Chapter 6

Rakiura Ancillary Claims

There are but a few grievances concerning land in Stewart Island. The most consequential of these contrary to the principles of the Treaty of Waitangi — regarding the Titi Islands and Rarotoka Island — have already been dealt with in the *Ngai Tahu Report 1991*. The claims were responded to by the Crown witness, David Alexander.

6.1 Claim no: **90**
Claim area: **Paterson Inlet**
Claimants: **Rena Naina Peti Fowler (E14)**
Claim:

> **Mrs Fowler claimed that land originally granted to five of her tupuna under the Stewart Island Grants Act 1873 has been 'lost to us by way of methods and means that we are unable to prevent' (E14:1).**

6.1.1 This claim concerns the confusion about two section 14s, in different blocks, on either side of Paterson Inlet. In 1878 William, Robert, George, and James Coupar, and Phyllis Wesley were granted title to section 14 in Paterson survey district under the Stewart Island Grants Act 1873 (E14:3). Although the grant did not say so explicitly, it is evident from the sketch on the grant that the section lay in block XVI on 'the Neck', on the southern side of the harbour. In conformity with the legislation, the section comprised 48 acres: 10 acres per male and eight per female.

In addition to title to section 14, block XVI, the Maori Land Court also has record of title to section 14 in block I, Paterson survey district. This section lies across the water on the northern side of the harbour, on an isthmus between Halfmoon Bay and Paterson Inlet, and originally comprised 30 acres. According to court records, section 14, block I, like its counterpart in block XVI, was granted to William, Robert, and George Coupar under the Stewart Island Grants Act (AB25:2).[1] The claimant Mrs Fowler is listed as the 10th owner in the schedule of ownership orders for the section (E14:10). However, information from the Land Registry Office shows that section 14, block I was in fact granted to a James Thomson on 24 January 1882 (E14:16).[2] The grant was made with 'the written authority' of the Governor and it is considered from this that at the time of its issue the Crown considered that the land was Crown land available for disposal (AB25:11).[3] The section has since passed hands a number of times and is now referred to as part section 14, block I, of 22 acres 3 roods.

Figure 9: Paterson Inlet

The confusion over the two sections may have arisen from an 1891 schedule of land granted to half-castes under the 1873 Act. Of the five people interested in section 14, the schedule listed only William, Robert, and George Coupar, and did not specify which block the section lay in. This would perhaps lead one to conclude that section 14 comprised only 30 acres: the acreage of the section in block I. A further basis for confusion may have been that in the 'Block' column of the schedule two periods are shown for the Coupars' allocations. At a quick glance, they could be mistaken for inverted commas, which would then denote that the section fell within block I (E14:9).[4]

Maori Land Court staff became aware of the discrepancy in 1983 after inquiries were made about the matter by Mrs Fowler. She was informed that section 14, block I was not Maori land and that the court had 'done all that it can' (AB25:12).[5] In March 1984 part section 14, block I was determined to be Maori freehold land but an application was subsequently made by the registrar of the court to have this order amended. The deletion of part section 14, block I from the schedule of Maori land was ordered on 12 February 1985 (AB25:15).[6]

In her submission to the Tribunal, Mrs Fowler wrote:

> I ask this learned Tribunal to please help us resolve this rather long standing problem which I feel is not of our making . . . I feel that it is not only crown leases that are suspect but that it is even in the everyday execution of simple pen mistakes and we are stuck with the burden of subsequent reactions. (E14:2)

The Tribunal's conclusion

6.1.2 It is apparent that William, Robert, George, and James Coupar and Phyllis Wesley did receive the land they were entitled to under the Stewart Island Grants Act 1873. Moreover, it is clear from the grant that this entitlement was satisfied with section 14, block XVI. It is apparent that the Maori Land Court's error in recording section 14, block I as Maori freehold land has resulted in the confusion surrounding the sections today. This error, however, has been brought to notice and correctly amended by the court. The Tribunal is satisfied that section 14, block I, granted to James Thomson in 1882, has never been Maori freehold land. The grievance is not sustained.

