

Ngai Tahu Land Report

Appendix 08 Presiding Officer's Closing Address

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PRESIDING OFFICER'S CLOSING ADDRESS

After a hearing that commenced here on this marae at Tuahiwi on 17 August 1987 and continued in various places at almost regular monthly intervals over the next two years we have now come to the end.

It has been a marathon in every sense of the word. As participants in that marathon we are all exhausted by the effort. By "we" I mean the claimants, the Crown, and this tribunal. But behind these three principal participants there also lies a host of supporting people who have taken part. If I could magically switch on a movie screen and display the record of this inquiry it would take an hour to acknowledge the credits.

It was decided at the outset of this claim that the tribunal would endeavour to receive as much evidence as possible in written form. That procedure was followed and apart from some oral testimony of kaumatua and other witnesses which, with all other evidence was recorded on tape for later transcription, the bulk of the evidence was presented in writing. The result is that the tribunal has before it a huge written record 8.5 metres high which documents the Ngai Tahu case and the Crown response. It also includes numerous other submissions made to the tribunal by persons and bodies interested in or affected by the claim.

The tribunal notified and timetabled its hearings in such a way as to allow the claimants and the Crown and other bodies to use the three weeks between each week of hearing to prepare for the fourth week of hearing. This procedure thrust a great burden on counsel as they co-ordinated and supervised the preparation of material by the researchers and experts involved. It was continually, over 25 weeks of hearings, a battle against time, but almost without exception the tribunal as a result was able methodically to work through that evidence. In the course of this inquiry the tribunal travelled all over the South island in order to hear and see the facts and issues arising from the claim.

The record shows a total of over 900 submissions and exhibits were presented to the tribunal, some containing as many as 700 pages each. The document evidence tendered to the tribunal comprised thousands of different items. The presentation of written evidence and submission gave rise to another helpful procedure adopted by the tribunal. In many cases the evidence given was detailed historical or other expert fact. After presentation at the hearing opportunity was given to the parties and tribunal to question the witness to clarify the evidence, but in addition each party was permitted to file a written memorandum commenting on the evidence and expressing

any contrary view. By this method the tribunal not only avoided unnecessary and often time wasting oral examination, but allowed both the Crown and the claimants the necessary time to give considered and researched response.

During the course of hearing, 20 memoranda of directions and interlocutory matters were issued by the tribunal and responded to by counsel. The record of documents in this claim is a large report in itself although it only lists the subject headings and author of each piece of evidence presented. Throughout this extensive inquiry of fact the tribunal has been helped considerably by the cooperative, constructive attitude of counsel appearing for the claimants and for the Crown. I will refer later to their participation in this inquiry.

When Mr Temm opened his case for the claimants he explained that although it was a single claim it nevertheless covered nine separate grievances which he referred to as "The Nine Tall Trees of Ngai Tahu". We have heard this expression many times over the past two years. We have also found as the hearing progressed that on each of the nine tall trees there were a varying number of branches each of which represented a claim within the claim. So that we are not facing nine separate claims, but in fact a total of 73 grievances arising out of the eight Ngai Tahu Crown purchase deeds, and mahinga kai. Each of these grievances requires comprehensive research and inquiry. But that is not all. Underneath the nine tall trees lie considerable undergrowth-representing over one hundred smaller grievances mainly raised by the people as the tribunal moved through the different districts to hear the main claims.

This will give some indication of the huge task that now confronts this tribunal as it commences to assess the merits of each of the claims and to determine the issues.

The tribunal proposes to report in two parts on this claim and the completion of counsel's submissions today ends the first phase. The tribunal in its first report will generally and comprehensively review the claim, examining and determining the facts and issues and reaching findings of fact. The tribunal will also define the principles of the Treaty of Waitangi which governed the relationship between Ngai Tahu and the Crown. Necessarily the report will contain the findings of this tribunal on the question of whether the Crown has acted in breach of those principles as that is the primary and statutory requirement of this tribunal. This first report will not contain specific recommendations as to the quantum of compensation payable or parcels of land that should be returned to Maori ownership. The tribunal proposes, and counsel for both the claimants and Crown respectively agree, that the question of remedies should be held over and dealt with at a later stage and, if necessary, by a further tribunal report. This is not a new approach by the tribunal. It was followed in the Muriwhenua Report (1988). It will no doubt be followed by other tribunals and is a sensible move which will save considerable time and expense. It will allow the claimants and the Crown to negotiate and even hopefully mediate settlement of remedies after both parties have had an opportunity to consider the tribunal's findings. The tribunal is, of course, mindful that its report should be sufficiently declaratory of the extent of its findings of grievance so that the Maori claimants, the Crown and indeed the public at large may have some perception of the quantum of any settlement that may be needed.

Having explained that the tribunal proposes to defer recommendations on remedies it should also be mentioned that if the parties cannot reach a settlement on remedies

further formal hearings may be required to hear submissions from counsel on the nature and extent of remedies sought.

