence along with other evidence shortly, when we are considering the submissions by the Crown and by Dr Young on behalf of the West Coast (South Island) Maori Leaseholders Association.

#### 1913 commission of inquiry into the Public Trust Office

14.2.19 A commission was set up in 1913 to look at the work of the Public Trust Office in relation to Maori reserved lands. The commission consisted of Alexander Macintosh and John Henry Hosking. The commission was asked to consider whether Maori affairs were being carefully and satisfactorily managed and whether this business, managed by the Public Trustee, should be separated from the Public Trust Office and managed instead by a board or trustee especially appointed for the purpose (N37:285). {FNREF|0-86472-060-2|14.2.19|35}

The commissioners expressed their opinion that all Maori reserves and their administration should be vested in an independent body and suggested the setting up of a Native Reserves Trustee.

This report led to the introduction of legislation for the appointment of the Native Trustee. A Bill was prepared in 1914 but the war intervened. Six years later the Native Trustee Act 1920 established the Office of the Native Trustee as a corporation sole with perpetual succession and a seal of office.

All Maori reserves that had been vested in the Public Trustee were vested in the Native Trustee who also inherited the former's powers, duties, and functions.

## The Maori Reserved Land Act 1955

14.2.20 This Act was an attempt to create a common code in respect of Maori reserves by incorporating the provisions of 43 statutes into one piece of legislation. It was also directed to stopping further fragmentation of the interests of beneficial owners in reserve lands and standardising those leases held by lessees of this land (N36:78).

In her excellent submission to the tribunal backgrounding all of the legislation and reports affecting the Maori Trustee, counsel Ms Nesus referred to the 1955 Act, stating that fragmentation of interests were perceived to be the greatest obstacle to the administration of reserved land (N36:78-79). While the smallest of these interests did not affect the leasing of the land, the Minister of Maori Affairs of that time, Mr Corbett, was reported in Hansard as saying:

it has made a very onerous task for the administration, and one which, because of Audit, has to be carried out with the greatest care and accuracy. (N36:79) {FNREF|0-86472-060-2|14.2.20|36}

Part II of the Act was intended to deal with this problem. Hansard provides an insight into the thinking of government at that time:

Many of these minor amounts are so small that they are not worth collecting. Another factor is that the original beneficiaries were small in number and in a confined area. Over the years such tribes as the Taranaki and Ngaitahu, which hold reserves, have spread out over New Zealand, and their members have gone into the cities and taken up other interests. They have practically no knowledge of their Maori Land interests and they just do not care. (above) {FNREF|0-86472-060-2|14.2.20|37}

This part of the Act provided that uneconomic interests in the reserves could be vested in the Maori Trustee by the Maori Land Court. An uneconomic interest in reserved land meant a beneficial freehold, the value of which did not exceed £25, ascertained in a manner prescribed by this legislation. These interests would be paid for out of the conversion fund established under the Maori Affairs Act. There was no obligation to pay for those interests which were less than five shillings.

We therefore see the introduction of a form of compulsory acquisition of Maori interests through this statutory provision relating to uneconomic interests.

In Part II of the Act power was given to the Maori Trustee to convert term leases to leases with a right of renewal in perpetuity. We thus have the position, after a period of almost 70 years, of all leases being made to conform with those which were created in Westland under the 1887 Act. Another important provision was the introduction of a prescribed rental of 4 per cent of the unimproved value of the land for any substituted or renewed lease of urban land, and 5 per cent in the case of rural land. This provision, under section 34 of the Act, therefore introduced a new contractual term between the Maori beneficial owners and the lessees, by which rentals were fixed by statute.

Section 9 of the Act specified that the Maori Trustee could not sell reserved land although there was an exception in the case of land which could not be profitably used in the interest of the beneficiaries when the land could be sold or gifted with the consent of the Minister of Maori Affairs. In neither situation was the consent of the owners required. We received no evidence or submissions from the claimants, or the Crown or from any other body concerning the attitude of the Maori owners to the provisions of the 1955 Act.

#### Maori Affairs Amendment Act 1967

14.2.21 Sections 155 and 156 of the 1967 amendment introduced two new sections, 9A and 9B, into the Maori Reserved Land Act 1955. Under section 9A the Maori Trustee was enabled to sell settlement or township land or any land in a prescribed renewable lease to lessees where the lessees desired to acquire the freehold of the land. They were required to give notice to the trustee together with details of the purchase price determined by special valuation. The trustee had the authority to act in his absolute discretion to determine whether a particular sale was impractical or inexpedient. Again, section 9B set up a situation where the Maori Trustee in his absolute discretion could sell to lessees the land leased to them instead of granting prescribed leases. These 1967 amendments were heavily criticised by the Commission of Inquiry into Maori Reserved Lands which said that, "A total of nearly 18,000 acres has been disposed of and obviously the areas sold would be the choicest sections" (D1:51). {FNREF|0-86472-060-2|14.2.21|38}

A table attached to the commission's report at page 52 showed that 35 sections had been sold at Greymouth since the 1967 amendment. The commission recommended that the legislative provisions allowing the sale to lessees of the freehold of Maori reserved land be repealed, and this was later given effect to in the Maori Purposes Act 1975.

#### The report of the Commission of Inquiry into Maori Reserved Land

14.2.22 This commission of inquiry was established in 1973 to inquire into and report upon seven terms of reference but in particular, and in relation to our inquiry, into:

(d) Whether the provisions of existing leases of the land as to rights of renewal, and as to the frequency of the review of rentals and the methods of reassessment of rentals are satisfactory. (D1:6){FNREF|0-86472-060-2|14.2.22|39}

The commission reported in 1975, making 66 recommendations. Many of these have been given effect to by government, but there has been no implementation of those recommendations relating to perpetually renewable leases, fixed rentals, and rent reviews.

The commission stated that:

Many submissions were made which were critical of the perpetual nature of the leases prescribed under the Maori Reserved Land Act 1955. The general feeling informing this criticism appeared to be that these lands are forever removed from the control, use, or occupancy of the beneficial owners. For some beneficial owners this destroyed

any concept of the lands being regarded as ancestral lands. Indeed, should the owners walk thereon they would in fact be trespassers.

Many witnesses had no idea where the lands in which they held an interest were situated. The impression was left with the commission that this was one of the contributing reasons to the willingness of so many of the beneficiaries to sell their interests in these lands. (D1:62){FNREF|0-86472-060-2|14.2.22|40}

The commission had this to say about the perpetually renewable leases:

a) It must be said that the aims of our forbears in granting perpetually renewable leases were entirely good. It was to give to the lessees such security of tenure that there would be no hesitation to improve the land to a maximal degree. The lessee did this knowing that he had unassailable rights of occupancy for himself and his descendants, and if possible, it made even more secure the ownership and enjoyment of his improvements.

b) This applied with special force to those improvements such as clearing and draining land which appear in time to merge in the land itself. In the rural lands it is even doubtful if less secure tenure would have encouraged the development of virgin lands at all. There is no doubt, however, that a terminating lease for a long term of years offers adequate security for the maximal development possible of urban lands and the commission received convincing evidence on this point both in Auckland and in Wellington.

c) Perpetually renewable leases may possibly be appropriate for the Crown or a Municipal corporation to grant because these are immortal legal entities and the revenues received are a very minor part of their total income. This however, is by no means true of the Maori beneficial owners of reserved land who endure the uncertainties of human life and whose revenues are derived in the main from the labour of their hands.

d) To secure the maximal use and development of lands, even rural lands, the security offered by the perpetual right of renewal is by no means necessary. It gives a degree of security curiously incongruous with our mortality and one that endures not only through the lessee's life but the lifetime of his descendants from generation to generation. While extending certain advantages to children yet unborn it imposes serious disadvantages on the living, namely the Maori beneficial owners whom the Maori Trustee represents. (D1:64){FNREF|0-86472-060-2|14.2.22|41}

The commission reviewed the situation as it applied to perpetually renewable leases in the United Kingdom, and reported that this type of tenure was abolished in that country by the Law of Property Act 1922. The English statute abolished copyhold and a whole cluster of mediaeval tenures. It also abolished leaseholds for life and perpetually renewable leases. It is interesting that the 1975 commission, although it was heavily critical of the provision for perpetually renewable leases and of the unfairness of their operation on the Maori owners, in fact did not give a clear recommendation that the perpetual lease should be broken. The commission clearly felt that the right of sale of land should be repealed, but did not recommend statutory change to the perpetual term. Instead, the commission recommended procedures to

review rent at periods of not less than five years, to provide for indexation of rentals, and also for rents to be fixed at a basic rent of 1 per cent above that for government stock (D1:124-125){FNREF|0-86472-060-2|14.2.22|42}. To be fair to the commission, it did recommend that in all new leases of Maori reserved land the term be fixed relative to the span of human life, or to the economic life of the improvements on the land, and that no new leases containing a perpetual right of renewal be granted. This, of course, would not affect any of those leases currently in existence.

We shall refer later to the work of the 1975 commission.

#### Formation of Mawhera Incorporation

14.2.23 The Mawhera Incorporation was created by The Mawhera Incorporation Order 1976 following the 1975 commission's recommendation and administers just over 900 leases of its land. These leases are subject to the provisions of the Reserved Lands Act 1955.

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*Waitangi Tribunal, Department of Justice, Wellington.*

# Ngai Tahu Land Report

## 14 The Perpetual Leases of Ngai Tahu Reserves

### 14.3 Claimants' Grievances

#### 14.3. Claimants' Grievances

##### Preliminary statement of grievances

14.3.1 The first statement of Ngai Tahu's grievances in respect of their leased lands were contained in their amended claim of 2 June 1987. They stated that the Crown:

(e) Without the consent of its Ngai Tahu owners has converted freehold land into leases in perpetuity and fixed unrealistically low rentals for their leased lands.

(f) Without the consent of its Ngai Tahu owners has fixed unrealistically low rentals for their leased lands.

(g) Without the consent of its Ngai Tahu owners has fixed unrealistically long rests between rent reviews in respect of their leased lands. (appendix 3.4)

##### Further statement of grievances

14.3.2 In their amended claim of 5 September 1987 the claimants filed this further statement of their grievances:

It is the applicant's position that the Crown acted in a manner contrary to the spirit and intent of the Treaty of Waitangi in unilaterally imposing the form of leasehold now known as Maori Reserved Land Leasehold on the lands reserved from the Arahura Purchase of 1860 against the clearly expressed wishes of the Poutini Ngai Tahu owners.

The applicant further contends that the above form of leasehold has severely disadvantaged the Poutini Ngai Tahu owners since that time and continues to do so in that they are deprived and have been deprived of the ordinary benefit of those lands, they are effectively prevented forever from enjoying the ordinary use and benefit of those lands and that they have not been able to enjoy the ordinary rights of ownership. (appendix 3.5)

##### Supplementary statement of grievances

14.3.3 The following specific allegations in relation to this matter appear in the claimants' summary of grievances filed on 17 August 1989, and are taken from the list of grievances arising out of the Arahura Crown purchase:

(7) The Crown failed to protect Ngai Tahu by passing legislation imposing perpetual leases without the consent of Ngai Tahu, and without provision to protect them from economic loss.

(11) The Crown has failed to protect Ngai Tahu by not implementing the recommendations of the Commission of Inquiry into Maori Reserve Lands, 1973.[referred to in this report as the 1975 commission] (W6)

#### Summary of Ngai Tahu position

14.3.4 In essence Ngai Tahu were saying that the legislative action of the Crown in 1887 and 1955, in passing laws that imposed on them perpetual leases with 21-year reviews, and prescribed rentals of 5 per cent for rural land and 4 per cent for urban land, was done without Ngai Tahu consent. They further claimed that although some remedial action was recommended in the 1975 commission report, government has taken no action to change the law.

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*Waitangi Tribunal, Department of Justice, Wellington.*

# Ngai Tahu Land Report

## 14 The Perpetual Leases of Ngai Tahu Reserves

### 14.4 Ngai Tahu Evidence

#### 14.4. Ngai Tahu Evidence

##### Views of Kaumatua

14.4.1 Strong feelings were expressed to us by several of the claimant witnesses. Andrew Maika Mason, deputy chairperson of Mawhera Incorporation which now administers the leases, had this to say:

By the time the miners came, control of Mawhera had passed into the hands of the Crown which had it leased to the Pakeha settlers and miners, and our people were therefore driven off it

Wherever our people went they could not go farming, their land was in the hands of the Crown which had leased it out to the Pakeha. Put shortly, they could not live in their spiritual and cultural centre, Greymouth, because their land had been effectively removed from their control. As a consequence they could not grow with the town's economy and neither could they farm in order to supply the town. They were reduced to subsistence living.