6.2 Claim no: **91**
Claim area: **Paterson Inlet**
Claimant: **Sydney Cormack (E16)**
Claim:

> **Mr Cormack alleged that the Crown's application to the Maori Land Court to purchase Maori reserves on 'the Neck' of Paterson Inlet was inconsiderate of Maori either living or owning land there. He also objected to the legislation of the time with respect to 'uneconomic interests', which made it difficult for the Maori owners to oppose the application.**

6.2.1 In April 1971 the registrar of the Maori Land Court in Christchurch was informed of the Department of Lands and Survey's 'general consideration' to purchase Ngai Tahu reserves around Paterson Inlet in order to provide public reserves in the area (P6:345).[7] The Commissioner of Crown Lands 'had in mind' in particular sections 15A (a 10-acre school reserve) and 22 (an old landing reserve) in block XVI and sections 192 and 193 in block I.

Mr Cormack was informed of the Crown's interest in purchasing the sections on 3 May 1971 (P6:346).[8] An application to have trustees appointed for the landing reserve was heard by the Maori Land Court on 5 August 1971 (P6:347–348).[9] Mr Cormack was present. Four trustees were appointed under section 438 of the Maori Affairs Act 1953 to hold and administer the land for the benefit of all owners of Paterson Inlet block XVI, with no power to alienate.

6.2.2 Mr Cormack had also been advised of the Maori Trustee's intention to purchase the uneconomic interests of section 1 on the Neck, comprising 86 acres. In his submission to the Tribunal, Mr Cormack alluded to at least two Maori Land Court sittings where section 1 on the Neck was at issue (E16:6). He maintained that a valuation of £700 was obtained for the section and that the sale was objected to by three economic owners. It was said that at the next sitting a revised valuation of £300 was given and consequently there were now no economic owners. Mr Cormack maintained that it was only the owners' openly expressed resistance to the sale which stopped the alienation of the land to the Crown. The Crown's application was dismissed and the court recommended that no further sale of Maori land be made on Stewart Island.

The above allegation has not been researched by Mr Alexander. Regarding the claim about the Crown's intention to purchase other Ngai Tahu reserves on the Neck, Mr Alexander submitted that, as at 1971, the Crown was only contemplating acquiring the sections, and did not appear to have committed itself to the concept.

The Tribunal's conclusion

6.2.3 Regarding the Crown's intention to purchase Ngai Tahu's land on the Neck, the Tribunal is of the view that as none of the land was taken the claimants have not been prejudicially affected. We do not uphold this grievance.

In the absence of any evidence on the other aspect of Mr Cormack's claim, we are unable to reach any finding. However, as Mr Cormack points out, the old ‘uneconomic interests' rule which allowed small interests in Maori land to be acquired by the Maori Trustee on succession had the effect of disenfranchising many Maori landowners. It may well have lessened the number of owners in each block, thereby possibly reducing the volume of opposition to alienation of the land. The uneconomic rule was strongly objected to by Maori and was repealed in 1974.

6.3 Claim no: **92**
Claim area: **Port Adventure and Toitoi**
Claimant: **Harold Ashwell (E3)**
Claim:

> **Mr Ashwell claimed that land set aside at Port Adventure and Toitoi under the South Island Landless Natives Act 1906 but never granted should be returned to Ngai Tahu without the conditions stipulated by the Government.**

6.3.1 Under the landless natives grants scheme, three blocks of land were set aside on Stewart Island to provide for those deemed to be landless. The first of these, at Lords River, was surveyed and the list of allocatees and their respective sections was gazetted in compliance with the South Island Landless

Natives Act 1906 (O14A:67).[10] Under pressure to meet the requirements of the scheme, in 1904 two further blocks on Rakiura were considered for allotment. The Port Adventure block, of 10,000 acres, was accordingly declared permanently reserved for allotment to named individuals from Marlborough. Land at Toitoi, 7400 acres in extent, was also permanently reserved for Ngai Tahu of Kaikoura (O14A:67).[11] The names of the allocatees, together with their respective shares in the two blocks, were entered into the Native Land Register (AB27:313–345).[12] Not all of the land in the blocks was allocated: only 9445 acres of the 10,000-acre Port Adventure block and 7035 acres of the 7400-acre Toitoi block. As with much of the land granted under the scheme, the two blocks were of ‘indifferent' quality. In 1929 the field inspector commented:

> Owing to the very poor nature of the land when considered for settlement purposes, and the great expense and risk of failure in bringing it in, I cannot see any possibility of making a successful settlement on either of the blocks even after the milling timber is taken off. There are a few isolated spots along the coast that might be considered possible but for the fact that access has to be by boat and no natural harbours are provided. (AB27:390)[13]

Although permanently reserved, the Port Adventure and Toitoi blocks were never surveyed, and as a result title was never granted to those listed as entitled to the land. Under section 8 of the 1906 Act the gazetting of the names of those entitled, their respective shares, the name of the locality, and the section numbers was required as a basis of title. As a subdivisional survey was not completed, such a notice could not be published.

