

Chapter 9

Ngai Tahu Ancillary Claims: An Overview

This report has gone a long way to describe how those Ngai Tahu lands excluded from the Crown purchases made between 1844 and 1864 have been affected by various intervening events down to the present time. It is a telling insight into the current state of landlessness that the tribe faces in 1995. And this, we feel, is the fundamental issue behind almost every one of Ngai Tahu's ancillary claims. It is this which fuels the complaints about the acquisition of Ngai Tahu lands for public purposes. It is the lack of a land base which has prompted Ngai Tahu from Aparima to call for the return of land there, although no specific Crown action is questioned. It is the fact that only three of the original 14 reserves set apart for the tribe in Kaikoura remain wholly in Ngai Tahu ownership which has drawn Trevor Howse to speak out. In 1868 the Native Land Court was directed to determine what reserves for mahinga kai should have been made under Kemp's deed. Despite requests from Ngai Tahu for areas to be set aside for fisheries, weka runs, hunting reserves, cultivation sites, timber reserves, and occupation reserves, as well as pa sites, the Native Land Court restricted the reserves to fishery reserves and awarded only a small number of these, much diminished in area from the reserves sought. As has been clearly detailed in this report, and brought to notice by the claimant Rakiihia Tau and others, even these limited but special reserves virtually disappeared as a result of land drainage, river straightening, loss of physical access, legislation and regulation processes, and Crown acquisitions.

As we set out in the preface, the manner in which the claims were presented and the subsequent lack of attention they have received in terms of research and argument have resulted in a rather inconclusive report on a number of issues. In many cases the individual complaints have not been held by the Tribunal to be breaches of the principles of the Treaty of Waitangi. Nevertheless, the report is valuable in that it reflects the concerns, the frustrations, the sense of hopelessness, and, in many cases, the anger of a people who are now bereft of their land, their traditional food resources, and their language. Viewed as a whole, together with the 1991 main report, it is a damning indictment of the Crown's failure to honour the Treaty of Waitangi.

As the Tribunal has worked its way through these claims, it has stated its conclusions on each at the end of each claim summary. In some cases we have made findings that the Treaty has been breached and have made recommendations. For the purposes of clarity and reference we have prepared a summary of the claims, findings, and recommendations, which is set out in appendix 1.

What follows are the general conclusions we have reached on the myriad matters raised in these numerous claims. In order to present an overview assessment of all of these ancillary claims, we refer, firstly, to the paucity of the land left to Ngai Tahu from the Crown purchases. Secondly, we look at the

inroads which have been made into these reserves and how these have come about. Thirdly, we look at the loss of the tribe's food resources. We next review the issues surrounding the compulsory acquisition of Ngai Tahu land for public purposes. Fifthly, we turn to Crown attempts over the years to provide some relief to the tribe, before reviewing recent changes in legislation which go some way towards answering Ngai Tahu's complaints. Lastly, we turn to consider the crux of the claims: the restoration of an estate and resource base to the tribe.

9.1 **Provision of a tribal estate**

A principal cause of the tribe's present landlessness lies of course in the niggardly amount of land reserved to Ngai Tahu from the original Crown purchase of their domain. In accordance with the principles of the Treaty of Waitangi, and the Crown's right of pre-emption which that treaty bestowed, in purchasing land from Maori the Crown was to ensure that the tribe was left with sufficient land for their present and foreseeable needs. Such a principle, as we have seen, was sorely neglected in the purchase of Ngai Tahu lands. In the Kemp purchase, the tribe was appeased with promises of further reserves and provision for mahinga kai which never subsequently materialised. As Kelly Wilson sadly related, scant provision was made for the people of south Westland, and no reserves at all were made in some areas where Ngai Tahu were known to reside. In the case of north Canterbury, no provision whatsoever was made for the tribe, as much of the land had already been on-sold by the Crown to settlers. Rather than the 'tenths' rule, which was applied in the Crown's purchase of other areas of New Zealand at the time and which would have seen at least one-tenth of all land acquired by Crown purchase remaining in Maori ownership, Ngai Tahu were left with one-thousandth of their previous domain, some 35,757 acres from a tract of 34.5 million. Such provision, as we have found in the *Ngai Tahu Report 1991*, was woefully insufficient for the support of the tribe, even in the short term. Moreover, the paucity of the tribal endowment was damaging to Ngai Tahu's traditional way of life and social structure, and impeded any attempts to participate in new activities such as pastoral farming.

The state that Ngai Tahu communities were reduced to as a result of the Crown purchase of their domain has been recounted by the Tribunal in 1991:

By 1864 Ngai Tahu were in a parlous, some might say pitiable condition. They were now an impoverished people largely confined on uneconomic patches of land, almost entirely isolated from mainstream European development, neglected by government at both central and provincial level, marginalised and struggling to survive both individually and as a people. Their rangatiratanga greatly diminished, their communal way of life and the cultural and spiritual values associated with it seriously undermined. As settlement steadily encroached on them from all sides, as land was progressively fenced and drained, as their access to mahinga kai steadily decreased, Ngai Tahu eked out a bare subsistence on land incapable of sustaining them.¹

In the *Ngai Tahu Report 1991*, the Tribunal found the Crown's failure to set aside an ample land endowment from the purchases for the tribe's present and future needs to be in serious breach of both

the Crown's duty to protect Ngai Tahu rangatiratanga and its obligations in the exercise of its pre-emptive right. We need say no more on this.

