

## CHAPTER 1

### THE CLAIMS, ISSUES, AND TREATY PRINCIPLES

#### 1.1 INTRODUCTION

The claims which are the subject of this report relate to the creation in the late 1960s of a joint-venture forest development company, Tarawera Forests Limited (TFL). The designer and promoter of the joint-venture concept was the Tasman Pulp and Paper Company Limited (Tasman), owner of the Kawerau Mill and nearly 20,000 acres of land in the nearby Tarawera Valley. Its co-venturers were the other substantial landowners in the valley at the time: the Crown, which owned more than 18,000 acres, and some 4400 Maori, who owned 38,000 acres.

A key term of the joint venture was that Tasman, the Crown, and the Maori Trustee (who was acting on behalf of the Maori owners) would transfer the title to their lands to TFL in return for a shareholding in that company. In addition, Tasman would provide the development costs of the forest and secure a further shareholding in TFL. This would make Tasman both the majority shareholder in the forest development company and eligible for taxation savings, the benefit of which it agreed to pass back to TFL. However, the exact interest in TFL of each of the three venturers was to be determined in proportion to their capital contributions at the time when the company first returned a profit, estimated to be about 25 years after its establishment. Until that time, the venturers would not receive any income from their investment.

To establish the future value of each venturer's capital contributions, the three tracts of land were valued at the outset according to a common formula. The results were as follows:

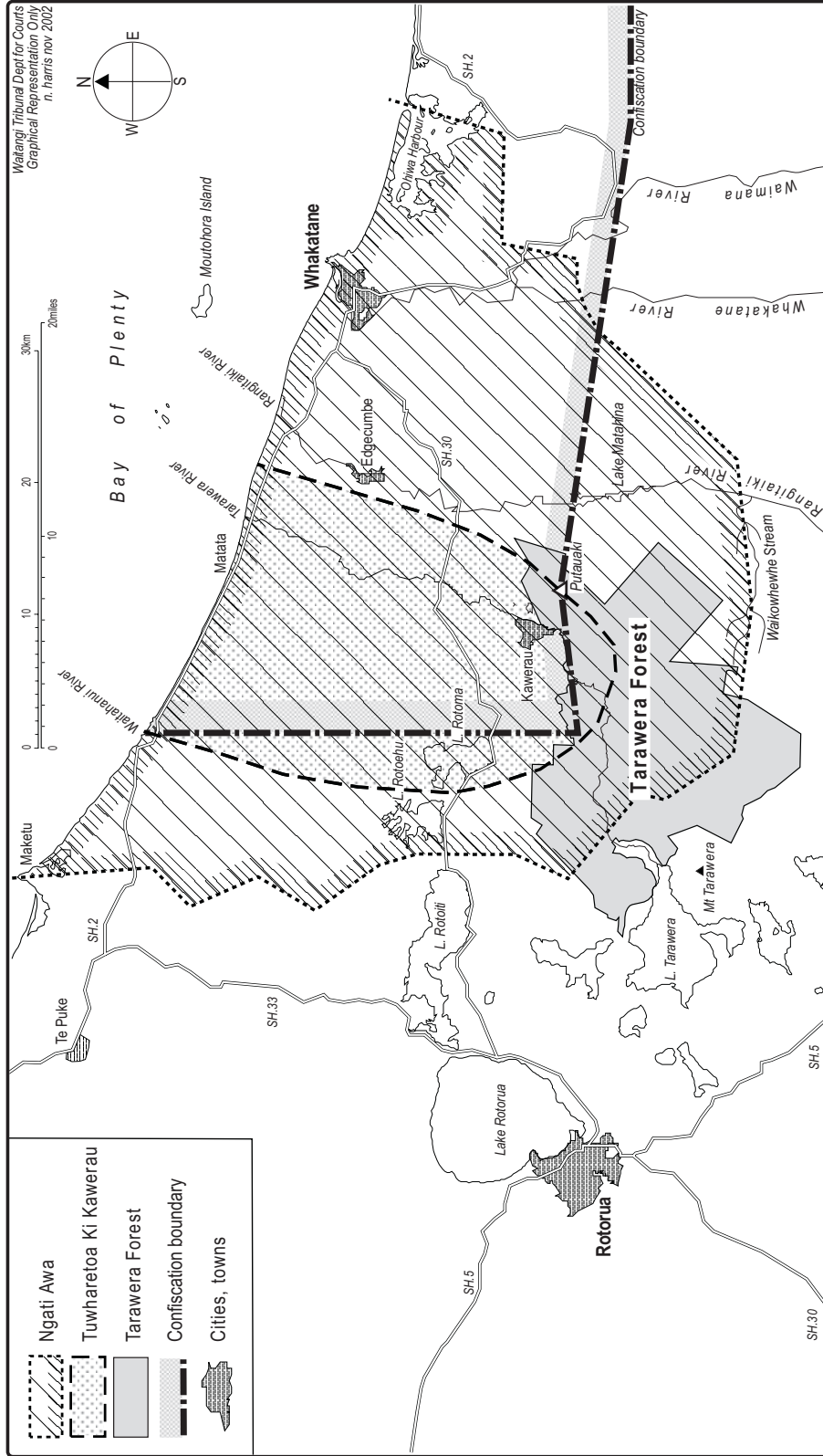
| Land        | Area<br>(acres) | Land transferred to TFL<br>(%) | Value<br>(\$) |
|-------------|-----------------|--------------------------------|---------------|
| Tasman land | 19,350          | 25.4                           | 124,688.00    |
| Crown land  | 18,691.6        | 24.5                           | 159,524.00    |
| Maori land  | 38,067.5        | 50.01                          | 257,442.40    |