The Maori Reserved Land Act is a very sore point with our people. When the Incorporation took over from the Maori Trustee, it was found that the original 500 acre Mawhera Reserve had been reduced to approximately 350 acres. The public trustee and the Maori Trustee had sold 150 acres. In theory we own 350 acres but in practice that ownership does not give us control because the land has all been leased in perpetuity. Further, we cannot even negotiate realistic rentals for the land because the rents are controlled by the Act. It is a sore point that in spite of the recommendation of the commission on Maori Reserved Land that something should be done about the leases and the rentals, nothing has been done in the 13 years since it reported its findings.

The result of all the things which I have described is that our people have not been able to develop any capital base. Economically they have fallen behind the Pakeha and are largely trapped in the labouring class. They have been effectively deprived of their own land and, because of the way that land has been leased, they have not been able to borrow against it and so could not raise the capital needed to develop an economic base.

The effects of this lack of access to capital do not stop with the loss of opportunity to go into farming or other businesses. Possibly the worst effect is that because of the inability to go into business, our people have been denied the chance to acquire business acumen

Another result of what I have described is the loss of our language and culture. Deprived of their land base, our people were also deprived of the chance to develop as a strong cohesive group built around its ancestral land

... I blame the Crown which enacted those laws and, when it did so, took no account of the partnership created by the Treaty of Waitangi. That partnership created an obligation for each party to consult the other before taking any action that might affect the other. The Crown did not require the administrators of our land to consult us so they did not do so. Had they consulted us, they would have been told that we did not agree to our land being leased in perpetuity or to any of it being sold. (D4:7-13)

14.4.2 In a very well prepared submission James Mason Russell said:

Throughout the history of Maori Reserved Land legislators have put pen to paper and broken the sanctity of contract regarding Maori leases, for the benefit of the lessees.

The lessees were given the perpetual right of renewal because of the Kenrick commission as perpetual right of renewal was introduced two years later in the 1887 Act. Legislators listened to the voice of the lessee but did not listen to the voice of the Maori when the Maori was agreeable to a 126 year lease that would have been beneficial to the lessees. Legislators broke the existing contract when they gave the lessee the perpetual right of renewal in 1887. That was not observing the sanctity of contract. The perpetual right of renewal came about as a result of pressure from lessees. It was a stipulation which came into the contract that one side never asked for.

My tupuna that agreed to a 126 year lease should have been listened to, to a more degree than they were. A grave injustice was done to our tupuna. (D17:26)

Effect on Mawhera income

14.4.3 Mr S B Ashton, a chartered accountant of Christchurch and secretary of the Ngai Tahu Maori Trust Board, also gave evidence (D4:19-21). Mr Ashton was critical of the action of the Crown and confirmed that from the total rental income received in 1987 the gross return on the value of the land was 1.95 per cent and the net return was 0.58 per cent. Mr Ashton considered that a realistic gross return on an investment of 9 million dollars should not be less than 10 per cent, that is, nearly \$900,000.

Views of the chairperson of Mawhera Incorporation

14.4.4 Mr Tipene O'Regan, chairperson of the Ngai Tahu Maori Trust Board and chairperson of the Mawhera Incorporation, submitted that perpetually renewable leasehold was a form of freehold which in effect meant that the owners could never again enjoy the ordinary rights of ownership.

They cannot walk on the land, they are entirely separated from its control or management. (D18:3)

Mr O'Regan went on to say:

It is our view that the unilateral imposition of perpetual leasehold combined with Crown Trusteeship is in some respects worse than the direct confiscation of land suffered by some tribes. Confiscation would, perhaps, have been more honest. It would have offered a clear cut cause for compensation and a more obvious injustice to touch the conscience of the Pakeha power culture. Instead that culture, as represented by the Borough and citizens of Greymouth, has had the benefits of confiscation for over a century without any such compensation. It has been confiscation on the cheap and by stealth.

This form of dispossession of the Maori owners has conveyed wealth and power to the lessees and the culture they represent for more than a century whilst we have remained the nominal owners of the land-theoretically we have not been dispossessed, theoretically we are still the owners. However, the majority of Kati Waewae have been forced to leave the Poutini coast and find work and sustenance in Christchurch and elsewhere. We have not even been able to farm the fertile soils of our own Arahura valley or the other lands in the region of which we have remained the nominal owners. Even though the Trusteeship ended in 1976 the lands are still imprisoned in the perpetual leasehold and the Maori owners still forced to live at a distance from their heritage. (D18:5)

Describing the effect on the claimants, Mr O'Regan said:

We have, in the course of establishing a viable economic future for our mokopuna, purchased the freehold of certain of our lands, both urban and farmland in the Arahura. In order to stand again on the lands reserved from the Poutini Purchase we have had to pay the full freehold price of our own lands in order to recover them. This has involved heavy economic and mortgage burdens and our capacity to do this has reached the limits of financial prudence already. This is a continuing injustice and the recovery offers little joy tinged as it is with the sense of resentment that it is the only avenue open to us to regain our mana under the present law. (D18:8)

Mr O'Regan gave a number of examples of how the fixed percentage rentals denied either party the capacity to exercise flexibility in the application of the leasehold rent, and how this operated unfairly against the claimants. He said:

The fixed rental provision prevents us dealing in the ordinary way of business with our lessees. Rent is never able to be a negotiable factor in our business relationships. In the case of commercial leasehold this is clearly inequitable. There is no reason in equity and justice why Maori Land should not be able to be managed and negotiated on in the same way as is freely available to other business activity. It is clearly discriminatory. If other lessors in business in Aotearoa can freely negotiate rental and other provisions then Maori should also be able to. (D18:10)

Mr O'Regan was severely critical of the actions of the Crown trustees, namely the commissioners, the Native Land Boards, the Public Trustee and most lately the Maori Trustee. He condemned the lack of action of the statutory trustees in consulting with the owners and in failing to invest in or develop the lands of the Mawhera owners:

As a result of this neglect on the part of the Crown's trustee agents the owners have suffered loss of value in their lands in real terms and they have been faced

subsequently with heavy costs and real difficulty in bringing order and a measure of modest profitability to the administration of their lands.

Insofar as the trusteeship has been accountable only to the Crown, established by the Crown and paid by the Crown, the acts of the trustees must be considered as acts of the Crown. It is our contention therefore that the neglect or omissions referred to above ... are acts of the Crown contrary to the spirit and intent of the Treaty. (D18:18)

We shall look a little later at the position of the Maori Trustee, in particular in relation to the administration of the perpetual leases and criticism of the trustee's administration.

#### Lease terms outdated and ineffective

14.4.5 Another criticism of the perpetual lease system was raised in the submission of the Wakatu Incorporation, which said in effect that, because the leases were subject to perpetual rights of renewal, the lease document itself provided that the lessee was entitled to a renewal on the same terms and conditions as the current lease. Wakatu said this resulted in the continual use of lease documents that were drawn up at the turn of the century, and because of this there were a number of significant omissions in the lease. For example, the lease documents fail to provide penalty for late payment of instalments and consequent delays in the recovery of rent. The leases do not provide for payment of any rental between the date of expiry of the lease and the determination of any arbitration on the rent. Owners were further affected by the continual use of the concept of unimproved value of the land as the basis for the determination of the rental (N11:6-7).

#### Reduced rental return

14.4.6 Obviously the most significant effect that the perpetual leases have had is in the reduced rental to the Maori owners. The claimants called Mr M R Hanna of Wellington, a registered valuer. The tribunal had placed before it, both in Mr Hanna's evidence and also in the evidence of another valuer, Mr T I Marks, called by the West Coast (South Island) Leaseholders Association, a series of tables showing the percentage interest rate return on 21-year perpetually renewable leases from various parts of the country. Mr Hanna indicated that:

the Greymouth Harbour Board is reported recently to have adopted a policy whereby rentals for the lease of its industrial land on 21-year Glasgow leases with seven year reviews will be charged at the rate of 10% upon the land value. (Q14:5)

Mr Hanna went on to say that, were the incorporation's leasehold land in Greymouth freed of the controls imposed by the Maori Reserved Land Act:

one could expect that leasehold yields throughout the Borough would move to match those ruling for similar tenure through the rest of the country. (Q14:6)

We shall look at Mr Marks' evidence when we are addressing the response of the lessees to this claim, as at this point we are largely looking at the effects of the grievance as alleged by the claimants. Mr Hanna gave consideration to the broad

question of what rentals the Mawhera Maori owners could expect to have received if their perpetual leases had been subject to rentals at current market rates from time to time, and reviewed on the basis of 7 rather than 21 years. Mr Hanna set out the methodology of his calculations, but we do not propose at this point to examine this evidence in detail.

#### Loss of rental measured by valuer

14.4.7 Mr Hanna calculated that the minimum loss to the Mawhera Incorporation may have been about \$750,000 for rent reviews calculated on 21-year renewals at market rate, and \$2,250,000 if the rental had been fixed at market rate at seven yearly reviews.

Mr Hanna agreed with Mr Marks, however, that a change from perpetual leasehold tenure to a lesser term, such as 42 years, would result in a redistribution of the interests in the land to the lessees' disadvantage. This disadvantage would be further compounded by shortening the period of review from 21 years to 7 years and by freeing the interest rate or yield up to market rates. Both valuers agreed that the lessees could expect to pay more rent, have their rent reviewed more regularly, have the length of their tenure severely limited, and suffer any penalty which would result from the new tenure, such as increased difficulty in negotiating mortgage finance on their interest or improvements. Mr Hanna believed that in calculating the monetary disadvantage to the Mawhera owners resulting from the imposition of 4 per cent and 5 per cent rental rates for a 21-year perpetually renewable lease, the year 1960 would be an appropriate date for commencement. Mr Hanna based this view on the grounds:

that prior to that time the general inflationary pressures in the economy at large were not sufficiently strong for the leasehold provisions of the Act to be a serious penalty to the owners. It appears that this view is shared by Mr Marks. (Q14:9)

#### Summary of effects

14.4.8 There can be no doubt that the combined result of the perpetual lease with its 21-year review and its fixed rental rates has, since the 1960s, imposed a monetary disadvantage on the claimants. We will return to this question later.

As will be seen from the above summary the claimants submitted that there has been serious economic loss to the Mawhera owners and indeed to all those owners who have been affected by the perpetual lease provision. The effect of the Crown's actions, in the view of the claimants, has been widespread and has resulted in not only the loss of control of their lands but in other consequential effects on Maori people. We propose now to look at the Crown's response to this claim and also to the evidence and submissions of the lessees.

# Ngai Tahu Land Report

## 14 The Perpetual Leases of Ngai Tahu Reserves

### 14.5 The Crown's Response

#### 14.5. The Crown's Response

Crown denies breach of Treaty

14.5.1 In his closing address Mr Blanchard, counsel for the Crown, strongly contended that it would be wrong for the tribunal to conclude on the evidence presented to it that there had been any breach of the principles of the Treaty in relation to the west coast leases. He stated the Crown recognised that, for the last 15 years approximately, legislation had worked unfairly against the Maori owners and the Crown was presently endeavouring to devise a plan to improve the situation. This plan would enable the leases to be put on a basis which was more commercially appropriate.

The Crown's case was that although Ngai Tahu were opposed to sale:

The Ngai Tahu beneficiaries plainly recognised that there had to be some degree of permanency of tenure for the lessees who were making their land at Mawhera so valuable and providing them with a substantial income... they wanted to have the entire benefit of the leasing situation. They could see the advantage of permanency in the leasing situation. (Y2:127)

The Crown argued that Ngai Tahu favoured permanency of terms for their lessees in 1887 and did not object to the 1887 legislation. Mr Blanchard submitted that the objection to the perpetual leases was a modern development because of the effects of modern inflation. Counsel also proposed that Ngai Tahu wanted to avoid the risk that the lessees would elect to leave Mawhera and resettle at Cobden, or that the Crown might force sale of the freehold.