9.2 **Inroads into the tribal estate**

Having set aside what was, in Mantell's words, 'enough to furnish a bare subsistence by their own labour', it is to be expected that these reserves, mere pinpoints on a map, would be retained by the tribe. Moreover, in view of the circumstances surrounding the Treaty which we have discussed in detail in earlier reports, one could expect that the Crown would take active measures to ensure that this was so. Indeed, how could 'future needs' be provided for if the land were not retained? This intention is reflected in the terms of the 10 purchase deeds themselves. Signed by 'nga rangatira me nga tangata o Ngaitahu', on behalf of 'ourselves, our relatives and descendants', the deeds invariably referred to the lands excluded from the purchase as 'hei wenua tumau iho mo matou, mo o matou uri i muri iho i a matou, ake tonu atu'. As pitifully small as the reserves were for Ngai Tahu, it is evident that, at the time of purchase, both the Crown and the tribe were of one mind; such land was to be kept permanently as a tribal estate for the sustenance of the communities where the reserves had been set apart. This is reflected in the restrictions on alienation placed on the title of many of the reserves.

The broad principle that tribes or tribal individuals should retain sufficient lands for their needs found expression in many policies and statutes of New Zealand's own Government. As the Orakei Tribunal reported in 1987, Maori reserves were recognised and provided for in the Native Reserves Act 1856, and section 22 of the Native Reserves Act 1882 added the important criterion that reserves could not be alienated unless:

a final reservation has been made, or is about to be made, amply sufficient for the future wants and the maintenance of the tribe, hapu or persons to whom the reserve wholly or in part belongs.

The preamble to the Native Land Act 1873 reiterated the objective of reserving areas for the purpose:

of assuring to the natives without any doubt whatever a sufficiency of their land for their support and maintenance, as also for the purpose of establishing endowments for their permanent general benefit from out of such land.

Rather than actively protecting the tribal estate, however, investigation into Ngai Tahu's ancillary claims has revealed that the Crown has been largely responsible for its subsequent decline. It is because of Crown policy and Crown action that Ngai Tahu no longer possess even the meagre reserves left to them as a result of the purchases. Many of the grievances have focused on the reduction of the reserves as a result of public works acquisitions. We will return shortly to this issue when we discuss the manner in which the lands were taken. For now we make the point that the degree to which Ngai Tahu land has been affected by public works is material. Often the best of a reserve has been taken, or too much, and, with few exceptions, no alternative land has been provided by way of compensation.

Ngai Tahu have also lost their reserves through discriminatory and arbitrary provisions in legislation. Of particular note is section 438 of the Maori Affairs Act 1953, which gave the Maori Land Court a very wide discretion in vesting land in trust for the purpose of facilitating the use, management, or alienation of that land. This section enabled the alienation by the Maori Trustee of both section 73 at Invercargill, on the pretext of its noxious weeds problem, and the fishing reserve at Hawea, without any consultation with the owners of the lands. Other provisions in Maori land legislation, such as that pertaining to 'uneconomic shares', while not the subject of specific complaint in these claims, have resulted in the alienation of Maori land.

Numerous allegations were made by Mr McAloon that many of the Arahura reserves have been literally washed down the river. While the Tribunal rejects this as being any fault of the Crown, we do acknowledge that larger reserves may have accommodated such natural phenomena. In addition, much of the reserved lands was lost or diminished by flooding or erosion because of its location alongside rivers or by the sea. In some cases the reserved lands, because of their location, were also needed for settlement, such as happened in Greymouth, where the town was located at the river mouth. Pressure from settlers seeking long-term commercial and residential sites resulted in the granting of perpetual leases.

One of the principal factors behind the reduction of Ngai Tahu's tribal endowments was not argued in any depth by the claimants. This of course was the Native Land Court's granting to individuals of titles to what were intended to be tribal reserves. The rationale behind early Maori land legislation has been explained by the Orakei Tribunal.² The Native Lands Act 1865 and subsequent amendments effected the individualisation of Maori landholdings with two objectives in mind: to better facilitate the alienation of such land and to destroy the communal nature of Maori society. The Orakei Tribunal found that the provisions of the 1865 Act which enabled tribal ownership of Maori land to be extinguished on the application of any one member of the tribe without the consent of the remainder of the tribe were inconsistent with the principles of the Treaty. In recognising *te tino rangatiratanga* of tribes over their lands, the Crown acknowledged the authority or *mana* of Maori for so long as they wished to hold their land in accordance with long-standing custom on a tribal and communal basis. It found that, by enabling the vesting of both the legal and the beneficial ownership in only a few members of the tribe to the exclusion of the great majority, the Native Lands Act 1865 breached the Treaty guarantee to Maori of the full, exclusive, and undisturbed possession of their lands.³ The grant of title to Ngai Tahu's tribal estates to individuals is accountable for much of the subsequent alienation of their lands.