Source: Document A22, para 6; doc A22(a), p 58

At the outset of the venture, the value of each venturer's land was secured by TFL debentures earning 6 per cent interest compounding annually. The net value of the development

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1.1



Map 2: Eastern Bay of Plenty confiscation area, 1866, with Ngati Awa and Tuwharetoa ki Kawerau boundaries.  
Source: Waitangi Tribunal, *The Ngati Awa Raupatu Report* (Wellington: Legislation Direct, 1999).

costs to be provided by Tasman was also to be secured by debentures earning 6 per cent compounding annual interest. Having estimated the forest development costs over 25 years, Tasman predicted that, at the time that TFL became profitable and the co-venturers' debentures were converted to shares, their respective shareholdings in TFL would be as follows:

|                         |                              |
|-------------------------|------------------------------|
| Tasman                  | 75.64 per cent               |
| The Crown               | 8.93 per cent                |
| Former Maori landowners | 14.43 per cent. <sup>1</sup> |

Relying on those figures, Tasman guaranteed that its co-venturers' final shareholdings would be no less than three-quarters of the predicted amounts.

As it transpired, by the time TFL's shares were allocated in 1989, Tasman's expenditure on the development of Tarawera Forest had far exceeded its initial predictions. Indeed, but for the minimum shareholding guarantee, Tasman's capital contributions would have resulted in it owning more than 95 per cent of TFL, with the Crown and the Maori venturers owning, respectively, 2.05 and 2.93 per cent. The minimum guarantee has, however, secured the final shareholdings in TFL at:

|                         |                  |
|-------------------------|------------------|
| Tasman                  | 82.495 per cent  |
| The Crown               | 6.6975 per cent  |
| Former Maori landowners | 10.8075 per cent |

The 10.8075 per cent Maori interest in TFL is held and administered by a holding company, Maori Investments Limited (MIL). In the first decade after TFL became profitable, MIL received dividends and interest of more than \$30 million, and the prospect of ongoing returns to MIL from its stake in TFL seems assured.

The primary claim with which this report is concerned (Wai 411) was made by and on behalf of the former Maori landowners and MIL shareholders. It challenges the Crown's role in the process by which the Tarawera Forest joint venture was developed, finalised, and implemented. In particular, the claimants assert that the Maori landowners' interests were insufficiently protected in that process and that the landowners did not give meaningful consent to the venture's key terms, including the transfer of their land to TFL. The Wai 411 claimants were supported by the Ngati Awa (Wai 46) claimants whose primary grievance concerning the forest venture is that it involved the transfer to TFL of the ownership of the sacred mountain Putauaki (Mount Edgecumbe).