Conclusions from Crown researchers

14.5.2 The Crown presented a joint research report by Messrs David Armstrong and Tony Walzl. This report is an excellent overview of the history of leasing on the west coast and has been most helpful to the tribunal. Indeed, the evidence produced by the Crown witnesses, together with the submission and evidence of the lessees as led by Dr Young, and further, the submissions and supporting material of the Maori Trustee, have all contributed to providing the tribunal with a comprehensive picture of events from 1856 down to the present time. The tribunal has also had the benefit of its own research in Professor Ward's overview report. We will analyse those submissions and evidence shortly but return now to the Crown case.

Messrs Armstrong and Walzl surveyed six areas of relevant matters and drew these conclusions:

- a) That with the consent of Ngai Tahu owners the Crown assumed responsibility for administering Greymouth reserves following the chaos which developed in the early 1860s after discovery of gold.
- b) Prior to Crown intervention Ngai Tahu had themselves leased portions of their reserve. There were no subsequent demands from the owners for their lands to be returned to them for occupation purposes.
- c) Alexander Mackay, as commissioner of native reserves, administered the reserves largely for the benefit of the owners while attempting to maintain impartiality. The commissioner interested himself in the general welfare of the owners and often with the consent of the owners strove to reconcile the requirements of the European land management with Ngai Tahu interest.
- d) The leaseholders' desire for security of tenure led to constant agitation for freeholding. As Ngai Tahu repeatedly rejected sale, perpetual leases could be seen as a compromise solution. If this solution had not been reached, leaseholding in Greymouth would have become less attractive.
- e) Ngai Tahu were cognisant of the need for a compromise solution. No evidence was found that showed Ngai Tahu opposition to perpetual leases while there was evidence available that indicated several owners favoured such a course.
- f) The public trustee administered the lands in much the same way as Mackay had done and at a time of violent leasehold agitation. (N6:79-81)

#### Summary of the Crown's view

14.5.3 The Crown urged the tribunal to look at the evidence in its proper historical context rather than in relation to current economic circumstances over the past 20 to 30 years. The Crown said that if the 1887 legislation had not been passed the reserves might well have been lost. The result of the legislation had been the retention of the Mawhera lands in Maori ownership and although there may be some need for legislative change now, by and large the leasing system had worked in a reasonably fair manner. There was, therefore, no breach of Treaty principles in the passing of the 1887 legislation.

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*Waitangi Tribunal, Department of Justice, Wellington.*

# Ngai Tahu Land Report

## 14 The Perpetual Leases of Ngai Tahu Reserves

### 14.6 The Lessees' Response

#### 14.6. The Lessees' Response

##### General reaction of lessees

14.6.1 Principal submission on behalf of lessees was made by the West Coast (South Island) Maori Leaseholders Association Incorporated represented by counsel, Dr Young. Other submissions were also received from individual lessees or groups of lessees who either sought the right to freehold their land or protection for the lessees if any changes in legislation were recommended.

Some lessees of residential land expressed concern about their inability to pay higher rents or to sell their leaseholds. One large New Zealand retail company agreed that the formula for fixing rent was not consistent with present day economic conditions and values, and that the terms of the leases were not consistent with current or common usage. That same firm suggested that the leases should be modified to include some of the provisions of the Public Bodies Leases Act 1969, particularly section 22, which provided for five yearly rental reviews. It was suggested to the tribunal by two other commercial firms that compensation or favourable government loans should be advanced to Maori owners to buy out lessees improvements, but that this tribunal should not recommend interference with lessees guaranteed title under the Land Transfer Act 1952.

In most of these submissions there was sympathy expressed for the Ngai Tahu position, but also concern at the effect on the leaseholder. We pass now to look at the views of the leaseholders association.

##### Legal submissions by leaseholders association on jurisdiction

14.6.2 In opening his submissions on behalf of the lessees Dr Young made two very interesting submissions to the tribunal. The first of these related to article 2 of the Treaty. Dr Young argued that once the Mawhera land came under the Native Reserves Act 1856 those lands could be disposed of with the assent of the governor. By assenting to place the lands under the Act Maori owners consented to a situation where their absolute rights of ownership were abandoned. For the purposes of article 2 of the Treaty therefore, it was no longer "their wish and desire to retain (the Reserves) in their possession" (N39:7). Thus having disposed of the land they were not entitled to the protection of article 2.

In a second legal argument Dr Young introduced article 3 of the Treaty. Dr Young submitted that a claim based on maladministration of the Arahura reserves was not a breach of the Treaty of Waitangi or its principles. Dr Young submitted that the real

villain in this piece was inflation and Maori had suffered just as other New Zealanders had who might have held fixed interest securities. He said:

The claimants must establish that the Treaty of Waitangi protects not only their land but also statutory and equitable rights Maori tribes and groups did not enjoy in 1840 but obtained subsequently ... If the commissioners of Native Reserves or the public trustee or the Maori Trustee or the Mawhera Incorporation have maladministered the Arahura reserves, and that is yet to be established, then it is regrettable. But it is not a breach of the Treaty of Waitangi or its principles... To accord Maori claimants a remedy based on maladministration would be to give them a remedy, or to use the language of the English text of the Treaty, a Right and Privilege not enjoyed by the British subjects. So article 3 of the Treaty has no application either. (N39:7)

Dr Young therefore submitted to the tribunal that the grievances of Ngai Tahu are not properly Treaty claims. In order to keep the continuity of this report relative to the Crown response, as earlier stated, we do not propose to deal with these two legal arguments at this point but will return to them later (14.8.14).

Lessees say Maori owners consented to leasing arrangement

14.6.3 Dr Young then moved to deal in some detail with the history of the Mawhera lands and in particular with the consent of Maori that the land be leased. He said it was evident from the pattern of leasing that the best interest of the Maori owners clearly depended upon the town continuing to thrive and flourish and that a commercial approach to the issue was called for. Dr Young referred to the statement by Alexander Mackay in his 1877 report who said of the lessors:

Neither have they any occasion to complain of not having had a fair share of the income devoted to their use, as they have received in cash and its equivalent, during the last eleven years, the sum of œ21,515.4s9d: and the recipients only number about twenty. (N7:31){FNREF|0-86472-060-2|14.6.3|43}

Dr Young considered that, allowing for the changes in the value of money, those sums of money were considerable indeed.

Dr Young developed the point that the Maori owners were in full accord with a process of leasing. He said there had been no objection made by the Maori owners to the passing of the Native Reserves Act 1882, which provided for administration by the public trustee and which in fact extended the term of leases up to 63 years, provided the lease was for building purposes.

Dr Young then asserted that the South Island Native Reserves Act 1883 introduced compensation for lessees' improvements into the leases. He said that in his 1887 memorandum, Mackay assessed the value of the improvements at œ400,000 (N7:3).{FNREF|0-86472-060-2|14.6.3|44} One would have expected that this valuable asset would have been sought by the Maori owners to be returned to them on expiry of the lease. On the contrary, Dr Young argued, the Maori owners wished the leases to continue and consented to the provision in the Bill. He referred to a statement by Mr Seddon MP during the passage of the Bill through the House, when Seddon observed:

that the Natives interested were quite as desirous as the tenants to have this Bill passed. The reason was this: that up to the present time there had been uneasiness amongst the tenants, and the property was depreciating in value. The Natives were as much alarmed and as desirous for this legislation as the tenants. (N40:33){FNREF|0-86472-060-2|14.6.3|45}

Counsel referred the tribunal to the comments of the Member of Parliament for Southern Maori, Mr Taiaroa, which were set out in his submission in which Mr Taiaroa said that the commissioner of Native Reserves and Maori who owned those reserves had consulted together and agreed that some means should be adopted by which a greater benefit should accrue to Pakeha as well as to Maori (N39:28){FNREF|0-86472-060-2|14.6.3|46}.

At page 29 of his submission Dr Young set out another extract from Mr Taiaroa's address to the House. It was reported Mr Taiaroa said:

[he] could not oppose the Bill altogether, because he had received a wire from Tainui and Mutu and all the other Natives interested in these reserves. He did not approve of what they put into the wire, but he would read it to the House, so that honourable members should see what it contained. It was this: H K Taiaroa, Wellington-We, who are the owners of these reserves are agreeable to the Bill, and we further agree that the leases shall be extended for a further term of sixty years. {FNREF|0-86472-060-2|14.6.3|47}

Dr Young submitted to the tribunal, therefore, that the assent of the Maori owners to the 1883 Act showed a process of communication that existed between the Maori legislators and their constituents. He argued that there were a limited number of Maori owners who had a substantial interest in the reserve and as Ihaia Tainui had been a Member of Parliament and was familiar with the legislative process, the owners of the Greymouth reserve were in a position to make their views known to Parliament.

Dr Young's submission was that in 1883 the Maori owners of the reserves clearly wished the leasing arrangement to continue. Dr Young referred further to the Kenrick commission and the subsequent Bunny report in which a proposal was made by the owners for 63-year leases with a further right of renewal for 63 years. This offer was contained in the letter to the Native Minister Mr Ballance which was referred to earlier in this report (14.2.14).

Dr Young submitted that:

One hundred years later the difference between leases in perpetuity and leases in essence for 126 years may appear, at least to the owners, to be very significant. It certainly now is from the point of view of the lessees. But viewed, as it must be, from the perspective of the 1880s the difference is infinitesimal. (N39:34)

Lessees say Maori owners favoured commercial dealing

14.6.4 Dr Young argued that the only way the tenants' interest in improvements could be funded out was by the adoption of what can be loosely described as a perpetual leasing system. By the 1880s there was no suggestion that the Maori owners wanted

to reoccupy the land and Dr Young said that the tribunal must not look at this situation wearing 1988 spectacles but rather how the position was viewed in the 1880s. From the point of view of the owners a system of perpetual leases was already in place in the early 1880s. In this submission therefore, counsel for the leaseholders was saying that the Maori owners had a commercial leasing system in place which they wanted to continue, even though they were resolutely opposed to the sale of the land.

Lessees say Maori owners were consulted and consented to 1887 Act

14.6.5 In his next submission Dr Young examined the background to the Westland and Nelson Native Reserves Act 1887 and referred to a number of passages from the debate in the House and later in the Legislative Council.

To the questions:

- Was there a fair process of consultation in relation to the 1887 legislation?
- Were the Maori owners generally in agreement with the course of action proposed?
- Did they have a fair opportunity to have their views heard?

Dr Young answered that:

- a) if there was insufficient evidence to enable any firm conclusions to be drawn to answer the questions, then the claimants had not proved their case and established that there was a breach of any Treaty principles.
- b) in determining what constituted a proper consultation and consent the issue had to be looked at in a realistic and practical way and the series of investigations and reports as to Maori attitude to sale and lease could not be ignored (N39:46).

Dr Young said that the statements made by Major Atkinson and Sir Frederick Whitaker could not be ignored and the Crown clearly believed that the Bill had the assent of the affected owners. He further submitted that Mr Parata's attitude to the legislation could not be ignored. It could not be assumed that the Maori members would not have performed their moral duties to the Maori owners and consulted them between June and December 1887 as to the legislation.

Dr Young continued that:

- c) although Mr Taiaroa opposed the Bill it was on grounds that had nothing to do with its intrinsic merits and in circumstances which lent weight to Major Atkinson's assertion that the Bill had Mr Taiaroa's consent.
- d) the Bill had the assent of the Maori legislators most directly concerned. They would not have given their consent unless they were satisfied that the owners were in agreement with what was proposed (N39:47).

By way of further substantiation of the owners' understanding of the perpetual leases counsel produced and commented on the 1909 action in which four signatories indicated their views on the leases. Dr Young urged that this evidence shows the Maori owners were properly organised, they instructed a solicitor, and were a reasonably cohesive group able to articulate their concerns effectively. He further noted that the 1909 proceedings were only 20 years after the legislation. If the perpetual leases were at issue then, why was this criticism not raised.

Lessees refer to Maori Reserved Land Act 1955

14.6.6 Dr Young also made the comment that no evidence was called by the claimants in relation to the 1955 legislation. Dr Young called a witness, Mr A M Jamieson, a retired solicitor, who was born in 1903 and had lived in Greymouth all his life. Mr Jamieson stated that the rate of rent prescribed under the 1955 Act at 4 per cent was in fact an advance on the rent that the Maori owners had been receiving of 3.75 per cent.