In some cases, while Ngai Tahu retain ownership of their reserves, they are unable to exercise control over the land. In 1991 we reported on the system of perpetual leasing, which in effect forever took away Ngai Tahu's future rights to the use and enjoyment of their reserves for very little return. We found such a system to be in breach of article 2 of the Treaty and recommended action to remedy the situation. Grievances concerning perpetual leases have surfaced again in these ancillary claims and are dealt with in the Tribunal's findings on claim 42 (concerning the Whakapoai reserve). The Tribunal is

gratified that the Government proposes in 1995 to legislate to remove the perpetual term provisions and restore a market rent but it still considers that further changes in other details of the proposals are needed if a fair and just solution is to be found. The final opportunity to remedy a long-standing and continuing grievance will rest in the select committee of Parliament and in the subsequent legislative action. As the position already stands, despite the Government's declared intention to break the perpetual leases, the Maori owners and, to a lesser degree, the lessees, are being required to carry the loss. It is inequitable that the Crown, having introduced in 1887 and still retaining today legislation which effectively forever took away the right of the Maori beneficial owners to manage their own lands and which created a regime of rent reviews quite unfair and damaging to those beneficial owners, should escape its responsibility to make a substantial compensatory contribution.

Other factors which have hindered Ngai Tahu's ability to manage and exert control over their lands have their foundation in prohibitive Maori land legislation and also in other general enactments. These restrictions have come to light during the hearing of the substantive claim and are referred to in the 1991 report. Investigation into these 100 ancillary claims confirms and extends the range of that legislation. We have referred earlier in this report to the injustices relating to perpetual leases. These injustices were created in respect of Ngai Tahu reserved lands by the Westland and Nelson Reserves Act 1887 and carried through into present day application under the Maori Reserved Lands Act 1955. We shall shortly consider the impact of public works legislation operating unfairly against Maori landowners. In claim 8 we examined the impact of the Ellesmere Lands Drainage Amendment Act 1927, which empowered a drainage board to drain Ahuriri Lagoon and thereby jeopardise Ngai Tahu fishing rights. In claim 66 we dealt with section 34 of the Maori Purposes Act 1950, later brought down as section 387 of the Maori Affairs Act 1953. This legislation set up a code which allowed for unproductive Maori land to be sold by the Maori trustee upon order from the Maori Land Court. There were no similar provisions in the law for idle European land or even Crown land to be sold. Section 387 was repealed in 1970 but not before this discriminatory and confiscatory provision resulted in the loss of Invercargill section 73 and possibly other lands during its 20-year existence.

Maori land legislation has contained many provisions which have affected the rights of Maori to own and control their land interests. This report is not the place to detail and discuss these matters, which have been looked at in earlier decisions and which will no doubt be further investigated by the Tribunal in other specific claims, where an opportunity will be provided for the claimant and the Crown to examine and argue the position. Suffice it to say in this report that legislative provisions have undoubtedly resulted in the diminution of Ngai Tahu's pitifully small estate and their control and management of it. Later in this chapter we shall look at some beneficial recent changes introduced into both Maori land law and general legislation which go some way towards remedying the position. We shall also comment on some positive attitudes developing in Government departments and local authorities.

9.3 **The loss of food resources**

The investigation into Ngai Tahu's ancillary grievances concerning mahinga kai has only added to the sorry picture painted in the *Ngai Tahu Report 1991*. In 1868, 20 years after signing a deed which guaranteed to them the retention of their mahinga kai, Ngai Tahu from the Canterbury region finally received the court's sanction to a handful of inland fisheries. In every single instance these specific fisheries have since been made redundant. In the case of Taerutu and Torotoroa, within a decade the fisheries were destroyed through drainage. Subsequent attempts by Ngai Tahu to secure areas of mahinga kai, such as the reservation of Taieri, did not result in any lasting success. In every case, the interests of 'settlement' have been placed above Ngai Tahu's rights, as guaranteed to them by the Treaty and by the terms of the Kemp deed. In 1991 the Tribunal felt unable to uphold the general grievance relating to the loss of the tribe's mahinga kai through the impact of settlement. We stated that the loss was the result of activities from the whole spectrum of society and could not be attributed solely to the Crown as a breach of its duty to protect under the Treaty. In the consideration of the ancillary claims, however, we feel that a distinction exists between the general impact of settlement on the countryside as a whole and that affecting a limited number of fisheries specifically set aside as mahinga kai for the use of Ngai Tahu. For this reason we have upheld the claimants' grievances.

The loss that Ngai Tahu have suffered through the destruction of their traditional mahinga kai has been a recurring theme in the Ngai Tahu claim. As was so eloquently put by Huhana Morgan during the hearing, the last straw has been the inability of the tribe in recent times to place kaimoana on the table of their wharekai for their guests. This is not solely as a result of the loss of the fisheries, but also, as in the case of Waikouaiti Lagoon, as a consequence of conservation restrictions which prevent Ngai Tahu from exercising their traditional rights. Over the years the tribe has largely been left out of the management of such resources, and has often been detrimentally affected by restrictive regulations which have no regard for their traditional rights. As the Crown has failed to protect Ngai Tahu's tribal estate, it has similarly neglected to ensure the tribe's continued use and enjoyment of a handful of valued fisheries. Such failure we have found to be a breach of article 2 of the Treaty.