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1. Tasman Pulp and Paper Company Limited, *Proposal by Tasman Pulp and Paper Company Limited to Maori Owners and the Crown to Participate in the Development of an Exotic Forest in the Tarawera Valley* (Kawerau: Tasman Pulp and Paper Company Limited, [1965]), p 4 (doc A4, vol 2, p122)

**1.2 CLAIMS' RELATIONSHIP WITH EASTERN BAY OF PLENTY INQUIRY**

While our inquiry focuses on events that occurred within living memory, the affected land has a far longer history, including nineteenth-century events which fostered other Maori grievances against the Crown. For example, part of the Tarawera Valley land was within the area of the eastern Bay of Plenty raupatu (confiscation) of 1866 (see map 2). The raupatu claims of Ngati Awa (Wai 46) and Tuwharetoa ki Kawerau (Wai 62) were the focus of an inquiry by the Waitangi Tribunal in the mid-1990s. The resulting interim report, the *Ngati Awa Raupatu Report*, was issued in 1999 and was intended to support tribal settlements of those claims and, the Tribunal hoped, claims concerning all other historical matters as well.<sup>2</sup>

**1.2.1 Severance of Wai 411 and non-raupatu Ngati Awa claims**

The eastern Bay of Plenty Tribunal explained that the Wai 411 claim was severed from its inquiry and deferred because it was of recent origin and was not a tribal claim. Also deferred were the non-raupatu claims of Ngati Awa, including the claim concerning the inclusion of Putauaki in Tarawera Forest. That claim, the Tribunal said, was allied to Wai 411 and would 'resurface' when Wai 411 was heard.<sup>3</sup>

The Tribunal's decision to defer the claims concerning the Tarawera Forest was supported by submissions made to it in August 1994 by counsel for the Wai 411 claimants, Rodney Harrison QC.<sup>4</sup> At that time, Dr Harrison considered that Wai 411 could be suitable for settlement by direct negotiation with the Crown. However, in November 1999, he requested a hearing of the Wai 411 claim on the ground that the settlement negotiations between the Crown and Tuwharetoa ki Kawerau could not be resolved while Wai 411 remained undetermined.<sup>5</sup> In response, the Tribunal's chairperson, Judge E T J Durie, noted that, although resources were fully committed elsewhere, the eastern Bay of Plenty Tribunal considered Wai 411 to be a discrete claim that could be heard in a week if pre-hearing conferences were used to advantage. An initial conference was arranged, to be conducted by Tribunal member Joanne Morris, to determine whether there was sufficient evidence to proceed to hearing.<sup>6</sup>

**1.2.2 Tribunal agrees to separate hearing**

At the conference on 10 April 2000, counsel's submissions revealed 'the conflicting views of the Crown and the negotiators for Tuwharetoa ki Kawerau and Ngati Awa as to the mandate for including the Wai 411 claim in settlements with those iwi'.<sup>7</sup> Counsel for the Wai 46

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2. Waitangi Tribunal, *The Ngati Awa Raupatu Report* (Wellington: Legislation Direct, 1999), p ix

3. Ibid, p 10

4. Paper 2.5, paras 8, 12

5. Harrison to director, Waitangi Tribunal, 12 November 1999

6. Paper 2.13

7. Paper 2.17, p 3

claimants, Layne Harvey, agreed with Dr Harrison that the Tribunal's inquiry into Wai 411 should focus on events since the 1960s rather than on historical matters affecting the Tarawera Valley lands. He advised that Ngati Awa wished to reserve their position on matters of a historical nature until a deed of settlement was concluded between their runanga and the Crown.<sup>8</sup> The Wai 411 and Wai 46 claimants also agreed at that time to pursue the possibility of 'conducting Wai 411 as a sole claim with Ngati Awa input'.<sup>9</sup>

In a memorandum and directions dated 12 April, Ms Morris reiterated the view of the eastern Bay of Plenty Tribunal that Wai 411 should be dealt with independently of tribal settlements. Noting the readiness of the claim for hearing, she resolved:

that Wai 411 (as a single claim focusing on the events surrounding the formation of Tarawera Forests Ltd and such later events as are relevant to the claimants' allegation of prejudice) should be heard and reported on by the Tribunal at the earliest available opportunity.<sup>10</sup>

Early in May 2000, a Tribunal was constituted to hear the Tarawera Forest claims. It comprised Ms Morris (presiding), Keita Walker, Professor Wharehuia Milroy, and John Baird.<sup>11</sup> The Tribunal heard evidence and submissions from counsel during a week in June 2000 and another week in September 2000. (An outline of the hearing agenda is provided in the appendix to this report.)