In 1924 the matter of the Port Adventure block was brought to the attention of the Minister of Lands by a number of the Marlborough allocatees (AB27:376).[14] The possibility of issuing title to each block in the names of the beneficiaries as a whole, rather than undertaking a subdivisional survey, was investigated but never followed up. This could be attributed to a number of factors: the expense of surveying the block boundaries, the fact that Maori had not settled on the land, and the suggestion that the Crown might resume the land and pay the beneficial owners compensation (AB27:387–388).[15] In any case, the matter lapsed. Further thought was given in 1964 to the Government resuming the land under section 110(6) of the Maori Purposes Act 1931 and compensating the intended owners. Again, nothing came of the suggestion.

Attempts to gain title

6.3.2 In the early 1980s an application was lodged by Rewi Fife, president of Rakiura Maori Land Incorporated, for Crown grants to issue to the Port Adventure and Toitoi blocks. Mr Fife made the application as an individual rather than on behalf of the incorporated society. Although having no beneficial interest in the blocks himself, he was motivated by his interest in protecting Maori land on Stewart Island.

His application was considered by the Department of Lands and Survey and it was established that the

amount of land which had been allocated to individuals by Mackay and Percy Smith (7035 acres 3 roods 3 perches in the case of Toitoi and 9445 acres 1 rood 30 perches in the case of Port Adventure) was Maori land pursuant to section 110(4) of the Maori Purposes Act 1931. The residual land in the blocks, which had not been required for allocation, was considered to be Crown land in terms of section 110(9) (AB27:399).[16] It may be helpful at this point to set out these subsections because the status of the land became a material issue in the negotiations for the return of the land and is indeed the key issue of this claim. Section 110(4) of the Maori Purposes Act 1931 provided that:

> All land permanently reserved and *allocated* in favour of landless Natives under the enactments in this section first recited (whether titles are issued under this section or otherwise) shall be deemed to be Native land within the meaning of the principal Act . . . [Emphasis added.]

Under section 15 of the Maori Purposes Act 1966 a new subsection (subs (9)) was added to section 110 of the 1931 Act. This subsection provided that:

> Where any land permanently reserved pursuant to the enactments referred to in the recital to this section *has not been allocated*, that land may be dealt with as if it were ordinary Crown land subject to the Land Act 1948. [Emphasis added.]

As set out above, throughout the initial phase of negotiations to have the Crown grant of the blocks completed, the Crown accepted that the land allocated to various individuals was Maori land in terms of section 110(4). Meetings between the Department of Lands and Survey on the one hand and Mr Fife and other members of Rakiura Maori Land Incorporated on the other took place throughout 1982. Questions regarding the society's authority to negotiate on behalf of the beneficial owners were dispelled by Judge M C Smith of the Maori Land Court, who informed the department that the society already had the power under its rules to negotiate with the Crown for the completion of the grants (AB27:405).[17] The department's position on completing the grants included the retention of a 20-metre wide strip of coastline along the full length of both blocks and up the Toitoi River. It also sought the society's agreement that the Crown would not be required to partition the block according to the original allocations. Of less importance was a walkway easement over an existing track from Little Glory Bay to Port Adventure. Although the above were put to the society as conditions, in fact the department's bargaining position was not strong. As the allocated land was considered to be Maori land, the only negotiating strengths were the unallocated areas of Crown land within each block and the possibility that the Local Government Act 1974 would apply to the blocks, a partition of which would require the setting aside of a 20-metre wide esplanade reserve (AB27:411–412).[18] This possibility was later dismissed.

The society's response to the department's position was sent to the head office at the close of 1982. In effect it was a complete rejection of the Crown's terms. The society proposed that the allocated area, including a one-chain strip *below* the high-water mark, be vested in the society immediately in trust for

the owners. Anything less, it was argued, would not reflect the true intent of the reservation: 'The coast and foreshore contain the various elements traditionally essential for the survival of the Southern Maori people and culture . . .' (AB27:416).[19] Of concern was the lack of control they would be able to exert over resources such as paua if they did not own the coastal strip (AB27:427).[20] It was also contended that, as an expression of goodwill and in recognition of the many years of delay in issuing title, the residual areas of Crown land should be included in the title of the blocks. The society also stated that the question of survey should be adjourned and left open for a future decision when the position of the descendants could be better assessed. It was particularly opposed to the walkway easement, desiring control over access to the blocks because of the revenue received from recreational shooting. Not surprisingly, therefore, this first phase of negotiations resulted in a stalemate.