9.4 **Public works acquisitions**

We turn now to discuss the manner in which the tribe's reserves have been taken for public works purposes such as defence, roading, railways, scenery preservation, and recreation, as this has been a dominant issue in the ancillary claims. Of recurring concern is the way in which the owners of affected land have been kept in the dark about such takings. Numerous complaints have been directed at the Crown's failure to notify owners of impending works and to consult with them about the issue. Criticisms have also been directed at the excessive nature of some takings, the fact that land has been taken over the objections of the owners, and that compensation for some takings has never been paid. Allegations have been made that in some areas only Maori land has been taken for public purposes.

9.4.1 Few of the Ngai Tahu claimants have questioned the Crown's right to take their land for public purposes. Kelly Wilson of south Westland, while bemoaning the fact that the one and only reserve

capable of being farmed at Mahitahi has been eaten into on three different occasions by public works, was not critical of the Government's use of the land. Rather, he simply made the point that alternative lands should have been provided by way of compensation. Such a tolerant view, which was reflected in many of the claimants' submissions, is remarkable in the face of the great loss which the tribe has sustained throughout the years.

The conflict between the Crown's guarantee in article 2 of the Treaty of 'te tino rangatiratanga' or 'the full exclusive and undisturbed possession' to Ngai Tahu over their lands, on the one hand, and the right of 'kawanatanga' or 'sovereignty' conveyed to the Crown in article 1, on the other, has not gone unnoted. Mr McAloon, researcher for the claimants, raised this issue with respect to the reserves in Arahura, alleging that the Crown's general act of compulsory acquisition of these lands for public purposes was in breach of article 2 of the Treaty, whether or not compensation was paid. However, the question has not been argued by either of the parties. In light of the many other large issues involved in the Ngai Tahu claim, this is not surprising. In the absence of any argument on this crucial issue, however, the Tribunal has refrained from making any definitive finding on the point. We feel that the circumstances of each case need to be considered in order to come to any conclusions with regard to a breach of Treaty principles. This task of weighing up the public interest against the guarantees stipulated in the Treaty becomes inordinately difficult with the passage of time since the taking in question and the limited extent of the information available to us. In considering the acquisition of parts of the Mangamaunu reserve for scenic purposes, for instance, we have been unable to form any conclusion on this issue. On the other hand, in claim 1 we have found that the Crown's compulsory acquisition of this land above the owners' objections to be in breach of article 2 of the Treaty, given the subsequent revocation of the scenic reserve status and sale of much of the area. In our discussion of that claim we also suggested the nature of the limitations which would seem to be imposed by article 2 of the Treaty on the right of the Crown compulsorily to take Maori land for public works. We now turn to review the manner in which Ngai Tahu lands have been taken, and to the recurring grievance regarding the failure of the Crown to return lands once they are no longer needed for the purpose for which they were taken.

- 9.4.2 Ngai Tahu criticisms regarding the lack of knowledge that owners had of the various takings are generally well founded. In some cases the Tribunal has been unable to ascertain whether or not the owners were notified, but the pattern has generally emerged that only in extremely rare cases were all of the owners of multiply held land notified of the impending takings. In many cases none of the owners were so notified. This can be attributed to provisions in public works legislation of the time for the procedure for taking Maori land, which differ considerably from those for taking general land. Whereas general land was often taken by agreement with the owners, the same was not true for Maori freehold land. Under section 24 of the Public Works Act 1882 no notice at all of the taking was required to be served on the owners of Maori freehold land, the publication of the relevant Order in Council being sufficient to take and hold the lands for the said purpose. By 1908 notice of the taking was required to be served on owners and occupiers of Maori freehold land only if the title to such land had been registered under the Land Transfer Act 1908. As very little Maori freehold land was so registered, in practice 'notification' was restricted to the publication of the *Gazette* notice in the *Kahiti*.

Nor was this substantially changed under the 1928 revision. It was not until 1974, with the passing of the Maori Affairs Amendment Act, that there was any serious requirement on the Crown to notify the owners of Maori freehold land of any proposal to take their land.

It is evident that the different procedures for the taking of Maori freehold land arose in order to overcome the difficulties and delays in locating the numerous owners of such land. The nature of a fragmented title, the number of owners involved, and the geographical dispersal of the owners have often been cited as justification for the lack of notice served on such owners. As one Public Works Department official said in relation to the taking of land from Ngai Tahu's reserve at Mahitahi for roading:

If you could locate the principal native owners and obtain their consent to entry and to the land being taken . . . this would enable you to proceed with construction, but the Department's experience has been that it is more expeditious to issue a Notice of Intention and take the land compulsorily where natives are concerned. (AB:80)⁴

While this method may have been more expedient from the Crown's point of view, it is apparent that Maori landowners lost out. The lack of sufficient notice removed the possibility of lodging any protest about the taking. By excluding Maori landowners from the option of taking land by agreement, it denied them the opportunity to say no to any proposed works. We draw attention to the case at Mahitahi where John Condon, a Pakeha whose land was required for an aerodrome, refused to sign the Crown's agreement for the use of his land. As a result his land was not subsequently taken. Part of section 781, Ngai Tahu's reserve, was acquired instead, with notice being served on only six of the 171 owners. The problems arising from the fragmentation of Maori land interests are not new to the Tribunal. We point out, though, that such problems are of the Crown's making. The fact that Maori have been prejudicially affected as a result is unjust. Moreover, the establishment in 1974 of a code for the representation of owners of Maori freehold land to be notified of impending works is evidence that a way around the problem, which would not cut Maori landowners out of the objection process, existed, and could have been introduced well before 1974. The Tribunal considers that the statutory shortcomings in the notification given to Maori landowners of the taking of their land for public purposes in no way recognise or protect Ngai Tahu's rangatiratanga over their lands. Such provisions also fly in the face of the Treaty principle of partnership, which requires the Crown to act towards its Treaty partner with the utmost good faith. The fact that Maori landowners were not afforded the same rights as non-Maori landowners can also be viewed as a breach of article 3.