Since that time, negotiations between the Crown and Ngati Awa and Tuwharetoa ki Kawerau have continued, and draft deeds of settlement have now been initialled and, in the case of the former, ratified.<sup>12</sup> The proposed settlement with Ngati Awa, if finalised in its present form, will settle all their Wai 46 claims, including the claim relating to Putauaki that was pursued before this Tribunal. It will not, however, settle the Wai 411 claim.<sup>13</sup>

### 1.2.3 Context provided by eastern Bay of Plenty inquiry

The eastern Bay of Plenty Tribunal's inquiry and report contains contextual information and findings relevant to the Tarawera Forest claims. With the Tarawera Valley land being mostly outside but partly inside the area confiscated by the Crown in 1866, customary title was converted to individualised title by one of two means – land returns ordered by the

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8. Ibid, p 1

9. Ibid

10. Ibid, p 3

11. Paper 2.21

12. The draft deed of settlement with Ngati Awa was initialled in July 2002 and ratified in January 2003. The draft deed of settlement with Tuwharetoa ki Kawerau was initialled in October 2002.

13. Office of Treaty Settlements and Ngati Awa, 'Deed of Settlement to Settle Ngati Awa Historical Claims', initialled deed for presentation to Ngati Awa, 2002, cls 1.3.1(b)(i)(ff), 1.3.2(a). Clause 1.3.1(b) also makes plain that the proposed settlement covers Ngati Awa's claims concerning two nineteenth-century events which affected land now owned by TFL but which were not investigated by the eastern Bay of Plenty Tribunal: see Waitangi Tribunal, *The Ngati Awa Raupatu Report*, p 1. These are the claims concerning the Native Land Court's award of land outside the raupatu area and the claims concerning the Crown's subsequent acquisition of such land.

Compensation Court or land awards made by the Native Land Court. On the matter of confiscated land being returned by the Compensation Court, the Tribunal found:

The compensation scheme . . . facilitated the transformation from a communal to individual form of ownership in which the entitlement of many was reduced to the rights of a few. Though a number of the larger awards were returned to individuals as ‘trustees’, it was never more than a temporary arrangement until the land could be divided into shares. In many cases, the individuals listed in the awards also had the power to alienate the land without recourse to the wider community. Only in some cases were restrictions on alienations applied or enforced. Even when such restrictions were enforced (as is the case of the Whakatanane awards), they merely served to delay – as opposed to prevent – the eventual alienation of the land, with restrictions on alienation being removed under section 207 of the Native Land Act 1909, subject to the provisions of that Act. In no case were the rights and protections afforded by a communal title adequately compensated for or replaced.<sup>14</sup>

Lands outside the confiscation area, including the bulk of the lands eventually included in Tarawera Forest, were awarded by the Native Land Court to Maori in individual shareholdings. On that matter, the Tribunal observed:

The Native Land Court was strikingly similar in its operation and effect to the Compensation Court. Both were presided over by Chief Judge Fenton and both facilitated the alienation of land through the individualisation of title. Again, the Government agent responsible for returning confiscated land was heavily involved in settling the ownership of the land that had not been confiscated and in effecting purchases.<sup>15</sup>

The Tribunal then concluded that both means of converting customary to individualised title were contrary to the principles of the Treaty of Waitangi:

It was contrary to the principles of the Treaty of Waitangi that land returns and allocations were not effected by a fair and open process. It was also contrary to the principles of the Treaty that tribal land was converted to individual shareholding when the policy for change had not been approved by the affected people and was contrary to their customary preference. It is further contrary to the principles of the Treaty that tribal authority was therefore effectively ended and that the land was thereby exposed to alienation. There is nothing in the record to satisfy us that the Government complied with even minimal protective standards to maintain its fiduciary obligations to the Maori people. On the contrary, the record points to a Government plan to reduce the effectiveness of tribal operations and to acquire land for European settlement.<sup>16</sup>