A further meeting was held between the parties in September 1983, with consideration given to the reservation of the Toitoi swamp as a wetland area as well as other alternatives to ease the deadlock (AB27:424–429).[21] In November 1983, however, the office solicitor for the department produced an alternative legal opinion on the interpretation of section 110 of the Maori Purposes Act 1931 (O14B:141–142).[22] Sections 7 and 8 of the South Island Landless Natives Act 1906 were referred to, which provided:

> 7. For the purpose of carrying out the intention of this Act, or in fulfilment of any contract, promise, agreement, or understanding in connection with the setting-apart of lands for landless Natives in the South Island, the Governor may from time to time execute warrants for the issue of Land Transfer certificates to all or any parts of the land heretofore selected and allocated in favour of any such purpose, to any person or persons whose names have been ascertained either in severalty or as tenants in common, and may fix the terms and conditions and the dates on which the legal estate therein shall respectively vest.
>
> 8. The names of the persons deemed to be entitled to such instruments of title, together with the respective areas allotted them, shall be published in the *Kahiti*, together with the name of the locality and the sectional number; and such publication shall form the basis of title, and shall operate provisionally as such for the purpose of exchange, subdivision, or the reduction of areas as hereinafter provided.

The assistant solicitor argued that 'allocated' was used in a general sense in section 7 and was particularised in section 8. For 'allotment' to have taken place in terms of the South Island Landless Natives Act 1906, the names of the persons deemed entitled, their respective areas, the name of the locality, and the section number would all have had to have been determined. As the land had not been surveyed, the last of these four factors, the section numbers, had not been set down. Neither were the details of the allocations published in the *Kahiti*. Therefore, it was asserted, there was no allocation in terms of the 1906 Act and section 110(4) did not apply. Rather, it was thought that the land fell within the provisions of section 110(9) and, therefore, the land was Crown land subject to the Land Act 1948. Mr Fife was subsequently told by the Minister of Maori Affairs that the Maori Land Court 'agreed'

with the department's finding (O14B:146).[23] This endorsement, however, was given by the district solicitor for the Maori Affairs Department in Christchurch. It was not a considered opinion, but simply a letter concurring with the Department of Lands and Survey's view (AB27:461).[24]

Although the change in status did not affect the Crown's intention to complete the title grant, in the words of the director-general, 'it gives the Department a much stronger hand and removes the bargaining power of the Maoris' (AB27:430).[25] The department was now in a position to 'insist' on its conditions.

The society contested such a conclusion, arguing that section 7 recognises allocations as made, while section 8 clearly states that the details to be published in the *Kahiti* are for the purpose of effecting title, not allocation. They pointed out that there is nothing in the Act to say that the non-publication of title details in the *Kahiti* (due to the Crown's failure to survey the blocks) voids any allocations made in favour of landless natives (AB27:443).[26]

It was suggested by the department that the Maori Land Court was the most appropriate authority to resolve the issue of the blocks' status. The society, however, was distrustful, viewing the court's earlier endorsement of the Crown's position as collusion, even though the court had not made any determination on the issue. Negotiations between the department and the society once again broke down. Subsequent appeals were made by the society to the Minister of Maori Affairs, the latter again recommending that the issue of status be referred to the court for determination. In his view, however, the status of the land was 'of little long term importance' (AB27:446).[27] In November 1986 the society wrote to the Waitangi Tribunal seeking the Tribunal's 'intervention and assistance' in having the blocks legally declared Maori land, and thereby returned to the rightful owners (AB27:452–453).[28]

6.3.3 The following June a meeting was arranged between Mr Ashwell and Mr Te Au, on behalf of the society, and the Minister of Maori Affairs, Koro Wetere. As a result of this meeting the following agreement was reached:

- the incorporation accepted, under protest, that the blocks were Crown land;
- the Crown would apply to the Maori Land Court to vest the full area of the blocks, including the residual Crown areas, in the society as trustees for the allocatees under section 437 of the Maori Affairs Act 1953;
- a 20-metre wide strip along the coastline and the banks of the Toitoi River would become a Maori reservation under section 439 of the Maori Affairs Act 1953 for the common use and benefit of the public;
- the incorporation would consider the reservation of the Toitoi swamp for public use and benefit; and

- the Crown would arrange survey of the blocks and reservations (O14B:147).[29]

In his submission to the Tribunal at Te Rau Aroha Marae at Bluff in February 1988, Mr Ashwell expressed his resentment that lands set aside by an Act of Parliament for a specific purpose have been made the subject of a new deal (E3:5). If a new agreement had to be negotiated, he maintained that this should be done on the basis that the number of descendants had trebled and therefore the area of land required to settle them should also be trebled. With regard to the Maori reservations to be created for public purposes under section 439 of the Maori Affairs Act 1953, he stated that they should not have to concede anything to get what is rightfully a Maori resource.