In submissions made in the ancillary claims, the Crown has commented generally on compulsory takings under the various Public Works Acts and made this statement:

The Crown notes that the Government is still to consider policy on the settlement of Treaty claims raising this issue. However, pending the development of that policy, in the context of other claims raising the same questions, the Crown has taken a similar position to that adopted by the Tribunal in the Draft Report — that a case by case assessment is required.

In general, the Crown has not accepted that Article I of the Treaty is necessarily subservient to Article II. It has taken the position that both articles must be read in relation to the principles of the Treaty as a whole. They must also be read alongside Article III which imparts to Maori the rights and privileges of British subjects. (AB34:2–3)

We would observe that the Crown does not appear to have had regard to the views of the Tribunal expressed in chapter 11 of the *Ngai Tahu Sea Fisheries Report 1992* and, in particular, our discussion of the Treaty principle that the cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga.

- 9.4.3 As important as the issue of notification is the Crown's failure to return lands which are no longer required for the purpose for which they were originally acquired. A striking example of this was the acquisition of some 592 acres in 1964 for the television transmitter site at Hedgehope. Less than one-sixteenth of the land so taken was required for the purpose. Rather than returning the surplus area, it was leased out for grazing and then set apart as State forest. The compulsory acquisition of Omihi K2 for scenery preservation purposes over the objections of the owners, and the subsequent revocation of the scenic reserve status over half of this area, is another case in point. Such actions, we feel, display an arrogance on the part of Crown agents and can hardly be reconciled with the Crown's duty to both act in good faith and protect Ngai Tahu's rangatiratanga over their lands. While in the case of the Hedgehope transmitter some moves have been taken to have the surplus land returned, as at April 1995 this has still not been done.

Ngai Tahu have not objected to giving up their lands when they were satisfied that this was for the public good. They are, however, well justified in objecting to the Crown's failure to return such land once that public interest has been served. The Tribunal agrees with the sentiment that Ngai Tahu's interest in the land does not stop at the point of taking, or when compensation is paid. Although the return of land taken for public purposes to the original owners or their descendants is provided for in legislation, we feel that this has some way to go. The claims presented to this Tribunal show a tardiness on the part of the Crown in returning such land. To be consistent with the obligation to protect Ngai Tahu's rangatiratanga over their lands, we feel that the tribe's continuing interest in lands devoted to the public good should be recognised by the Crown.

- 9.4.4 Research into the claims reveals that in most cases monetary compensation was paid to the owners of affected lands. Such compensation was generally low, based on the Government's valuation of the lands because invariably the owners could not afford an independent valuation. The benefit of monetary compensation to owners of Maori freehold land is questionable, given that such owners were often numerous, and the amount, when divided up between them all, was nominal. We agree with Mr Wilson's view that a 'land for land' basis of compensation would have been more acceptable than the payment of money. The provision of alternative lands by way of compensation may have gone some way towards maintaining the tribal estate.

9.4.5 It was interesting to hear the opinion of Ken Piddington in his capacity as Director-General of Conservation. He spoke with regard to the department's management role of conservation areas, submitting that there is no incompatibility between the department's responsibility to manage land and waters for conservation purposes and the vesting of such areas in Maori ownership. In other words, the management of the land is not dependent on ownership. This is a substantial move forward from the traditional viewpoint, whereby Crown ownership of resources is considered to be essential. The Tribunal welcomes such an enlightened approach and comments that the same concept could be applied to the Crown's use of land for any public purpose.

The provision of joint-venture alternatives, as opposed to the continuing loss of the freehold, also warrants serious consideration. Joint control of land to be used for public purposes is consistent with the principle of partnership inherent in the Treaty. It would also ameliorate continuing encroachment into Maori reserves, such as we have seen in this ancillary claims report. The Tribunal is aware that in the United States joint-venture uses of Native American lands occur which have benefits for the state and the indigenous people involved. We are also aware that when Native American land is required for roads in the State of New Mexico an easement over such land is acquired, not the freehold. The option of a lease, a licence, an easement, or a joint-venture arrangement should, we believe, in the great majority of cases, be the appropriate way of protecting property rights guaranteed to Maori under article 2 of the Treaty. There would be no difficulty in reconciling either acquisitions of leasehold interests or a joint-venture approach with section 2 of Te Ture Whenua Maori Act 1993, which sets out the Act's primary objectives as the retention, use, and development of Maori land. No doubt the policy ministry, Te Puni Kokiri, could provide research on such proposals.

9.4.6 The Tribunal considers that a further review of the Crown's power to acquire Maori land under Part II of the Public Works Act 1981 is required. We recommend firstly that:

- the Public Works Act be amended to provide that it should be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi.