Dr Young summarised his submissions saying:

- a) The assertion there has been a breach of Treaty principles in relation to the legislation is unfounded.
- b) The Maori owners originally submitted voluntarily their land to a statutory regime which from the very outset contemplated the possibility of sale or lease in perpetuity.
- c) Although the issues as to rent were a running sore, it was an underlying community of purpose at all times between the Maori owners and the lessees which dictated largely the ultimate form of lease provided.
- d) There is no evidence at all from which it can be fairly concluded that any of the legislation was passed without adequate consultation. What evidence there is suggests that there indeed was consultation.
- e) On the whole the rent recovered by the Maori owners was in line with the rent recovered in relation to other Glasgow leases in New Zealand at all relevant times.
- f) The 1955 legislation was, on the material which the lessees can produce, an advance and not a retrograde step as far as the Maori owners were then concerned.
- g) To approach the issues of the legislation and the policies adopted from the point of view of current values of money, and current inflationary expectations was to adopt a blinkered and ultimately distorted view of the historical process. (N39:54)

14.6.7 Valuation evidence was called on behalf of the lessees to establish that from 1878 to 1984, a period of some 106 years, the average increase in land value for the Greymouth borough was a mere 4.8 per cent, the last 20 years having had a completely disproportionate effect on that figure. For the Grey county the figures had been calculated, from 1891 to 1986, a period of 95 years. The rate of increase during this time was 3.2 per cent, again with a disproportionate effect on the general rate of increase over the last years.

Dr Young submitted the evidence showed that up until 1955 the Maori owners, in relation to the Mawhera leases, did not appear to have been particularly disadvantaged. The rate of return that was referred to in 1909 and later established in the 1953 arbitration was 3.75 per cent.

Lessees' rights should not be disregarded

14.6.8 In conclusion, counsel stated that although it was undeniable that negotiated or arbitrated rents were producing rentals significantly in excess of the rents provided for under the 1955 Act, it was questionable if those rents would be as high as anticipated by the claimants. A strong statement was made by Dr Young in conclusion that it would be manifestly unjust and impolitic if the tenants of Mawhera incorporation should be selected to fund the compensation assessed to meet any loss suffered by the claimants. He urged upon the tribunal that it was a very serious thing indeed to interfere with settled titles to lands, titles which had been bought and sold and which had been offered as security for advances of money.

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*Waitangi Tribunal, Department of Justice, Wellington.*

# Ngai Tahu Land Report

## 14 The Perpetual Leases of Ngai Tahu Reserves

### 14.7 The Maori Trustee's Response

#### 14.7. The Maori Trustee's Response

Allegations levelled at Maori Trustee

14.7.1 In this part we look at the response of the Maori Trustee to the allegations made by the claimants. The allegations were divided into two groups, the first of which covered:

- a) failure to allocate reserves set aside in the Arahura purchase deed;
- b) failure of Crown to protect Ngai Tahu by allowing reserves to be reduced in area;
- c) inadequate provision under South Island Landless Natives Act 1906 to remedy landlessness caused by sale;
- d) marginal nature of reserves; and
- e) failure to provide for reforestation of the Mawheranui block.

The second group dealt more particularly with the failure of the Crown's appointed trustee to administer properly the reserved lands and included:

- a) failure to prevent taking of reserved land for public works;
- b) failure to consult owners as to use of land;
- c) adoption of an unfavourable attitude as Maori Trustee to the prospect of incorporation between 1967-1978;
- d) failure to act as a prudent trustee by acting in a passive role in respect of town planning matters;
- e) failure in duty as trustee to amalgamate land titles;
- f) failure to consult with owners over termination of Greymouth Post Office lease negotiations in 1974;
- g) failure in duty as trustee by attempting to recover for the Crown its expenditure in acquiring shares instead of the equity value fixed by the incorporation valuer; and
- h) failure as trustee to invest in or develop Mawhera lands.

14.7.2 The above allegations were contained in the submissions and evidence of claimant witnesses James McAloon (D3:14) and Tipene O'Regan (D18:16A-18). Elsewhere in this report we shall be dealing more specifically with those questions falling within the first group above. We shall in this section set out the responses of the Maori Trustee and later look at our findings on the alleged grievances in the second grouping above.

General denial of liability by Maori Trustee

14.7.3 In his opening submission on behalf of the Maori Trustee, counsel Mr Woods said the Maori owners were not alone in their concern that the Maori Trustee had:

expressed for some time that the current legislation is most iniquitous in respect of the interests of the beneficial owners and has openly advocated and given every practical support to numerous petitions for change in the legislation. (N32:1)

Mr Woods emphasised the Maori Trustee was a corporation sole constituted under the Maori Trustee Act 1953 and was not a department of government nor an agent of the Crown in the administration of reserved lands. Counsel said firstly, the Maori Trustee denied the allegations of breach of trusteeship and charges of mismanagement and secondly, the allegations fell outside the scope of the claimants' claim. Mr Wood then gave a summary of the Maori Trustee's role in reserved lands in the South Island and of recent developments in policy and administration since the 1975 report of the commission of inquiry. Counsel argued that the claimants were apparently confused as to the role of the Maori Trustee, and further, that the claimants did not appear to be directly challenging either the constitution of reserved lands or the necessity of maintaining a policy of reserved lands.

Counsel further argued that the claimants had failed to distinguish between acts of day-to-day administration and acts of omission resulting from the performance of a statutory requirement, or direction. Mr Woods submitted that only the latter were caught by section 6 of the Treaty of Waitangi Act 1975. He called two witnesses Ms Catherine J Nesus and Mr Richard T Wickens.

14.7.4 Ms Nesus, solicitor from the Department of Maori Affairs, presented a 115 page summary of the legislation dealing with reserved lands (N36), accompanied by a document bank of 540 pages (N37).

Ms Nesus described her submission as "navigating a bumpy course through the volume of law that exists". We agree with her view and as expressed previously, appreciate her useful contribution.

#### Submission of Deputy Maori Trustee

14.7.5 Mr Richard T Wickens, Deputy Maori Trustee and with more than 14 years duty in the Maori Trust Office, dealt more specifically with the alleged grievances. He said his submissions fell into two categories:

- a) to provide an administrator's perspective to the management of reserved lands; and
- b) to comment in rebuttal of the allegations made by Mr McAloon, concerning prejudiced administration of the reserved lands. (N34:1)

Mr Wickens offered the tribunal a quote from an observation made by a previous Maori Trustee, Mr Jock McEwen, to the 1975 commission.

The Maori Trustee is a man walking through a narrow defile on a course chosen by somebody else with stones raining down upon his head from the beneficial owners on

the one bank and the lessees on the other. He is quite unable to placate either side.  
(N24:1)

Mr Wickens provided a carefully drawn analysis of the early history of the trusteeship including steps taken to appoint the Public Trustee in 1882 and subsequently the Maori Trustee in 1921. More importantly however, Mr Wickens drew from this historical analysis a number of salient points that had direct bearing on allegations levelled at the Maori Trustee which in his view should have been directed to government. In summary these points were as follows:

(a) There are constraints placed on the trusteeship by the legislation. To describe the legislation as having evolved is perhaps inaccurate, **FOR THE 1873 NATIVE RESERVES ACT GAVE THE TRUSTEE NO MORE FREEDOM TO MANAGE THE RESERVES THAN DID THE MAORI RESERVED LAND ACT 1955.**  
(emphasis added)

(b) Although consultative mechanisms were put in place in several enactments, accountability continued throughout to be to the government and not to the owners. It would seem that the real power over the fate of the reserves has always been firmly concentrated in the hands of the government.

(c) Successive governments never contemplated large scale consultation but merely a kind of representative consultation. It is also relevant that consultation of a quality to satisfy trustee requirements may have been considered impractical in many instances as the beneficiaries of the individual blocks were not determined until the 1920s.

(d) The Crown's attitude up until the 1955 Act was one of special interest. The concentration of power in the hands of the Crown may have circumscribed the role of the trustees. The Crown saw itself as having a duty to the Maori people and introduced 'policies which it saw as necessary to fulfil that duty'.

(e) The shortage of funding has always been a characteristic of Maori land administration.

(f) Apart from early provisions in the 1856 and 1873 Acts, administration of the reserves was centralised in Wellington.

Mr Wickens then dealt in some detail with specific cases and allegations. He submitted that:

- the appropriate forum for dealing with breaches of trustee law was with the High Court and that avenue was and is available to the claimants (N34:11); and

- notwithstanding that remedial right and because the claimants had chosen to raise allegations in a public forum it was necessary to point out the generality of the claimants conclusions but in some cases the absence of recorded reasons and other factors such as local knowledge and experience which guided the decision making process of decisions made long ago (N34:8-10).

Mr Wickens in his concluding submission emphasised the costs involved in proper consultation due to multiple ownership, and said that achievement of the ideal would be prohibitive without regular subsidies from government (N34:19).

In summarising of the Maori Trustee's position it is evident that the main thrust of the response to the claimants' allegations was that the claimants had remedies in the general courts for their complaints; that the grievances should be directed to the Crown rather than the Maori Trustee, and that in most specific instances there was an adequate answer to the claimants' criticism.

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*Waitangi Tribunal, Department of Justice, Wellington.*

# Ngai Tahu Land Report

## 14 The Perpetual Leases of Ngai Tahu Reserves

### 14.8 The Tribunal's Examination of the Evidence and Findings

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Perpetual leasing is main complaint

14.8.1 The principal grievance of Ngai Tahu over their reserved lands was that the Crown failed to protect Ngai Tahu by passing legislation to impose perpetual leases without the consent of Ngai Tahu. Within the framework of that grievance come the associated grievances that the Crown fixed unrealistically low rentals and long review periods. The second grievance also relates to the perpetual leases, in the Crown's refusal to implement the recommendations of the 1975 commission of inquiry report which advocated change to the form of those leases. The third category of grievances voices the claimants' concern over the Crown's administration of the reserved lands, and in particular acts and omissions of the various statute-appointed trustees.

We propose to look in sequence at each of these matters and commence with the perpetual lease.

Grievance must be looked at in proper time perspectives

14.8.2 The first grievance requires consideration of the particular statutory provisions which created the perpetual leases. It also requires determination of whether or not Ngai Tahu consented to the leases. Both questions require a study of the historical background, so it will be necessary for us to retrace, in as brief a manner as we can, how the system of leasing started and progressed. We will have to look not only at the 1887 and 1955 Acts, which expressly covenanted the perpetual lease provisions, but a number of other earlier and later Acts which also relate to the reserved lands. The chronology and principal content of the statutes, reports and other relevant events have already been summarised (14.2). In this section we will draw on the main threads from that chronology. We were admonished by counsel on several occasions not to look back on past events with a current day outlook and knowledge. We have in fact been conscious of this requirement in our consideration not only of this part of the claim, but the many other grievances going back to even earlier periods in the Ngai Tahu claim.

Classification of resources

14.8.3 As we have earlier stated, there were two classes of land reserved from the Arahura 1860 sale to the Crown. The first area, totalling 6724 acres, was land set aside for individual allotments (herein referred to as schedule A lands) and the second area of 3500 acres was reserved for "Religious, Social and Moral Purposes" (herein

referred to as schedule B lands). In his report to the chief land purchase commissioner on 21 September 1861 James Mackay said:

On the 21st May 1860, the Ngaitahu Title was completely extinguished over all the portion of the West Coast district lying between Kaurangi Point in the Province of Nelson, and Piopiotai, or Milford Haven, in the Province of Otago, and bounded inland by the watershed range of the East and West Coast of the Middle Island, the reserves mentioned in Schedules A and B being the only portions excepted from sale

As previously stated, reserves for individual allotment amounting in the whole to 6724 acres have been set aside.

Reserves amounting in the aggregate to 3500 acres have also been made for the benefit of the aboriginal inhabitants of the West Coast, and for the promotion of social, moral and religious objects among them.

The last mentioned reserves have been conveyed to Her Majesty, subject to the provisions of the New Zealand Native Reserves Act 1856; the Deed of Conveyance being enclosed herewith ...

The Natives are not sufficiently enlightened for a sub-division of the reserves to be now effected, and it was also impossible for me in every case to ascertain the number of persons interested in each reserve {FNREF|0-86472-060-2|14.8.3|48}

The schedule B lands, therefore, were placed under the 1856 Act immediately on transfer to the Crown.