6.3.4 In researching the claim, Mr Alexander submitted that the Crown has agreed to more than its strict obligations require of it:

- it has agreed to all of the land in both blocks becoming Maori land, not just the 9445 acres of the Port Adventure block and the 7035 acres of the Toitoi block which it was originally planning to grant; and

- it could have insisted that the coastal and riverbank strips remain in Crown ownership (O14A:70–71).

Although Mr Alexander conceded that the additional grants could easily be justified given the nearly 90 years of Crown neglect in arranging the grants, and the saving that the Crown makes by not having to survey all of the individual allocations, he considered that the agreement leaves the Crown open to risk. At no time during the negotiations with Rakiura Maori Land Incorporated has the Crown consulted the allocatees or their successors, or attempted to do so. He maintained that this leaves the Crown open to a charge that it has gone behind the backs of those who have a greater stake than the society in the land concerned. This, he said, may be dealt with by the Maori Land Court at a later date. He did not address the key issue regarding the status of the land.

The survey has not yet begun. Attempts to alter the boundaries to reduce the costs of surveying the blocks and to regularise the land-holding pattern were not supported by the Department of Conservation. On 5 January 1988 the chief surveyor wrote to the Acting Director-General of Lands, asking for urgent confirmation that the survey was to proceed (E29).[30] It was estimated that the survey would cost $200,000, although this was not definite. The Department of Survey and Land Information is also aware of this claim to the Tribunal and has suggested that any survey should wait, pending the Tribunal's views on the matter (E28).[31] In July 1989 discussions were held between the department and the Maori Land Court as to the form the section 437 application should take (AB27:455–459).[32] It appears that recent delays have been due to the problems and expense of carrying out the block surveys. The department wishes to explore further the possibilities of boundary rationalisation with the Department of Conservation and the society (AB27:460).[33] Despite the lack of progress there is no

suggestion that the Crown has withdrawn its commitment to seeing the agreement implemented.

The Tribunal's conclusion

6.3.5 **On the issue of status**

The Tribunal has been asked by the claimant to find on a legal question — the status of the Port Adventure and Toitoi blocks — which has not been argued by either of the parties. Indeed, the legal arguments of each party have been discovered only as a result of research into the matter. It is questionable whether the Tribunal is the correct body to conduct such a judicial review. Our brief is to inquire into and find on matters in terms of the principles of the Treaty of Waitangi, not general law. Having said that, we do make the following comments.

In our opinion, the Crown's argument that the land is Crown land by virtue of section 110(9) falls down in interpreting section 8 of the South Island Landless Natives Act 1906 to say that the blocks were not allocated as provided in section 110(4) of the Maori Purposes Act 1931 because certain elements were missing in the allocation process, namely the section numbers. We find considerable merit in the society's contentions that section 8 sets out the procedure to establish title, not allocation, and that allocation as intended by section 7 of the Act referred to Mackay and Percy Smith's exercise in matching landless Maori to available Crown lands. It was not dependent on the procedures outlined in section 8. Section 110(9) has application only to such lands as were permanently reserved and not required for the satisfaction of claims under the scheme; for instance, the residual areas which were not allocated from the two blocks. In our view, the Crown's original view as expressed in 1981 was the correct one; the allocated areas of some 7035 and 9445 acres are Maori land pursuant to section 110(4) and the residual areas, now calculated at 541 hectares, are Crown land in terms of section 110(9) because they have never been allocated.

It is easy to understand why Rakiura Maori Land Incorporated feels as angry as it does about the situation. The Crown has been able to obtain the society's agreement to a number of conditions on the questionable premise that the land is Crown land. Although the Minister may have thought this question to be of 'little long term importance', it is evident that the status of the land has been crucial to the negotiations, and the strength of each negotiating party's hand. The 1987 agreement was, in effect, one forced upon the society by the Crown's opinion on the legal status of the land. We feel that this question should have been resolved before any agreement was attempted, although we can appreciate the concerns of both parties to have the matter completed. The Crown's persistence in pushing its interpretation of the legislation, without taking measures to have the issue resolved, does not indicate a consideration for the principles of partnership or good faith inherent in the Treaty.