Secondly, we recommend as a consequence of the first recommendation that:

- the Crown and local authorities be expressly authorised to acquire a lease, licence, or easement over, or enter into a joint-venture arrangement in respect of, Maori land required for public purposes, instead of acquiring the freehold title of such land.

These recommendations should be brought to the notice of the Minister of Lands, the Minister of Justice, and the Minister of Maori Affairs.

9.4.7 In most cases the Tribunal has not made any recommendations with regard to the specific ancillary grievances relating to public works which have been upheld. We have, however, referred to the resultant reduction of Ngai Tahu's already meagre reserves, and we will return to this point shortly. Below are the specific recommendations that we have made regarding lands acquired for public

purposes:

- The 'Karetai lands' at Taiaroa Head, lot 33 and part lot 27, should be returned to the descendants of Korako Karetai (claim 51). We have also supported the vesting of the rest of the headland in the Otakou runanga.
- Section 75 at Harington Point should be returned to the descendants of Wi Potiki (claim 52).
- Part section 48, block IV, Glenomaru survey district should be returned to the Ngai Tahu owners entitled (claim 56).
- Lots 1, 3, and 4 of section 65, block VI, Waimumu Hundred should be returned to the original owners, and compensation should be determined for the acquisition (claim 61).

9.5 **Crown attempts to alleviate landlessness**

Various attempts have been made by the Crown over the years to alleviate the sorry plight in which Ngai Tahu have been left. These have been outlined in the *Ngai Tahu Report 1991*. Such attempts suggest that the Crown has at different times acknowledged that it is incumbent on itself to ensure that the tribe has not been left altogether landless. Having said that, the Tribunal cannot view such Crown initiatives as serious undertakings to remedy the situation. The Crown's response to requests for specific food reserves at Makawhio in 1892, for example, was to set aside lands in areas other than those requested by the tribe and of no use to them. Furthermore, the tribe has never received title to these areas.

9.5.1 Of particular note in the ancillary claims is the provision of further lands for Ngai Tahu under the South Island Landless Natives Act 1906. The allocation of land under this Act was in response to years of Ngai Tahu protest about the inadequacy of their lands. As we set out in 1991, the scheme attempted to remedy 'landlessness' by bringing individual Maori landholdings in the South Island up to 50 acres per head, an amount commonly perceived by Pakeha politicians to be sufficient for their needs. The whole basis of the scheme, as we have seen, was seriously flawed and the ancillary claims have only highlighted these shortcomings. Maori from Marlborough were allocated land on the slopes of Rakiura, and Ngai Tahu from Kaikoura in the north and Oraka in the south were allocated land on the rocky, remote hills above Wanaka. In 1991 the Tribunal reported that the 1906 Act and its implementation were but a cruel hoax which did little to relieve the grim reality of Ngai Tahu's landlessness. It is ironic to say the least that today, when Ngai Tahu are finally in a position to benefit financially from the landless natives lands through the milling of indigenous timber thereon, they have been prevented from doing so by the Government.

Moreover, a closer look at the implementation of the landless natives scheme as a result of the ancillary claims has revealed that title to some 19,734 acres of allocated land has never subsequently been granted. In the Tribunal's mind, this further exacerbates our 1991 finding of a lack of good faith on the

part of the Crown. We have made the following recommendations with respect to the landless natives lands:

- Negotiations should be recommenced immediately in respect of the Wanaka-Hawea blocks on a value-for-value exchange in land (claim 14).
- Title to the Whakapoai landless natives block should be vested in the descendants of those Maori originally found entitled (claim 33).
- The Crown should permit the Waitutu Incorporation to market the timber on their lands or provide adequate compensation for the loss of milling opportunities. The Crown should also reimburse the incorporation for all provable, actual, and reasonable costs incurred in negotiations and planning applications up to the date on which the incorporation receives consent to market its timber resource or alternative remedies are agreed on between the incorporation and the Crown (claim 89).
- The whole of the Port Adventure and Toitoto landless natives blocks should be completed as to survey and vested in the persons found to be entitled by order of the Maori Land Court within 12 months from the presentation of this report to the Minister, free from any restriction, covenant, easement, or condition, unless agreed to by the owners or their trustees (claim 92).

The Tribunal has not upheld claims that Ngai Tahu are entitled to unallocated areas of land which were set aside for the purpose of being assigned to landless natives.

The Crown submitted that there does not appear to be an obvious distinction justifying the Tribunal's approach to claims 14, 77, and 89, on the one hand, and claims 33 and 92 on the other. Crown counsel stated:

Claims [14, 33], 77, 89 and 92 concern land allocated under the South Island Landless Natives Act 1906. In respect of claims [14], 77 and 89 the Tribunal finds that the land allocated or granted by the Crown under this Act was of poor quality, that such Crown action breached the principles of the Treaty, and that remedial action is required accordingly. However, at claims [33] and 92 the tribunal recommends that land which was allocated in the 1906 Act, but not granted, should now be granted to the descendants of the original allocatees, despite its poor quality. (AB34:8)

The Crown has not recognised that there are two separate issues at stake here. Claims 14, 77, and 89 concern land granted because of Ngai Tahu's landlessness. The land granted was of poor quality and did little to alleviate that landlessness. Thus remedial action is recommended by the Tribunal. In claims 33 and 92 (and claim 16⁵) the main issue is that, despite the promise of land to alleviate Ngai Tahu's landlessness, the land was never granted. That the land was and is of poor quality should not obscure

the fact that the Crown promised land and did not grant it. Thus the Tribunal has recommended that the land should be granted to the descendants of the original allocatees. There is no inconsistency.