Although the question of general remedies will be deferred it is quite possible the tribunal may include specific recommendations in its first report where it is seen by the tribunal that urgent action is required to deal with a matter or that it may be desirable and convenient in the report to advise a certain course of action. This may arise in the case of some of the undergrowth claims.

The tribunal is anxious to avoid fragmentation of its reports but it is also very conscious of the fact that this claim has been proceeding over a period of two years and has been a considerable drain on the resources of the claimants. It is possible that the tribunal may have to consider this question as a matter of immediate concern and act accordingly. I now come back to the tasks in hand-the compilation of the report on this immense and complex claim.

May I say that the tribunal has drawn together the draft plan and profiles of the report. It is daunting to contemplate the work that is now required to fill in the framework and build the report. It will take some time and will require patience and tolerance on all sides. But that is what this tribunal has been commissioned to do and will do it. Each grievance will require separate analysis of the arguments for and against. Behind the arguments for and against each grievance lie masses of historical, legal, archaeological, biological, geographical and other scientific, social, economic facts and submissions. This tribunal has undoubtedly had placed before it every discoverable piece of information relevant to the wide range of facts surrounding the many and varied topics covered in this claim. Only those who have been present throughout can fully understand the mammoth mountain of evidence and submission that has accumulated and now has to be broken down and sifted and sorted and pigeonholed into each of the respective claims before each issue can be decided.

But it can also be said that those who have been present throughout have shared a learning process. And out of this learning process, and as a result of concessions that the Crown have made during the course of this hearing, it is clear indeed that underlying the whole of the Crown dealings with Ngai Tahu in the South Island there was a failure of the Crown to provide adequate reserves for the present and future needs of the Ngai Tahu people when the various purchases took place.

This failure of the Crown to ensure Ngai Tahu were left with a sufficient endowment for their own present and future needs has impacted detrimentally on the economic circumstances of Ngai Tahu. It also has resulted in the denial of access to traditional food resources.

The tribunal will deal fully with this breach of Treaty principles in its report, but the evidence presented to this tribunal throughout this inquiry and acknowledged by the Crown is so cogent and clear that the tribunal would be remiss in its duty if it failed to comment on it at this point. There are a number of issues that require considerable study by the tribunal before it makes a finding-some of these issues are substantive matters. These include:

i) whether or not Ngai Tahu should have been awarded tenths in the Otakou purchase;

ii) whether Ngai Tahu sold 'the hole in the middle' in the Kemp purchase; and

iii) whether the land west of the Waiau river (the Fiordland area) was sold under the Murihiku deed.

There are others. Persuasive argument and considerable evidence on these disputed questions has been put to the tribunal by both the claimants and the Crown. They require careful investigation. But not so the inadequacy of reserves and the lack of land resource for Ngai Tahu. The Crown's failure to apply its stated policy that the agents of the Crown "were not to purchase from the Maori any land the retention of which would be essential or highly conducive to their own comfort, safety or subsistence" is plainly and abundantly clear to this tribunal and to all who heard and took part in these proceedings.

It is important that the tribunal notify this finding; albeit expressed today in a preliminary way and to be enlarged upon and perhaps quantified in the full report; for this reason.

The claimants have indicated that as part of any remedy they seek return of land. There can be no doubt whatsoever that Ngai Tahu, in any subsequent negotiations with the Crown to settle remedies, will be asking the Crown to return to them Crown land or land vested in state owned enterprises. Ngai Tahu have stated their desire for land as compensation to this tribunal and publicly on several occasions. Until this tribunal has completed its investigations and reached its findings on each grievance it cannot with any certainty indicate the extent of grievances and thereby allow the parties to treat with each other on the question of recompense. That the tribunal is able to say today however that Ngai Tahu were inadequately endowed with land at the time of the Crown purchases must surely indicate that Crown land or state owned enterprise land may be resorted to as compensation.

Unfortunately the proceedings before this tribunal have not always been as fully reported as one might have wished in order to apprise the nation of the extent of the grievances in the Ngai Tahu claim. Indeed this situation has also occurred in the North Island in respect of other claims.

The president of the Court of Appeal, Sir Robin Cooke, in the decision given on 3 October 1989 in the Tainui coal case said this:

it is obvious that, from the point of view of the future of our country, non-Maori have to adjust to an understanding that does not come easily to all: reparation has to be made to the Maori people for past and continuing breaches of the Treaty by which they agreed to yield government. Lip-service disclaimers of racial prejudice and token acknowledgements that the Treaty has not been honoured cannot be enough. An obligation has to be seen to be honoured. On the Maori side it has to be understood that the Treaty gave the Queen government, Kawanatanga, and foresaw continuing immigration. The development of New Zealand as a nation has been largely due to that immigration. Maori must recognise that it flowed from the Treaty and that both the history and the economy of the nation rule out extravagant claims in the democracy now shared. Both partners should know that a narrow focus on the past is

useless. The principles of the Treaty have to be applied to give fair results in today's world.