We would point out that the question of status has a bearing on other claims and other landless natives lands which were permanently reserved for specific individuals but never subsequently granted (see claim 34). It is an issue which needs to be determined by an independent authority. It is to the Crown's

credit that it recommended recourse to the Maori Land Court for the resolution of the status issue. The society's misgivings about the court's impartiality on this issue, believing the court had sanctioned the Crown's interpretation, can also be understood. However, as we have discussed above, the court's endorsement was not a considered judicial opinion and the Tribunal considers that this course of action still warrants consideration.

It is important to note that the Maori Land Court has jurisdiction under section 131 of Te Ture Whenua Maori Act 1993 to determine and declare by order the particular status of any parcel of land whether or not that matter may involve a question of law. The status of these two important blocks of land appears to rest so far on opinion only and has not been canvassed in a judicial hearing. In addition to the above jurisdiction (which is a new jurisdiction in that the Maori Land Court from 1 July 1993 can determine the status of land that is claimed to be Crown land), the Maori Land Court has available to it a further jurisdiction under section 18(1)(i) of the 1993 Act. This new section permits the court:

> to determine for the purposes of any proceedings *or for any other purpose* whether any specified land is or is not held by any person in a fiduciary capacity, and, where it is, to make any appropriate vesting order. [Emphasis added.]

The Maori Land Court can now have regard to all the circumstances surrounding claimed rights to any piece of land and, having declared such land is held in trust, may then proceed to dispose of it by vesting order. This new law is now available to those claiming interest in Toitoi and Port Adventure and whilst the decision of the Maori Land Court is a matter for that court, it would seem to this Waitangi Tribunal that an application could well be argued with some force that the Crown holds these two blocks in trust for the persons to whom they were originally allocated. Independently, therefore, of any finding of this Tribunal, there would appear to be a possible remedy available to the claimants to seek an order as to status from the Maori Land Court and possibly also use the new jurisdiction of that court to seek a declaration of trust and/or a vesting order in the names of the persons entitled, being those descendants of the original allocatees.

6.3.6 On the issue of Treaty principles

Having voiced our opinion on the status of the Port Adventure and Toitoi blocks, we turn now to consider the Crown's actions in the light of Treaty principles. The fact of the matter is that the two blocks were permanently reserved and allocated to named Maori in order to relieve, in however pitiful a way, the effects of their landlessness. Title was never granted because the blocks were never surveyed. The blocks were never surveyed because of the cost involved and in light of the fact that the land would probably never be occupied by the allocatees, given its remoteness and lack of access. And so the position remained. In 1924 the Crown considered issuing title in one to each of the blocks. It also considered a compensatory monetary settlement. Nothing happened. In 1964 the Crown looked at resuming ownership and paying compensation. Nothing happened. In the 1980s Rakiura Maori Land Incorporated sought title. When negotiations for the completion of title to the land reached an impasse,

the Crown departed from the view held for 70 years that the land was Maori land, and decreed that the land was Crown land. Despite the agreement reached in 1987, the land remains in Crown hands after 90 years of procrastination. The Tribunal is of the view that, while the Crown has recognised Maori entitlement to the land, it has failed to exercise its Treaty obligation to act in good faith by completing the survey and granting title. We consider that the Crown has an obligation in terms of the Treaty to complete this vesting of Port Adventure and Toitoi by surveying the two blocks and returning the land to those entitled.

Despite the fact that the 1987 agreement was dictated by the strong bargaining position of the Crown, the compromise was not without merit. The Crown has endeavoured to protect the public interest by insisting on the reservation of areas for public use and enjoyment. In return for the reservation of the coastal strip and the Toitoi River, the Maori allocatees would receive title to the residual areas of Crown land. Under the section 439 reservation provisions, they would retain ownership of and control over the reservations. Given that this ‘agreement' was made under duress, however, and given the subsequent dissatisfaction expressed by the claimant, we feel that it would be unsuitable to consider a settlement along the lines of the 1987 agreement.