The Crown also suggested that it may be appropriate to deal with the claims which relate to the South Island Landless Natives Act 1906 after the Tribunal has investigated the claim to the Southland indigenous forests (Wai 158), as that claim also involves land allocated under the 1906 Act (AB34:9). The Tribunal maintains, however, that it has sufficient information concerning these ancillary claims on which to base its findings and recommendations.

9.6 **Recent changes**

Many of the ancillary grievances have been directed at legislation which affects Maori land, in particular the Maori Affairs Amendment Act 1967, the Town and Country Planning Act 1977, and the Mining Act 1971. As these concerns were not argued in any depth by the parties, the Tribunal has avoided making any findings on such legislation. We have also commented that a number of the claimants' grievances would seem to have been caught up by recent legislative changes affecting resource management, namely the Resource Management Act 1991, the Conservation Act 1987, and the Crown Minerals Act 1991. These recent Acts require that all persons exercising functions and powers under those Acts shall take into account (or words to that effect) the principles of the Treaty of Waitangi. Under the Resource Management Act 1991, the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga is listed as a matter of national importance.

Of course these legislative provisions are subject to interpretation. The Waitangi Tribunal established to hear the Ngawha geothermal claim (Wai 304) has recently expressed strong reservations about the Resource Management Act 1991, in that it does not go far enough to ensure that Treaty principles are applied. The Wai 304 Tribunal concluded that, under the Act, decision-makers are not required to act in conformity with, and apply, relevant Treaty principles and it recommended that the legislation should be amended to ensure that Maori Treaty rights are accorded their appropriate standing. It may still be some time before Maori are accorded the recognition they seek in matters affecting their resources. None the less, the groundwork is in place for proper recognition and protection to occur, and there has been a perceptible change in public attitudes in some areas. The Department of Conservation, for instance, has displayed a positive recognition of Treaty principles in having Ngai Tahu representation in the management of Wainono Lagoon and in seeking to bring commercial eeling of that lagoon to an end. The Tribunal welcomes such moves. We caution, however, that in devolving power to local authorities the Crown's responsibility to uphold the principles of the Treaty is in no way lessened.

- 9.6.1 There are several claims which we have indicated are resolvable in the Maori Land Court. The recently enacted Te Ture Whenua Maori Act 1993 has at its heart the retention of Maori land and contains provisions which answer some of the complaints expressed by Ngai Tahu. The Act has also increased the Maori Land Court's jurisdiction on a number of issues. We have made two recommendations on

matters to be determined by the court. The second of these is now possible through new provisions in the 1993 Act. We recommend that:

- the question of accretion at Karitane be referred to the Maori Land Court for inquiry under section 29 of Te Ture Whenua Maori Act 1993 (claim 50); and
- the Minister of Maori Affairs apply to the Maori Land Court to have section 14 at Sandhill Point reserved under section 339 of Te Ture Whenua Maori Act 1993 and vested in Ngai Tahu (claim 85).

It remains to be seen whether this Act will fulfil the aspirations of the people in the management of their land.

9.7 **The restoration of the tribal estate**

In some respects the current landless, or nearly landless, plight of Ngai Tahu today makes the investigation into how this came about irrelevant. Whether the reserves were subsequently sold 'willingly' by Ngai Tahu vendors, or taken by the Crown for public works, or swallowed up by the river, the fact remains that Ngai Tahu are today all but landless. And this fact in itself stands in breach of the principles of the Treaty of Waitangi. Chief Judge Durie concluded as much in the *Waiheke Island Report*:

I come to that conclusion having regard to a policy, fundamental to the execution of the Treaty in my view, that in the colonisation process the tribes would not be left landless, and by extrapolating from that, a continuing duty to consider redress where a current state of landlessness is in itself evidence that the Crown has not maintained that intent.⁶

Because of the Tribunal's limited jurisdiction in that claim, it was unable to examine the detail of how Ngati Paoa lost its land. The Chief Judge's conclusion was based solely on Ngati Paoa's virtual landlessness as at 1987. As parties to both the Treaty of Waitangi, on the one hand, and the various deeds of purchase of their land on the other, Ngai Tahu could never have conceived that their lands would eventually be dissipated to the extent that they are today. Such a result is in breach of both compacts.

The Tribunal has found the failure to set aside sufficient land for Ngai Tahu's present and future needs, including ample provision for mahinga kai, to be a grave breach of article 2 of the Treaty. We consider that it was therefore imperative that the Crown ensure that the paltry lands and fisheries that were reserved from the purchase were kept intact for the support and enjoyment of the tribe. In failing to protect even the miserable resources which were reserved to the tribe from the purchase of their land, the Crown has acted in serious breach of the Treaty.