Alexander Mackay's view on sale and lease

14.8.4 We have earlier seen how well Alexander Mackay administered the leases during the 1860s and 1870s. By 1873 the leases were for terms of 14 or 21 years (N7:16). {FNREF|0-86472-060-2|14.8.4|49} It was in this year that Mackay reported to Parliament on the reserves (N7:13-17) and made the statement previously set out (14.2.7), that it was intended to let the land in perpetuity for the benefit of Maori. {FNREF|0-86472-060-2|14.8.4|50} In case this is taken to indicate that Mackay was in favour of leasing these reserve lands forever we need to look at a further statement he made a few months later in a letter to John Greenwood where he disagreed with the proposition of leasing land for building purposes for 60 or 99 years in a young country like New Zealand (N7:168). {FNREF|0-86472-060-2|14.8.4|51}

That Mackay continued to hold this view is evident from his memorandum on the status of Mawhera reserves in July 1877 (N7:30-31). {FNREF|0-86472-060-2|14.8.4|52} In this report, referred to in detail in an earlier section (14.2.9) Mackay continued to oppose the sale of land and recommended leases for 60 years to persons wishing to erect permanent buildings of brick and stone. Alexander Mackay was, on the face of it, not only opposed to sale but also to leases beyond 60 years.

14.8.5 The tenants kept up pressure to sell through the 1870s. Under the 1873 Native Reserves Act, leases for building purposes were extended to a maximum term of 60 years. Mackay, as we have seen, was in favour of such a term but resolutely opposed

to sale. However, Greymouth lessees still urged the Crown to buy the land and lease it to the tenants at lower rents and with rights of continual lease renewal (N7:28). {FNREF|0-86472-060-2|14.8.5|53}

In 1881 Mackay was still promoting the 21-year farming lease and the total 60-year term building lease (N7:174). {FNREF|0-86472-060-2|14.8.5|54} The following year saw the passing of the 1882 Act which passed title and control of the reserves to the Public Trustee, who was empowered to lease for 30 years for farming, and 63 years in 21-year terms for building.

Did the Maori owners agree to perpetual leases in 1883?

14.8.6 The South Island Native Reserves Act 1883 was a most important statute in the chain of events affecting the Mawhera leases. In the first place, section 3 authorised the governor to grant the 500 acres of the Mawhera reserve to 26 Maori whose names and the acreage each took were set out in a schedule to the Act. At that date therefore, 8 September 1883, the relative interests and persons to whom title was to pass were clearly ascertained and named in the Act. In the second place the Maori owners agreed to a system of compensation for improvements being introduced into the leases provided they did not have to buy those improvements themselves if the lease terminated. The owners were consulted by their representative in Parliament, Mr Taiaroa, who said they were perfectly satisfied to grant leases for 21 years and 60 years. However the Act provided only for 21 years in respect of Mawhera leases. The reduced term and dissatisfaction of tenants over the form of the compensation for improvements led to the 1886 Royal commission and the subsequent Bunny report. Again there was great pressure put on the owners to sell. They steadfastly refused and expressed the view they were prepared to grant leases for 63 years with a right of renewal for another 63 years (N7:190). {FNREF|0-86472-060-2|14.8.6|55}

We set out in 14.2.14 the text of the letter signed by seven Maori and translated by Mackay on 20 October 1885. We also set out the written depositions handed in to the commission by three of those seven, namely Inia Tuhuru, Teoti Tauwhare, and Henare Meihana. The evidence of these three persons contained references to leasing land in perpetuity and were tendered by the Crown and the Westland Lessees Association as evidence that the Maori owners consented to a perpetual leasing arrangement. Examination of the depositions does not in our view give any clear indication at all that those witnesses consented to the introduction of perpetual renewal clauses into the leases.

Inia Tuhuru qualifies his statement by the words "all land not required for our own use." (N7:322){FNREF|0-86472-060-2|14.8.6|56}

Teoti Tauwhare uses the words "in fact we wish the leasing system perpetuated" (N7:323){FNREF|0-86472-060-2|14.8.6|57} and Henare Meihana simply agreed with the others. It is further quite evident from Meihana's evidence that his views were in accord "with the tenor of the letter we are forwarding to the Native Minister." (N7:324){FNREF|0-86472-060-2|14.8.6|58}

Inia Tuhuru also referred to this same letter in his deposition when, after referring to leasing in perpetuity, he added "We send a copy of a letter to the Native Minister

relative to the future dealings with our lands." (N7:322){FNREF|0-86472-060-2|14.8.6|59}

As is clearly shown in that letter the signatories were agreeable to a 63-year term lease and a further renewal of 63 years, not to leasing in perpetuity.

The tribunal therefore does not see the evidence up to this point as indicating that the local Ngai Tahu people intended leasing their lands in perpetuity. We consider that Professor Ward correctly assessed the situation when he said:

Nothing in the evidence suggests that leases in perpetuity were being considered as an option at this stage. The Kenrick and Bunny Reports had not discussed them. The alternative which, rightly or wrongly, the owners of the reserve felt they were being presented with was sale. (T1:321)

This view is further supported by the following comment in the report of the 1975 commission:

(iv) It is pertinent to observe that the Wakefield concept of perpetually leasing the land is not the same as granting leases with perpetual right of renewal. In the former the rent and terms of all ensuing leases are negotiated while in the latter the rights of the parties are fixed by the original contract.

(v) The promise made by Alexander Mackay for perpetual leasing was spelled out in different form in the 1887 legislation in section 14 of that Act as a covenant for perpetual renewal with 21-year revisions of rent. (D1:59){FNREF|0-86472-060-2|14.8.6|60}

As we have seen, the Kenrick Royal commission recommended that leases be granted for 63 years.

Did the Bunny report recommend perpetual leases?

14.8.7 Following on the recommendation of the Kenrick commission, Bunny, as special commissioner, again raised the question of sale. However, as we noted in 14.2.16 the owners were strongly averse to this notion, although they were willing to grant leases for 63 years with a right of renewal for a further 63 year term. There is therefore no indication whatsoever up to this point, that the Crown intended to introduce perpetual leases or that the Maori owners favoured perpetual rights of renewal.

Bunny, in his report, commented that the existing leases with their 21-year terms, made it impossible for the tenants to borrow money. He suggested as one of several desirable alternatives that the lessees be allowed to buy the freehold, and intimated that:

the government might itself be able to acquire the freehold from the Native owners, and, by placing the reserve under local control, give the persons interested some voice in deciding the future management of the estate. This seems upon the whole the best course, if feasible. (N7:192){FNREF|0-86472-060-2|14.8.7|61}

So, at this point in 1886, there was a Royal commission recommendation for 63-year leases instead of 21 year terms and a special commissioner advocating Crown purchase of the freehold, but no perpetual leasing proposed. Nor was there discussion or consultation with Poutini Ngai Tahu about perpetual leasing.

The introduction of the perpetual lease clause

14.8.8 We looked earlier (14.2.17) at the Westland and Nelson Native Reserves Act 1887. This Act did not put into effect either the Kenrick commission recommendation of 63-year leases or the Bunny report alternative of the Crown purchasing the freehold. Instead, in section 14, five words were inserted which introduced the perpetual lease. The section read:

14. In all leases to be hereafter granted there shall be a condition for a new ascertainment of the rent at the expiry or surrender of every such lease, and that the then holder shall have the right of renewal for a like term upon the same conditions and covenants (INCLUDING THE RIGHT OF RENEWAL) subject only to the difference that the rent shall be the rent so ascertained as hereinbefore provided. (N7:06) (emphasis added)

Section 3 of the Act had repealed the provision of the 1882 Act allowing 30-year and 63-year terms and fixed a uniform term of 21 years. Whilst we have section 14 before us it is also appropriate to draw attention to the words included in it, "upon the same conditions and covenants".

That is, not only did this 1887 Act create the perpetual lease, but it also created the provision which imposed the restrictive form of the lease. How then did this provision become part of the law? We look at some possible reasons.

Was the perpetual renewal clause inserted to appease the tenants?

14.8.9 The 1975 commission of inquiry report suggested that the perpetual right of renewal could indeed have been prompted by the Bunny report, where it said of Greymouth in 1886:

It is almost impossible to borrow money, for the purpose of making necessary improvements, upon the present title. (D1:432){FNREF|0-86472-060-2|14.8.9|62}

Professor Ward said of the clause:

it was clearly passed in response to these investigations (Kenrick commission and Bunny Report) both of which had argued that the tenants had genuine grievances which required redress. (T1:322).

Messrs Armstrong and Walzl said:

The leaseholders desire for security of tenure led to constant agitation for freeholding. As Ngai Tahu repeatedly rejected any suggestion that they sell the Reserve, PERPETUAL LEASES CAN BE SEEN AS A COMPROMISE SOLUTION. (N6:81) (emphasis added)

Mr McAloon said:

The Act may, perhaps, be seen as a government attempt to compromise between the demands of Greymouth leaseholders to freehold, and the absolute refusal of the Maori owners to countenance this. (D3:22-23)

In his submission Dr Young said:

It being recognised as fair and appropriate and lawful that the tenants should be compensated for these improvements, the only practical way that compensation could be provided for was in the nature of what was in essence a perpetual leasing system. [There was not] the slightest suggestion the Maori owners wished to resume occupation of the land. (N39:34)

Objective of 1887 Act as seen by Parliament

14.8.10 Let us look now at the explanation given by Parliament for the introduction of the 1887 legislation as it pertained to the Greymouth reserve.

Sir Julius Vogel said:

The object of the Bill is not so much for the purpose of altering the position of the Natives as for making clear what are the relative positions of the lessees and sublessees. (D5:109)

Seddon said:

As regards the question raised by the honourable gentleman, that the titles have been individualized, I may say that I see nothing in this Bill which, as far as Greymouth is concerned, interferes with that. It merely says that these reserves, though the title vests in the Natives under the original Act, shall be placed in the hands of the public trustee—that is, that the Natives shall not take the land as a freehold and administer it themselves. It is quite possible that it would be against the interests of the Natives themselves if they had the land given to them in that way; for, very possibly, it would be sold to the present occupiers, or to speculators, and those who are now living on the rental from those lands would spend the money, and find themselves without anything to keep them. (D5:114)

Guinness said:

as the tenants are uncertain as to their rights of renewal and of payment for improvements, the consequence is that there is no inducement to them to improve their holdings ... Another important point to consider is, that by giving fixity of tenure and right of renewal it will encourage the tenants to put up substantial buildings: it will have the effect of improving the buildings and increasing the value of the township generally. As the township improves, every twenty-one years the rent, under this Bill, as also under the Act of 1883 will be adjusted, and if the township improves and land increases in value, as we have reason to expect, the rent that the Natives will Draw will increase in proportion. Therefore, this Bill, instead of having a detrimental

effect on the interests of the Natives, will have a contrary and very great beneficial effect in that direction. (D5:115){FNREF|0-86472-060-2|14.8.10|63}

There can be no doubt that the 1887 Act was introduced after the Kenrick commission and Bunny report as a means of remedying tenants' grievances, and to allow them a form of tenure which would permit them to carry out substantial improvements to the properties. Although the Bunny report advocated purchase of the freehold by the Crown, this alternative was not acceptable as the Maori owners strongly opposed it. In the view of this tribunal the principal purpose of the 1887 Act was to protect and improve the tenants' position.

In a later 1909 report of the public trustee J W Poynton, to Parliament's Native Affairs Committee to which we will later refer, Mr Poynton, in referring to the grant of perpetual leases, said:

By section 14 of The Westland and Nelson Native Reserves Act, 1887, the position of the tenants was further improved. This section is very innocent-looking ... It, however, made a complete revolution in the leases. (N40:94){FNREF|0-86472-060-2|14.8.10|64}

As we have earlier stated, until the 1887 legislation, neither Mackay nor the Maori owners had been consulted or had consented to leases with perpetual renewal clauses. These virtually came out of the blue, as government sought to appease the tenants on the one hand, but not to upset the Maori owners by dealing with the freehold. What then was the attitude of Poutini Ngai Tahu to this legislation? Were they consulted? Did they consent?

The claimants alleged that the government acted unilaterally and without the consent of Poutini Ngai Tahu. The tribunal has therefore examined very carefully the evidence presented to it and in particular the events surrounding the 1887 legislation. As already explained, we do not consider that the pre-1887 evidence gives any indication of either consultation or consent, although that evidence was relied upon by the Crown and West Coast Leaseholders Association as indicative of consent. Poutini Ngai Tahu, or at least those of the tribe from whom statements were taken, opposed sale.