The claimant Mr Ashwell is not the only party with concerns about the 1987 agreement. The Crown, too, has raised the issue of representation, questioning whether Rakiura Maori Land Incorporated has authority to speak for the original allocatees, and whether the Crown should be a party to an agreement with persons other than those entitled. However, the Tribunal considers that this problem could easily be overcome by following Judge Smith's 1982 suggestion that the title issue in the names of those originally gazetted in their respective shares, and that the land be declared Maori freehold land and then vested in a trustee under section 215 of Te Ture Whenua Maori Act 1993 (formerly s 438 Maori Affairs Act 1953). In this process the Maori Land Court, following the usual procedure, would probably give directions as to private and public notice of its proposal to revest and create a trust. This would generally result in a meeting held prior to the court fixture at which the owners could discuss the issues and nominate trustees to represent them so that the vesting could proceed. The court would probably constitute an investigatory or holding trust to allow the succession to deceased beneficial owners to be completed. Rakiura Maori Land Incorporated may offer itself as trustee for this initial investigatory period. That society is to be commended for the interest taken and effort expended in negotiations so far. Although the claimant has submitted that in the view of the society the land should be vested in it and beneficial title remain with those succeeding the original allocatees, the Tribunal feels that title will most appropriately be vested in those persons found eligible by the Maori Land Court.

The necessary survey of the block for the completion of grants has still not been undertaken. This is no doubt as a result of the overall Ngai Tahu claims hearings. The Tribunal has not been privy to all of the reasons why the claimants are opposed to the Crown's seeking of these public use reservations. In addition to the issue of rangatiratanga over their lands, and the reasons earlier referred to, such as control over kaimoana and access, there may be other valid grounds of objection. We feel that, in light

of the manner in which the 1987 agreement was reached and the continuing delay in completing the title grant, the Crown is obliged to seek new approval from the persons beneficially entitled or their appointed trustee representatives. If the Crown seeks to retain the 20-metre coastal strip and the Toitoi River strip and reserve the Toitoi wetlands for public purposes, that proposition should be put to the meeting of owners called to discuss the appointment of trustees.

In conclusion then, the Tribunal finds that there has been a breach of article 2 of the Treaty in the failure of the Crown for 90 years to vest legal and beneficial title in the persons entitled. The Crown in more recent times since 1980 has wrongly imposed undue pressure on those claiming the land. It must now restore good faith by taking immediate steps to complete the survey and vest the land. Counsel for the Crown has suggested that a meeting of owners prior to the survey of the land would be advantageous in determining the nature of the work to be done. The Tribunal agrees that there would be merit in such a meeting. Although only 9445 acres of the Port Adventure block and 7035 acres of the Toitoi block were allocated, the Tribunal considers that the failure to vest this land in the persons entitled for some 90 years justifies some compensatory award from the Crown. The award of the residual areas of Crown land, calculated at 541 hectares, to the entitled persons would be modest compensation for the delay, and we note that, in view of the land's poor quality, the return of it may not satisfy the needs of Ngai Tahu. The Tribunal considers that the Crown should be financially responsible for calling a meeting of the descendants of the original allocatees at a time, date, and place to be fixed by the Maori Land Court, and upon directions as to notice of such meeting fixed by a judge of the Maori Land Court.

This process is capable of completion within six months of the presentation of this report to the Minister of Maori Affairs.

The Tribunal accordingly recommends, pursuant to section 6 of the Treaty of Waitangi Act 1975, that all of the area permanently reserved in the Port Adventure and Toitoi blocks be completed as to survey and revested 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.

6.4 Claim no: **93**

Claim areas: **Port Adventure, Chew Tobacco Bay, Little Glory Harbour**

Claimant: **Harold Ashwell (E3)**

Claim:

> **Mr Ashwell claimed that scenic reserves in Port Adventure and Chew Tobacco Bay and at Little Glory Harbour should be vested in Rakiura Maori Land Incorporated to facilitate access to and administration of the Port Adventure and Toitoi blocks.**

The claimant maintained that these areas were former Maori landing grounds and that a landlocked resource is of no use without access. Mr Alexander pointed out that the areas in question, acquired as part of the Rakiura purchase of 1864, are now scenic reserves held under the Reserves Act 1977. He further submitted that the landless natives blocks themselves have a considerable sea frontage and that the old landing sites may not prove to be the most suitable now or in the future. As the scenic reserves include islands and encompass more than landing sites, in Mr Alexander's view it should not be necessary to completely revoke the reservation status of these areas in order to provide access to the Port Adventure and Toitoi blocks (AB35:19).