The onus is now on the Crown to restore a tribal endowment. The Chief Judge's conclusion with

regard to Ngati Paoa has equal relevance to the plight of Ngai Tahu:

It seems then a reasonable expectation today, and in keeping with the spirit of the Treaty, that the Crown should not resile from any opportunity it may have to provide at least a part of those endowments that it ought to have guaranteed, and to ensure, that proper policies to that end are maintained.⁷

9.7.1 In paragraph 9.4.5 the views of a former Director-General of Conservation, Mr Piddington, were referred to in relation to Crown ownership of land. This Tribunal agrees with Mr Piddington's views that the Crown does not need to have ownership in order to ensure that land is managed so as to safeguard and conserve its valuable resources in the public interest. The Tribunal has also adopted this view during its consideration of claim 51 concerning Taiaroa Head. The Tribunal has gone further to demonstrate that, within the existing statutory framework, there is adequate provision to enable the return of Crown land to Maori ownership while also providing complete protection of the national interest. The Tribunal has set out the relevant sections of the Reserves Act 1977 and Te Ture Whenua Maori Act 1993 which would permit such a course. The Tribunal has also reflected that there is a lack of knowledge of these procedures by Maori and Pakeha alike and that this innocent ignorance extends even to local authorities and Government departments. Perhaps by drawing attention to the existing law the Tribunal may succeed in persuading the Government to have a second look at its proposed overarching policy which was announced in June 1994 and referred to in the booklet entitled *Crown Proposals for the Settlement of Treaty of Waitangi Claims*. The Tribunal respectfully draws to the Minister of Conservation's notice its statement of the procedural regime, as recorded at paragraph 4.6.7 of this report, which is presently available to the Minister. There seems to be a lobby of persons and organisations which is opposed to any Crown land administered by the Department of Conservation being returned to Maori solely or to Maori and the Crown jointly. These persons may be uninformed on the protection mechanisms which are available to the Government.

9.7.2 The question of settlement for Ngai Tahu has been left to the two parties to negotiate. This report has established the need for the restoration of a tribal land base on a regional basis. To this end, we have recommended that, in negotiating the settlement of the wider Ngai Tahu claim, both parties have regard to the appeals of the tangata whenua in regions such as Kaikoura, south Westland, and Aparima (claims 2, 15, 16, 73, and 75). We acknowledge that there will also be other Ngai Tahu communities in similar circumstances whose landless plight was not brought to the attention of the Tribunal. We strongly urge that both parties have regard to the local concerns.

In the same way, the Tribunal finds that the Crown is similarly duty-bound to restore fishery resources to the tribe. We have recommended in several instances that alternative regional inland and estuarine fisheries be developed for the use of the tribe (claims 3 to 8, 10, and 53). In particular, in response to the claimants' requests, we have recommended that:

- The Crown should vest Tutaepatu Lagoon in Ngai Tahu ownership and contemporaneously enter into a joint management scheme with Ngai Tahu for the development of the fishery for

their use. The joint management scheme should bind the Crown to provide financial, technical, scientific, and management resources (claim 9).

- Wainono Lagoon should be developed in partnership with Ngai Tahu of south Canterbury as a traditional fishery resource for them (claim 11).
- The Crown should commence a programme of effective consultation with Ngai Tahu as to the management of Waikouaiti (Hawkesbury) Lagoon and should ensure the resumption of fishing by the tribe on a traditional basis (claim 55).

Direction has come from the claimants with respect to the Canterbury region in the recent publication of a resource management strategy for the development of inland and estuarine fishery reserves. The Tribunal commends them for this positive start. We recommend the development of resources to fulfil the requirements of Ngai Tahu in each region. On a final note, and echoing the sentiments expressed in 1991, the Tribunal points out that the participation of Ngai Tahu in the management of resources is essential to ensure that such resources are developed in a way which reflects their needs.

9.8 **Conclusion**

This third major report concludes the Wai 27 Tribunal's inquiry into all Ngai Tahu grievances to the point of determining whether the tribe's claims are well founded or not. It does not, however, entirely complete the statutory duties reposed in the Tribunal by section 6 of the Treaty of Waitangi Act 1975. Subsection (3) of that section gives the Tribunal discretionary power to recommend the action to be taken by the Crown to compensate claimants for any act, omission, policy, or practice of the Crown found to have prejudicially affected them. In chapter 24 of its 1991 report the Tribunal set out its general views and indicated that it would be prepared to hear the parties and make appropriate recommendations if settlement negotiations between the claimants and the Crown should fall down.

As this report on the ancillary claims reaches finality and is about to be presented, there is a request from the claimants for the Tribunal to reconvene on the question of remedies. That request is presently being considered by the Tribunal. This makes it all the more important, therefore, that this report on ancillary claims can be completed so that the claimants and the Crown can have before them the Wai 27 Tribunal's final assessment of all Ngai Tahu grievances, as well as the recommendations made in respect of certain claims.

1. *Ngai Tahu Report 1991*, para 16.1.1

2. *Orakei Report*, 1987, p 41

3. *Ibid*, p 154

4. Engineer-in-chief and under-secretary to district engineer Greymouth, 14 July 1938, W1 44/2/2, NA Wellington

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5. Despite its relevance, the Crown omitted this claim from its submission concerning the South Island Landless Natives Act 1906 (AB34:8).

6. *Waiheke Island Report*, 1987, pp 36–37

7. *Ibid*, p 40

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