In Professor Ward's view:

Whether they would have opposed alienation by perpetual lease cannot be definitely established from the available evidence because this form of leasing was not being discussed. (T1:321)

We propose here to refer to a lengthy passage from Professor Ward's report on the passage of the 1887 Act:

Several issues have been raised before the tribunal with regard to the passage of this Act. It has been suggested that the Bill was rushed through and that the objections of the Maori Members of Parliament were not heeded. (D3:22-29) A close examination of the evidence suggests that some haste was involved in the final stages of the passage of the Act, but that one of the Maori members concerned came to support its

measures and the other, although opposed, cannot be said to be specifically opposing the provisions relating to leases in perpetuity. The qualified support given to the Bill by these members cannot however be taken as an indication that the Bill was supported by the Maori whose land was affected by the Act. Several petitions presented around the time the Act was passed would appear to indicate otherwise.

When the Bill was first discussed in June, Tame Parata, the Member for Southern Maori opposed it and presented a petition from H K Taiaroa, a Legislative Councillor and an owner of the Greymouth Reserve (T2:97).{FNREF|0-86472-060-2|14.8.10|65} This petition was referred to the Native Affairs Committee but the report does not indicate what Taiaroa's objections to the Bill were. (T2:109){FNREF|0-86472-060-2|14.8.10|66}

Parata had a number of concerns. The Bill had not been available in translation until the morning of the 8th and he felt that he had not had sufficient opportunity to consider it. The owners of the reserve at Greymouth, were, he said, in ignorance of its provisions. He also had some substantive arguments. He had misgivings about a clause in the Bill allowing land to go out of Maori ownership for mining purposes or for public works. The clause allowing leases to be renewed in perpetuity did not meet his favour either because he felt it effectively took the land away from its owners.

Another objectionable power the Bill proposes to give the public trustee is that of extending the leases another twenty-one years if he sees fit; and so he will go on extending the leases time after time to the end of the world, and the Natives will never obtain possession of their ancestral land again. (D5:110){FNREF|0-86472-060-2|14.8.10|67}

He asked that consideration of the Bill be postponed until the next session. The House did not agree to this and put the Bill through its final reading on the 9th. The Bill was amended in the process and Parata supported it on the third reading despite the fact that it still contained the provisions concerning perpetual leasing, mining and public works. The amendment had provided that two Maori assessors be appointed to assist the other Assessors under the Act. Taiaroa and Parata were themselves suggested for these positions. (N7:237){FNREF|0-86472-060-2|14.8.10|68}

On the following day the Bill was opposed by Taiaroa in the Legislative Council. Taiaroa objected to being denied the opportunity to manage his own land and to the provision giving the lessees rights of perpetual renewal. He accused the five members from Greymouth and Hokitika of bringing the Bill forward to improve their chances of re-election. He too mentioned the prospect of the owners losing control of their land.

The Council must be perfectly aware that this land will never return. I understand from this Bill that the public trustee is to lease the land for a term of twenty-one years, and the land can be relet then for a second twenty-one years without the Natives having any voice in the matter whatever. These twenty-one year leases will be renewed and renewed until other generations spring up, and possibly until the day of judgment. (T2:112){FNREF|0-86472-060-2|14.8.10|69}

Parliament was prorogued later the same day.

When the issue came up for reconsideration in December, Parata again had problems getting a Maori translation. On 2 December he told the House that although the Bill had been on the order paper for a considerable time he had not been able to get a copy to circulate amongst his constituents. (N72:40){FNREF|0-86472-060-2|14.8.10|70} He did not want the Bill rushed through. On the 21st of December he noted that many Maori interested in reserves had petitioned the House or written to him asking to take up their lands when the existing leases expired. One of these petitions was from Inia Tuhuru and seven other owners of the Greymouth reserve asking that the management of the reserve be left to them. (T2:98){FNREF|0-86472-060-2|14.8.10|71} A similar petition from Pamariki Paaka and eight owners of reserves in Motueka affected by the Bill was presented by Parata on 3 November. This asked for the repeal of the South Island Native Reserves Act and the grant of the power to deal with their land as they thought fit. (R6:3){FNREF|0-86472-060-2|14.8.10|72}

Parata did not go this far on the issue of owner control and management. He thought that the Bill could be amended to make it acceptable and suggested that any new leases should only be granted with the consent of the owners, and that renewals should not be granted without their knowledge and consent. He said he would carefully examine the Bill at its third reading, and if amendments were made there would be no reason for him to oppose it. The Bill was given its third reading straight after its second, Parata offering no further arguments against it despite the fact that it had not been amended to accommodate his suggestions. (N7:241-2){FNREF|0-86472-060-2|14.8.10|73}

The tribunal observes from an examination of Parata's Parliamentary address, that he was most insistent that before any fresh leases were granted the consent of the Maori owners should be obtained and that no renewals should be granted without their knowledge or consent.

Having made that statement he proceeded then to talk about the reserves in Motueka and, almost at the end of his address, he made this statement:

I ask the Premier to strike out from the Bill the references to the Wakanui lands in the South Island, so that it may be quite clear that this measure will apply to reserves on the west coast of the South Island. That would distinguish the land to which it is to apply from the other part. While asking for this amendment, I support the second reading of this Bill. (D5:133){FNREF|0-86472-060-2|14.8.10|74}

In response, the Premier Major Atkinson said that he would be glad to consider the question raised by Mr Parata, and that he would introduce a clause giving the governor a general power to deal with the matter if he was satisfied that no injustice would be done. This obviously must have satisfied Parata because the record discloses that the Bill was then read immediately a second and a third time. It is also clear from an earlier statement made by Parata in the same final address he made to the House, that he was not going into the question of the reserves at Arowhenua, Mawhera, and Greymouth, because there was:

an honourable gentleman in Wellington who knows all about these reserves, and no doubt he will take advantage of the opportunity and, if necessary, he will improve the

measure so far as it relates to these reserves, and, if any necessary amendments are needed, will see they are inserted. (D5:132){FNREF|0-86472-060-2|14.8.10|75}

The tribunal does not consider that Parata's consent to the passage of the Act represented support in any way for the content of the Bill including, in particular, the provision relating to perpetual renewal. Parata was speaking to the second reading of the Bill and obviously intended that there should be further amendments made to it. Another important fact is that just prior to the committal of the Bill, the member of Parliament for Dunedin, W D Stewart, pointed out that the time had arrived when South Island Maori should have an independent power over their reserves. He raised the question so that the Prime Minister might consider the matter before the Bill went into committee. The premier in reply, said that he hoped in the next session to bring down a Bill that would give Maori such a right as Stewart had raised wherever they were fit to exercise that power. Obviously the closure was taken very quickly and perhaps the premier's statements to both Parata and Stewart gave them some encouragement that there would be changes made to the legislation that would return some measure of control to the owners. We do not consider that, because Parata did not appear to have continued with his opposition, he necessarily agreed with the content of the Bill.

We now return to continue the review of this matter by Professor Ward:

In the Legislative Council Taiaroa opposed the Bill to the end, though his opposition does not seem to have been primarily directed to the perpetual leases. He wished to amend the Bill to provide that the Native Lands Administration Act 1886 would not apply to land in the South Island or Stewarts Island because South Island Maori were unclear about how the 1886 Act affected their interests. Taiaroa was willing to vote for the Bill if his amendment was included. The amendment was not accepted. Following its rejection Taiaroa made an eloquent plea to the Council to delay the passage of the Bill for three weeks, complaining that he did not have an up-to-date copy of the Bill and its amendments in Maori. The Bill was passed over his objection. (N7:243-4){FNREF|0-86472-060-2|14.8.10|76}

In summary it would seem that on both occasions that Parliament considered the proposals which were eventually enacted in the Westland and Nelson Native Reserves Act it did so under pressure and at the tail end of a session. There was, however, a six month gap between the two debates. On both occasions Maori members complained that they did not have access to updated Maori versions of the Bills. It is not clear whether this materially affected their ability to represent the Maori affected by the Act. Parata, the M.H.R for Southern Maori spoke against provisions in the Bill including the clause giving lessees a perpetual right of renewal, but on both occasions he voted for the Bill. In December 1887 he helped make the Bill law despite the fact that he knew it to be contrary to the wishes of some of the owners of the affected land. Taiaroa maintained his opposition to the end, but as he expressed willingness to vote for an amended Bill containing the perpetual lease arrangements it does not seem that his opposition was directed at the perpetual leasing. (T1:325-326)

The tribunal does not accept that either of the Parliamentary representatives' actions amounted to a consent by Poutini Ngai Tahu to the perpetual leasing provisions of the 1887 Act. We think it necessary to observe that many measures are passed into law

with no voice being raised on the final reading despite the fact that a member of the House does not agree with certain contents of the measure. The evidence in this particular case certainly does not amount to an estoppel that would operate against Poutini Ngai Tahu that their Parliamentary representatives had given their consent to the statutory provision.

Was consent of Ngai Tahu necessary to validate Crown action?

14.8.11 It might be asked whether Crown consultation with Maori owners, and the latter's consent to the legislation was necessary.

With a few strokes of a pen, by the insertion of the words "including the right of renewal" in section 14 of the 1887 Act, the legislation took away from the Maori owners a valuable property right and gave it to the tenants. It may have been done for any one or more of the reasons explained, including the purpose of encouraging development of the land and thereby enhancing the future rental return to Maori, but it was nevertheless an action that was to deprive the owners of use and occupation as well as a property right. The Mawhera lands were reserved for individual occupation. They were not to be set aside as lands for tribal endowments. The owners were known and had been determined in number and acreage only four years previously, in the 1883 Act. They were entitled to informed advice on the meaning and effect of such an important change to their title. They did not get it. In 1866 the Mawhera lands were placed under the 1856 Act so as to permit management and control. The Maori owners agreed to this course. They were not then able to cope with the European commercial processes of leasing. Alexander Mackay handled these proceedings to the satisfaction of the owners. Mackay and those owners were prepared to grant long term leases with compensation provisions. They were opposed to sale. By 1887 the Maori owners were becoming more conversant with commercial matters and indeed had petitioned Parliament for control of their lands to be returned. The Crown, in response to tenant pressure, gave into settler lobbying and answered its conscience to Maori interests by suggesting in its Parliamentary debate that the move was in the best interests of Maori as they would gain more rent and as they were incapable of managing their own affairs anyway.

Looking back with 1887 eyes, as we were urged to do, it is perhaps understandable that politicians acted as they did in the circumstances. Looking back however, with those same 1887 eyes, but with lens that require us to focus on the principles of the Treaty of Waitangi, this tribunal cannot accept that the actions of the Crown were in accordance with the Crown's duty to protect Ngai Tahu interests. It is ironic but pertinent that today, when Maori are seeking to reverse the position, this tribunal has been urged by tenants to respect their property rights and their guaranteed title under the Land Transfer Act. They do indeed have a valuable right. The Crown has also declared its intention to consult with the lessees before amending legislation is introduced. That is entirely proper too. It was not done in 1887. Unfortunately, that was not the only omission of the Crown. Legislation and Crown actions and omissions in 1955, 1967 and from 1975 to now, continued a breach of the duty to protect Maori owners of reserved lands, as we shall shortly see. At this point however we must look at the responses of the Crown and the lessees.

Did Ngai Tahu and the Crown agree to a compromise?

14.8.12 It was suggested by the Crown that perpetual leases could be seen as a compromise solution. This may well be the case, but it raises the question-who made the compromise? If the Crown are suggesting that the Maori owners saw this solution as the only way in which they could prevent their land from being sold, then of course it is not so much a compromise as a form of forced agreement to which the Maori owners had no alternative. If, on the other hand, it was a compromise of the Crown, then obviously it was intended to be a way of placating the tenants and yet upholding the owners' refusal to sell. The tribunal believes that it was indeed this latter form of compromise and certainly not an agreement that had the full knowledge and consent of the Maori owners.