The Tribunal's conclusion

6.4.1 The Tribunal concurs with Mr Alexander's view that the assignment of the entire area of scenic reserve would not be necessary to provide access to the Port Adventure and Toitoi blocks. Moreover, section 129B of the Property Law Act 1952 (and its amendment) allows for ‘reasonable access' to be granted to landlocked land. Under this section of the Act the High Court may vest parcels of appurtenant land in the owner of the landlocked land or grant easements over that land. Should the Port Adventure and Toitoi blocks qualify as ‘landlocked' land (ie, there is a lack of reasonable access to the land, which impedes the occupier's use and enjoyment of her or his land), the claimants may have recourse to the legal option supplied by that Act. Sections 315 and 316 of Te Ture Whenua Maori Act 1993 also give jurisdiction to the Maori Land Court to create easements and lay out roadways for the purpose of providing access, or additional or improved access, to any Maori freehold land. The Tribunal accordingly makes no finding on this matter. The claimant's concerns are capable of resolution under existing law.

1. Correspondence file Southland 38, MLC Christchurch

2. Certificate of title 24/63

3. Assistant land registrar to registrar, Maori Land Court, 14 June 1983, correspondence file Southland 38, MLC Christchurch

4. ‘Land Granted to Half-Castes under “The Stewart Island Grants Act, 1873”', AJHR, 1891, sess II, G-8, p 3

5. Registrar to R Fowler, 24 June 1983, correspondence file Southland 38, MLC Christchurch

6. Extract from SIMB 67, p 16, correspondence file Southland 38, MLC Christchurch

7. J Harty to registrar, Maori Land Court Christchurch, 26 April 1971, block file Southland 38, MLC Christchurch

8. T Ryan to S Cormack, 3 May 1971, block file Southland 38, MLC Christchurch

9. SIMB 48, pp 144–145

10. *New Zealand Gazette*, 1908, pp 1845–1848

11. Ibid, pp 891–892

12. Native land register of South Island landless natives, pp 197–214, DOSLI Wellington

13. Field inspector to Commissioner of Crown Lands Invercargill, 5 April 1929, L&S 39880, DOSLI Wellington

14. T Ruka and 16 others to H Uru, 24 September 1924, L&S 39880, DOSLI Wellington

15. Commissioner of Crown Lands Invercargill to Under-Secretary for Lands, 28 May 1925, L&S 39880, DOSLI Wellington

16. Director-General of Lands to R Fife, 20 August 1981, L&S 39880, DOSLI Wellington

17. Registrar, Maori Land Court Christchurch, to R Fife, 21 May 1982, L&S 39880, DOSLI Wellington

18. Commissioner of Crown Lands Invercargill to director-general, 25 November 1982, L&S 39880, DOSLI Wellington

19. 'Draft Proposals for the Acceptance of Control of the Port Adventure and Toitoi Landless Maori Reserves by Rakiura Maori Land Incorporated', R Fife, L&S 39880, DOSLI Wellington

20. Note for file, 3 October 1987, L&S 39880, DOSLI Wellington

21. Ibid

22. 'Status of Land in Toitoi and Port Adventure Blocks, Stewart Island', 4 November 1983, L&S 39880, DOSLI Wellington

23. Minister of Maori Affairs to R Fife, 13 March 1985, L&S 39880, DOSLI Wellington

24. District solicitor to Commissioner of Crown Lands Invercargill, 29 November 1983, Southland 51, MLC Christchurch

25. Director-General of Lands to Commissioner of Crown Lands Invercargill, 14 November 1983, L&S 39880, DOSLI Wellington

26. 'Status of Land in Toitoi and Port Adventure Blocks, Stewart Island', L&S 39880, DOSLI Wellington

27. Minister of Maori Affairs to R Fife, 5 August 1985, L&S 39880, DOSLI Wellington

28. H Ashwell to secretary, Waitangi Tribunal, 3 November 1986, L&S 39880, DOSLI Wellington

29. Minister of Maori Affairs to H Ashwell, 24 June 1987, L&S 39880, DOSLI Wellington

30. H Roderique to K Cayless, 5 January 1988, L&S 39880, DOSLI Wellington

31. K Cayless to district manager, Department of Survey and Land Information, undated and unsourced

32. Draft application; Director-General of Lands to T Gilroy, 24 July 1989, L&S 39880, DOSLI Wellington

33. Chief surveyor Invercargill to Commissioner of Crown Lands, head office, 23 February 1990, L&S 39880, DOSLI Wellington