The learned judge in making that statement was referring to the possible award of Crown surplus lands in settlement of confiscation claims.

The Court of Appeal declared in the Tainui case that the Crown should take no action either directly or by its agents to dispose of Crown lands until such time as a protective scheme had been worked out for the Tainui claimants.

As land will be an essential ingredient of remedial settlement in the Ngai Tahu claim the tribunal urges government to follow the clear principle stated in the Tainui case and take no action to dispose of surplus South Island Crown land pending the completion of the Ngai Tahu report and the tribunal recommendations. Following the unequivocal view of the Court of Appeal, that any attempt to shut out in advance any claim to surplus land is not consistent with the Treaty this tribunal would expect government and its agents to abide by this declaration and hold back from land disposal.

I now wish to make some acknowledgements.

The tribunal wishes to thank the claimants, Mr Tau and the Ngai Tahu Trust Board for the dignity, patience and courtesy which in every way have been so much a part of the way in which these proceedings have been initiated and conducted. At all the hearings the quiet restraint and politeness of the kaumatua and people have impressed this tribunal. There have been many occasions when the witnesses including professional and expert persons have been just unable to control strong emotional stress as they have recounted history and its effect on Ngai Tahu people. However strong, feelings of frustration and anger have been carefully restrained. This has not been an easy process as there has been much to be angry about. Lurking constantly and there to step in and moderate strong language has been the great ally of Maori people-their constant companion-their sense of humour.

There has not been much to laugh about in the evidence apart from the irony of some of it and the many misjudgments of Maori and their future in much of it. This nation is fortunate that its tangata whenua can still laugh.

What Ngai Tahu can well be proud of is that they as a people have found themselves as a people and a tribe. As importantly, they have more than adequately honoured their promise to their tipuna in the presentation of this claim, this 'take' to the Waitangi Tribunal. Ngai Tahu have followed the processes laid down by law. They have always done that but without much success. There is no doubt that with the passing of years it is not always possible to retain the accuracy of record, particularly of the spoken and handed down word. It cannot be said of Ngai Tahu that they have not persevered in their search for justice. I hope their wairua can now rest.

The claimants, Mr Tau, the trust board and all Ngai Tahu who have supported this claim have upheld the mana of Ngai Tahu They have discharged the heavy responsibility which has burdened Ngai Tahu shoulders and hearts and minds for so long.

Heading the presentation of the Ngai Tahu claim has been their counsel, Mr Paul Temm QC. The tribunal thanks Mr Temm for the courteous, constructive and very able way in which he has presented this very wide ranging claim. The tribunal has appreciated very much indeed counsel's helpful procedural suggestions which have certainly allowed the proceedings to flow smoothly yet enabled the tribunal to allow adequate response on all evidential matters. The tribunal extends also to Mr David Palmer its gratitude for the assistance he has given during this claim. The tribunal has asked me also to thank Crown counsel Mrs Kenderdine and Mr Blanchard. I believe it is important to record at the end of this arduous inquiry, not only the most competent way in which the Crown has responded to the claim, but more particularly the way in which it has been done. Crown Counsel saw the Crown's role in this matter as presenting to the tribunal every relevant fact uncovered by the team of researchers and professionals engaged in this massive task. And they did so.

In my respectful view, Crown counsel have acted in every way to protect the Crown's position, yet more importantly to uphold the honour of the Crown. The Crown did not see itself in an adversarial role, though it did not hesitate to challenge disputed grounds; it rather saw itself almost in an amicus curiae role which required it to bring to the tribunal's notice all discovered material and opinion whether against or for the claim. The background researching by Crown officers and professional consultants has covered every facet, every nook and cranny of not only the nine tall trees and the related claims but also the large number of small claims. The result is that the record before this tribunal contains a most comprehensive and valuable taonga that will provide future generations with a priceless data base. This has resulted from the combined efforts of the claimants, the Crown and the tribunal's research teams. They are all to be thanked and congratulated for their diligence and scholarship. Before passing from the subject of the Crown's participation in this inquiry may I venture to suggest that if those Crown officials attending the South Island land sales 140 years ago had regarded the Crown's honour in the way these proceedings have been conducted by Crown officers this tribunal would not have been here today.

In conclusion, but not least of all, the tribunal expresses its thanks to the band of loyal and dedicated staff of the Ngai Tahu Trust Board and tribunal, and as well the trustees and marae committees of marae we visited, and the people, for all the arrangements made to ensure our hearings ran smoothly and that we were comfortable.

It now only remains to be said that the tribunal reserves its findings which will be reported to the minister in due course.

The tribunal now stands adjourned.

Waitangi Tribunal, Department of Justice, Wellington.