The introduction of the 1887 perpetual lease clause would likewise not seem to be consistent with the principle of good faith, seen by the Court of Appeal in its 1987 decision as being an important principle of the Treaty. The Crown had seen the need to provide a system of management and control of lands to protect Maori reserved land. In effect it created a statutory trust under which it retained ongoing fiduciary obligations. It was a trust in which the Crown retained its control. Its intervention in 1887 to transfer a valuable property right, giving perpetual rights of use and occupation to the lessees, can hardly be interpreted as an act of good faith. The Crown's simple duty to its Treaty partner was to protect the land until such time as effective management and control could be transferred back to Maori. It breached that duty by legislating to take from the owners the right to future use and occupation, and conferring that right on a third party. Furthermore, the land was not public land but privately owned land. It was not until 1976, following the 1975 commission's report, that Maori regained management from the Crown-appointed trustee. Even so, the title to the land was then, and is still, burdened with perpetual leases containing unsatisfactory covenants such as 21-year rent reviews and rents of 4 per cent (urban) and 5 per cent (rural).

Ngai Tahu were in favour of a commercial leasing regime

14.8.13 Dr Young, on behalf of the lessees, put forward the proposition that the Maori owners' best interests were served by the pattern of leasing that emerged and were clearly dependent upon the town continuing to thrive. Counsel considered that Maori adopted a commercial approach to the issue and were in full accord with the process of leasing. He argued that the difference between leases in perpetuity and leases offered by the Maori owners for 126 years, when viewed from an 1880 perspective, raised only an infinitesimal difference. There is no doubt that a relatively small number of owners were in fact receiving the benefit of rental from the Mawhera lands. There is also no doubt that the owners were anxious to cooperate with the tenants to allow the leases to continue for a long period. However, these actions cannot be taken as implicit consent to the 1887 provision.

Legal argument of the lessees

14.8.14 We proceed now to consider Dr Young's legal arguments set out above (14.6.2). Briefly stated, counsel argued:

a) that when Ngai Tahu consented to their land going under the 1856 Native Reserves Act in 1866 it was no longer land they wished to retain in their possession and article 2 of the Treaty no longer applied; and

b) that article 3 of the Treaty had no application to give claimants a remedy based on maladministration.

Dealing with the first question, we cannot accept that the Maori owners understood or agreed that by passing over control of their land to commissioner Mackay they no longer wished to retain the reserve in their possession. In our view, the act of consenting to the land passing to the Crown under the Act was not a disposition of the land in terms of the Treaty. Despite the vesting of the legal estate, Maori still retained a beneficial interest until the land was actually sold by the Crown. If land was subsequently sold by the commissioners, it would be no longer in the possession of the beneficial owners and Maori would have no further rights in respect of that land. We interpret the Treaty provision as intending to apply to land in respect of which Maori still retain a beneficial interest. Until Maori deliberately sell the land it remains protected under article 2 of the Treaty. The Mawhera owners resolutely opposed sale of their reserved lands, as is clearly shown and acknowledged in the evidence and in both Crown and lessees' submission to the tribunal.

We pass to consider the second contention, that the Treaty does not protect the statutory and equitable rights which Maori tribes and groups enjoy and that any claim for maladministration does not lie under the Treaty. In answer to this, we agree that the claimants enjoy the same common law and statutory rights as non-Maori. If a fiduciary duty is established, Maori would have rights to bring an action in the courts to remedy any breach of that duty.

However the claim is not based solely on maladministration, but rather challenges the action of the Crown in passing legislation which is alleged to be inconsistent with a principle of the Treaty. The tribunal is asked to determine whether there has been a breach of Treaty principle and if there has, to then recommend a remedy. In exercising its statutory jurisdiction the tribunal is charged to establish whether any act or omission of the Crown infringes a Treaty principle. To this extent the jurisdiction is particular to Maori by the express words of the statute. We do not therefore accept that the tribunal has no jurisdiction to proceed.

Is lack of objection sufficient to establish consent?

14.8.15 Both the Crown and lessees put forward the view that there was little or no objection from the Maori owners to the proposed perpetual leasing arrangement, and advanced in support of this contention the evidence given by the Maori owners at the 1885 Royal commission and in the Bunny report. We have already examined this evidence. Counsel also referred to the assent given by the Maori legislators most directly concerned with the Bill, and said that they would not have given consent unless they were satisfied that the owners were in agreement. We have also previously looked at what took place during the passage of the Bill.

A strong submission was made to the tribunal that the letter signed by four owners produced to the Parliamentary committee in 1909 examining further complaints of

tenants, (14.2.18) was subsequent consent to the 1887 Act. Consideration of the evidence indicates that letter had been prepared by the Public Trustee himself, as the same language and terms are used, almost exactly, as in a letter later sent by Mr Poynton to the Honourable Mr A T Ngata. We do not consider that this letter is evidence that Maori owners, 22 years prior to that date, were satisfied with the perpetual lease provision or even aware of it. We also query whether any strong inference at all can be drawn from the letter. The circumstances in 1909 clearly showed that the tenants were again moving to purchase the freehold, and this was being resisted by the public trustee who sought the support of certain owners to prove to the parliamentary committee that the leases were favourable to the tenants. The Maori owners who were making the submission would certainly have wanted to endorse the action of the public trustee in preventing their lands from being sold.

Looking, therefore, at the circumstances attending the 1909 evidence, we do not consider that it does anything more than substantiate once again the owners' continued opposition to the sale of the freehold. Viewing the whole question of owners' objection however, the tribunal must agree that there is no evidence of strong opposition to the 1887 legislation. Lack of opposition, however, does not constitute consent although it might certainly give rise to the inference that there was lack of consultation. Lack of objection might also be due to lack of knowledge on the Maori owners' part of the full meaning and effect of the provision inserted into the 1887 Act. More importantly however, the lack of objection may have been due to the satisfactory way in which the land had been administered by Mackay, at least up until he left the scene in the 1880s. Maori owners had no need to register any objections, in that they were receiving rents from the land at a rate which was obviously based on the current market rate at that time. Indeed the evidence before the tribunal showed that there was little objection raised by the owners right through the period up to and including the 1955 legislation. Bearing in mind that the management and control of the reserves was out of Maori hands and being administered initially by the Public Trustee and then subsequently by the Maori Trustee, and that there was no structure representing the Maori owners interest as a whole until the 1960s, it is easier to understand the reason why there was not continual objection from those owners. We consider that the lack of objection by the owners may not be so much indicative of their attitude to the perpetual leasing of their land but more especially related to their lack of complaint about how the land was being administered and rentals received. We shall also come back to this question a little later.

Further reason for lack of objection by owners

14.8.16 We consider that the insertion of the perpetual leasing clause was a breach of the Crown's duty to protect under article 2. The Crown could well have persisted with a regime of 21-year leases or even moved to the longer term offered by the Maori owners. The Crown had no right to move to a system of perpetual leasing without proper informed negotiation and consultation, followed by consent of the Maori owners. It is true that there was little objection from the owners. Indeed in 1955, apart from some objection to the setting up of the conversion fund, it was presented in the House by the Minister of Maori Affairs that there was no criticism of the measure. This could well have arisen for the reason stated by the minister, Mr Corbett, and referred to in 8.2.20, that fragmentation of land and the spread of the Ngai Tahu and Taranaki tribes had removed them from their lands. The entrenchment of control

under a perpetual leasing system which was centrally located in the Maori Trustee's office under the Reserves Act was, in our respectful view, the main contribution to loss of interest. Despite the lack of objection for whatever reason, the Crown continued with the perpetual lease regime but took a further step to intervene in the statutory contractual relationship between the Maori Trustee and the lessees by introducing in section 34 of the Maori Reserved Land Act 1955 a new prescribed rental. This rental was fixed at 4 per cent of unimproved value for urban land and 5 per cent for rural land. At the time this rental rate may not have been disadvantageous to Maori owners, but it nevertheless imposed a new contractual term in the reserved land leases. It is appropriate that we look at this statutory contract.

What was the nature of the reserved land leases?

14.8.17 Throughout the hearing these reserved land leases have been referred to as Glasgow leases (ie, 21-year perpetually renewable leases). It was suggested to the tribunal that this form of lease was quite usual in New Zealand and certainly a well known type of lease in 1887. That is so, but there is an important difference between the position obtained with the Mawhera leases and most Glasgow-type leases in New Zealand which are made under some empowering Act, and are generally between a local body such as a harbour board, city council or a church body, and citizens.

In the leases made under an Act such as the Public Bodies Leases Act 1969, for example, the empowering Act confers wide powers as to nature and term. The parties to the lease then, within the overall statutory umbrella negotiate their terms. As the 1975 commission said of leases under the Maori Reserved Land Act 1955:

There are in fact four distinct parties concerned. These are the Legislature, the Maori Trustee, the lessee, and the beneficial owners who are represented by the Maori Trustee. (D1:60){FNREF|0-86472-060-2|14.8.17|77}

The 1975 commission went on to look at the role of these four parties and made some strongly critical statements about the position of the Maori owners:

The beneficial owners are not a contracting party and their role is a completely passive one. They are treated as children or persons under disability. They are not well informed upon the law or the facts concerning the lands in which they have an interest. They are not adequately consulted either ... or indeed capable of being consulted, even when major changes in the law or the leases which affect their interests are contemplated. Even on occasions when they have expressed views in these matters their representations have not carried weight. (D1:62){FNREF|0-86472-060-2|14.8.17|78}

So in this reserved land leasing situation, although the Maori Trustee is the nominal representative of the beneficial owners, as the 1975 commission said:

in reality the parties who alone are free to determine the nature and terms of the leases are Parliament, ie, the Crown and the lessees. (D1:61). {FNREF|0-86472-060-2|14.8.17|79}

and:

To call the Maori Trustee a free, responsible, and informed person entering freely into a contract on behalf of those whom he represents, is completely unreal and indeed to call it absurd would not be too harsh a term. {FNREF|0-86472-060-2|14.8.17|80}

It has been the Crown therefore, who has set the contractual terms and changed them. The Crown in 1955 fixed the rental rates. At the time they were in line with market rental. There was no disadvantage to Maori owners. However, during the 1960s the fixed rates dropped below the market rate as inflation started to take effect. The Crown took no action to review the prescribed rates, and it was really from this point that the Maori owners began to suffer serious disadvantage. Another event occurred in 1967 which really showed the Crown had progressed the full way in yielding to the tenants-the passing of the Maori Affairs Amendment Act 1967.

The Crown allows the freehold to be sold to the tenants

14.8.18 Sections 155 and 156 of the Maori Affairs Amendment Act 1967, as we have seen (14.2.21), allowed lessees to purchase the freehold from the Maori Trustee. Again, this action of the Crown was strongly criticised by the 1975 commission. It said:

As far as the commission is aware no consideration of any kind accrued to the Maori Trustee or the beneficial owners in return for this provision. CLEARLY THIS IS A UNILATERAL ALTERATION BY LEGISLATION OF A LONG EXISTING CONTRACT BETWEEN THE MAORI TRUSTEE AND THE LESSEES. (D1:53){FNREF|0-86472-060-2|14.8.18|81} (emphasis added)

The commission reported that the Maori Trustee had not been invited to put forward any views on freeholding to government.

Thus the owners now stood to lose the freehold of their land. They had been separated from administration or control of it since 1866. They had had perpetual leases imposed on them without proper consultation or their consent in 1887. They had had prescribed rents of 4 and 5 per cent imposed in 1955 and finally, in 1967, the Crown allowed their land to be sold to the tenants. The tribunal has no doubt that the owners were so far removed from management of their lands and so lacking in co-ordinated grouping for resistance that there was little they could do.

However, as inflation continued into the 1970s, Maori were beginning to express concern about management of their estate. On 20 December 1973, as a result of New Zealand Maori Council representations supported by various Maori authorities, the commission of inquiry was constituted with seven terms of reference to inquire into Maori reserved lands and their administration.

Management and control of Mawhera is restored to Ngai Tahu

14.8.19 We saw in 14.2.23 the results of the commission's work, which recommended a number of remedial changes to the terms of the perpetual lease. These were directed to five-yearly reviews of rent, indexation of rental and rents being fixed at a basic rent of 1 per cent above government stock.

The commission felt that it could not recommend breaking the perpetual term because of the compensation payable but it noted:

It is true that many years ago it [the right of perpetual renewal] was arbitrarily imposed by legislation without the consent of the beneficial owners.  
(D1:68){FNREF|0-86472-060-2|14.8.19|82}

The commission published its 500 page report in 1975, and although it was obviously hesitant to recommend the end of perpetual leasing in the existing leases, it saw the unfairness of the prescribed lease. Its recommendation that incorporation be legislated to allow Maori owners to take over management of their own lands was put into effect by government, and thus we saw the statutory birth of Mawhera incorporation, on 31 May 1976 and the end of Maori Trustee control. However, the commission's recommendations in respect of rent review and rent fixing have not been implemented in any form, despite assurances given to the Mawhera Incorporation and other Maori authorities that the position was to be reviewed. It is possible that if government had moved in respect of rent review and rental as quickly as it moved to transfer management these grievances would not have come before this tribunal. Despite its stated intention to intervene, the Crown has failed for 16 years to remedy the lease terms. We observe here that in 1975 it did repeal the tenants right to freehold.

Summary of tribunal findings as to breach

14.8.20 In our view the following acts and omissions of the Crown are inconsistent with the principles of the Treaty:

- 1 The insertion of the perpetual right of renewal in the leases of Maori Reserved Lands by section 14 of the Westland and Nelson Native Reserved Land Act 1887.
- 2 The insertion of sections 9A and 9B into the Maori Reserved Land Act 1955 by sections 155 and 156 of the Maori Affairs Amendment Act 1967.
- 3 The failure of the Crown to implement those recommendations of the Commission of Inquiry into Maori Reserved Land 1975 relating to renewal of terms and review of rent.

We set out earlier in this report (chapter 4), relevant Treaty principles governing the relationship of Maori and the Crown. The retention by Maori of tino rangatiratanga under article 2 requires the Crown not only to respect but further, to guarantee and protect mana Maori. It cannot be said that the Crown, in legislating to take away forever from Maori their future rights of use and enjoyment in respect of Mawhera lands, was discharging its guarantee to protect rangatiratanga under article 2. Nor can the Crown's unilateral action in respect of these perpetual leases, and their imposed unreasonable statutory terms, be seen to be dealing with Maori on the basis of sincerity, justice and the good faith of a Treaty partner.

The tribunal finds, therefore, that there has been a clear breach of article 2 of the Treaty. Furthermore, the tribunal is satisfied that, as a result of the Crown's actions and omission, the claimants have clearly been prejudicially affected thereby. Not only

have the claimants lost a right of use and occupation but they also lost a valuable property right in their land when the Crown gave away that right to the tenants.

We therefore find that the claimants have established grounds 7 and 11 as set out in their summary of grievances.

#### Allegations against the Maori Trustee

14.8.21 In 14.7.1 we set out a number of allegations made by the claimants in respect of the Crown's failure to administer properly the reserved lands. We also examined the Maori Trustee's response. The whole question of Maori Trustee administration was investigated as part of its terms of reference by the 1975 commission. The commission considered there was a solid basis of fact underlying and supporting opinions put to the commission criticising lack of consultation, and the remote and impersonal administration. However the commission came to the view:

There is no doubt that a lot of the criticism levelled at the present administration of the Maori Trustee comes about by reason of the restrictive legislation within which he must operate. (D1:31){FNREF|0-86472-060-2|14.8.21|83}

The tribunal endorses this view and indeed, at various times in the submissions of claimant witnesses Messrs McAloon and O'Regan, the administration's deficiencies were directed back to the Crown and its legislative control. We also accept the six points made by the deputy Maori Trustee as a major contribution to the dissatisfaction of the Maori owners (14.7.5).

The tribunal has considerable sympathy for both the Maori owners and the Maori Trustee but very little for the Crown. From 1856 until 1975 the Crown persevered with a form of trust management in which, as we have seen, the Crown made the rules and supervised the process. The system adopted alienated Maori from any real consultation or knowledge about their interests in the reserved lands. The 1975 commission recommended alternative management systems for Maori incorporations and trusts that had been part of the Maori land utilisation system from 1909, (the year when the Native Land Act gave powers of management to Maori land incorporations). They were not new. They were there to be used many years earlier. There is no doubt that the fragmented title of Maori land, which was completely out of their control and use, led to alienation; a process certainly speeded up by the conversion procedures of the 1967 legislation. But the perpetual lease, the 21-year reviews and the 4 and 5 per cent rentals were the key elements of owner grievance. These elements, exacerbated by remote trustee control, estranged Maori from their land. Although management of the land has been returned, the major disadvantages remain and the Maori owners are bound by lease contracts containing terms imposed on them by enactments of Parliament. As each day continues without redress the financial loss of Maori owners accumulates.

14.8.22 It is the finding of the tribunal that primarily the actions or omissions of the Crown have been responsible for the general complaints laid at the door of the statutory managers. The tribunal accepts that some of the specific matters alleged against the Maori Trustee may be properly justiciable in the New Zealand courts of ordinary jurisdiction. The incorporations and trusts which have taken over

management of the reserves are corporate bodies with powers to commence such proceedings. Generally, however, this tribunal considers that the number of specific complaints made to us during the hearing of the substantial grievances add weight to the claim, and support the findings made by us in 14.8.20 in respect of the principal grievance. By reason of the generality of the complaints listed in the second grouping in 14.8.20, and for the other reasons given above, we do not intend to make specific findings against the statutory trustees.

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*Waitangi Tribunal, Department of Justice, Wellington.*

# Ngai Tahu Land Report

## 14 The Perpetual Leases of Ngai Tahu Reserves

### 14.9 The Tribunal's Views on Remedies

#### 14.9. The Tribunal's Views on Remedies

What do the parties seek?

14.9.1 Having found that the Crown's legislative enactments in 1887 and 1967, and its omission since 1975 to implement remedial action, were respectively acts and an omission inconsistent with Treaty principles we must now consider the question of remedy.

What are the views of the parties and the other key figures in these grievances, namely the claimants, the Crown, the lessees and the Maori Trustee.

Remedy asked for by Ngai Tahu

#### 14.9.2 The claimants seek as follows:

(a) Monetary compensation from the Crown calculated on the basis of the difference between ordinary term leasehold rates pertaining to similar lands and the actual rates derived to the owners from the perpetually renewable leasehold imposed by the Maori Reserved Land Act 1955 and its preceding Acts. Calculated as a lump sum from 1872 to the present.

(b) Amendment to the Maori Reserved Land Act 1955 to the effect that the leases prescribed in that Act will:

(i) Over two 21-year lease periods convert to term leasehold those lands subject to the leases prescribed in the above Act.

(ii) Immediately change from a fixed percentage rental basis to one of a freely negotiated rental subject to the Arbitration Act.

(iii) Immediately change from the present rental review period of 21 years to a rental review period of 5 years in respect of commercial and rural land and 7 years in respect of private residential land.

The above statement of remedies was set out in a statement attached to a letter dated 5 September 1987 (appendix 5) addressed to the tribunal's registrar.

However in his address to the tribunal at Greymouth on Tuesday 1 December 1987, Mr Temm, for the claimants, said this:

We say that the owners are prepared to be reasonable, as the Maori have been down through the years. They don't ask for compensation for what they have lost. Lord knows if they were to work it out, it would be figures that would run into astronomical calculations if you took into account compound interest they would otherwise be entitled to for breach of trust. And as we all know when a breach of trust is committed by a big trustee compound interest is the ordinary role of damages. The cost would be absolutely astronomical but they don't ask for that. They are being very simple and practical. They are simply saying that they want their annual losses to be brought to an end. That's the first thing they ask for. And they seek a recommendation from the tribunal that the law be changed to put them on the same footing as Pakeha land owners. (W1)

The above statement would seem to indicate the claimants are not seeking the compensation referred to in the earlier claim dated 5 September 1987. There is no reference to compensation in either Mr Temm's closing address (W1:267-271) or in his final reply (Y1:122-124).

The Crown reserved its submissions on remedies

14.9.3 The Crown, whilst arguing that it had acted at all times in good faith and certainly not in breach of the Treaty, nevertheless recognised that for the last fifteen years approximately the legislation had worked unfairly. The Crown reserved submissions on the quantum of loss and also made no submissions on terms of remedial legislation as that matter was before a cabinet committee (X2:140).

The lessees oppose breaking perpetual leases

14.9.4 The West Coast (South Island) Leaseholders Association also said there had been no Treaty breach but, if so found by the tribunal, then the party in default was the Crown. Counsel Dr Young strongly opposed as unfair and unjust the claimants' proposal that the perpetual lease terms be broken. He claimed the lessees had settled land transfer titles which should not be expropriated and that if any monetary compensation was to be paid out then that was to be paid by the Crown. Counsel had called valuation evidence to establish that the lessees stood to lose \$4.5 million if the government met the claimants' proposal (N32:18).

The position of the Maori Trustee

14.9.5 The Maori Trustee supported the claimants' case for a review of leaseholds and provisions for rent fixing (N32:18). Deputy Maori Trustee Wickens commented:

The Maori Trustee is well aware of the defects in the Maori Reserved Land Act 1955, and has been conscious of the need for change to it. An attempt was made to change the leases in 1971 following the introduction of an amendment to the Local Bodies leases, allowing for rent reviews at five yearly intervals. The Maori Trustee had drafted an amendment along similar lines, but was instructed by government not to proceed with it. The amendment to the Local Bodies leases was a short-lived piece of legislation as it was repealed not long after it had been passed due to the public outcry against it. (N34:21)

The recommendation of the tribunal

14.9.6 The tribunal has no difficulty in coming to a view on remedy. We commented earlier that the sanctity of title now pleaded by the lessees is what the Maori owners lost by Crown action in 1887. If this was simply a matter between Crown and the lessee involving Crown land, then the lessees plea would have a strong base. But this case involves Maori land. It is not public or Crown land. It is private land. We see that an injustice occurred and still continues. It must be righted. The tribunal knows of no other privately owned land, management of which has been taken from the owners and the land placed under perpetual lease with 21-year rent reviews at fixed rentals of 4 per cent (urban) and 5 per cent (rural). Counsel for the Maori Trustee referred to a comment by the then Minister of Local Government in 1977:

The resolution of this issue will necessitate an arbitrary decision one way or the other and, clearly whichever of the alternatives is adopted there will be very considerable resentment from the proponents of the other. (N32:21)

As will be seen throughout this report, inadequate lands were reserved for Maori in almost every South Island Crown purchase. To have land which was set aside for individual allotment placed in perpetual lease was a further indignity. Kaupapa Maori and government's stated policy are directed to Maori self-determination and return of Maori land to Maori control.

The tribunal also accepts that the lessees are justly entitled to be compensated by the Crown for such loss they may suffer consequent upon implementation of this tribunal's recommended actions. That loss is an ascertainable figure. The tribunal considers that the statutory changes sought by the claimants should be implemented without further delay. The claimants do not appear to be seeking compensation for the loss suffered and the Crown have reserved submissions on this question. The tribunal is therefore not minded to make any present recommendations on compensation by way of solatium for loss. This question is reserved and may be raised and dealt with in the event that the tribunal is required, at some future time, to address remedies upon completion of negotiation between the parties.

If compensation is insisted upon by the claimants-and their valuer gave a minimum figure of \$750,000 on 21-yearly reviews and a maximum of \$2.25 million on 7-yearly reviews then it will be necessary for the question to be argued later. Crown counsel suggested that their values did not agree with the claimants' assessment of loss and suggested there might well be a need for the respective valuers to reappraise the situation in order to resolve the issue. The question of compensation is therefore presently deferred.

14.9.7 We proceed therefore to make the following recommendations in respect of the principal grievance:

1 That the Maori Reserved Land Act 1955 be amended (as sought by the claimants and set out in paragraph 6 page 2 of appendix 5) so that the leases prescribed in that Act will:

(a) Over two 21-year lease periods convert to term leasehold those lands subject to the leases prescribed in the above Act;

(b) Immediately change from a fixed percentage rental basis to one of a freely negotiated rental subject to the Arbitration Act; and

(c) Immediately change the present rental review period of 21 years to a rental review period of 5 years in respect of commercial and rural land and 7 years in respect of private residential land.

2 That the lessees be reimbursed by the Crown for any provable loss suffered by them as a result of the legislative changes recommended above.

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{FNTXT|0-86472-060-2|14.8.6|59} 59 see n 27

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{FNTXT|0-86472-060-2|14.8.10|72} 72 Petition of Paaka and others, presented by Parata in House of Representatives, 3 November 1887, in JHR 1887, p xxii; Report of the Native Affairs Committee, 1888, sess II, I-3. Harepeka and others also petitioned in November 1887, asking that no fresh leases be granted for their lands, but petition did not state where land was, JHR 1887, p xxiii

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