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14. Waitangi Tribunal, *The Ngati Awa Raupatu Report*, pp 91–92

15. *Ibid*, p 129

16. *Ibid*

Since *The Ngati Awa Raupatu Report* was issued, the Chatham Islands Tribunal has, after extensive analysis, reached the same conclusions about the effects on the Ngati Mutunga hapu of the land tenure reform that was effected and maintained by the Native Lands Act 1862 and ‘a plethora’ of later amending Acts.<sup>17</sup> Of particular note for present purposes is a section of that Tribunal’s report entitled ‘Lasting Prejudice to Maori Land’. The Tribunal’s account there of the four most notable consequences of tenure reform appears equally apt to describe the remaining Maori-owned land in the Tarawera Valley in 1966. Those consequences are ownership fragmentation, title fragmentation, absentee ownership, and acculturation (the last of which is defined as ‘put[ting] the land forever beyond the reach of the tribe and its values’).<sup>18</sup>

### 1.3 WAI 411

#### 1.3.1 The claimants

The primary claim in the present inquiry was filed with the Waitangi Tribunal in June 1993 and was registered in January 1994 as Wai 411. The original claimants were William Shuki Savage and Gavin Motai Park. They claimed on behalf of themselves and two groups of Maori whose membership overlaps to a large extent, namely:

- ▶ the former owners of the 38,067.5 acres of land now known as the Tarawera 1 block and their heirs and descendants; and
- ▶ the shareholders and debenture stockholders of MIL.<sup>19</sup>

At the time of filing Wai 411, Mr Savage was the chairperson of MIL and Mr Park was a director. Sadly, Mr Savage died early in 1999. In May 2000, the claim was amended so that Mr Savage’s niece, Beverley Rae Adlam, could replace him as the first-named claimant.<sup>20</sup> Ms Adlam, a director of MIL since February 1985, had succeeded Mr Savage as chairperson of the company in 1998.<sup>21</sup> Monica Lanham, who was Mr Savage’s sister and Ms Adlam’s mother, had been the foundation chair of MIL, and she was also a leading member of a group of land-owners that appeared before the Maori Land Court in 1966 to argue that the joint-venture proposal made inadequate provision for the contribution of Maori land.

At the Tribunal hearing, claimant counsel Dr Harrison emphasised the fact that, before its inclusion in the forest venture, the Maori land was held in 40 blocks by some 4000 individual legal owners who affiliated to more than 20 iwi. This meant, he said, that the land was not tribal land at the time and, consequently, that the Wai 411 claim was not a tribal claim. He

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17. Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001), p 182

18. *Ibid*, p 196

19. Claim 1.1, p 1

20. Paper 2.20

21. Document A16, para 2

further submitted that the proper recipients of redress for the Treaty breaches alleged by the claimants were the MIL shareholders or MIL itself. This was because the former landowners and their successors are now more closely identified with that company than with any other entity.<sup>22</sup> Ms Adlam also emphasised these points in her evidence to the Tribunal.<sup>23</sup> In particular, she asserted that tribally based redress would benefit numerous people who were not entitled to receive any, while depriving those who were rightfully entitled of their full and proper share.<sup>24</sup>

In response to questions from counsel for the Wai 46 claimants, Ms Adlam agreed that the Maori land which became the Tarawera 1 block had been awarded by the Native Land Court primarily to Ngati Awa and to iwi with Tuwharetoa and Te Arawa connections. Ms Adlam also acknowledged that several of the other iwi with which MIL shareholders affiliate – including Ngati Kahungunu for example – had never been owners of the land. Accordingly, shareholders who affiliate with those iwi must have acquired their MIL shares through their connections to landowners, including by marriage.<sup>25</sup> Asked by the Tribunal why the Wai 411 claim had been made, Ms Adlam said that the claim was made on behalf of the Maori landowners, whose real grievance is based on loss of land and loss of control over the whole process. She then noted that whakapapa is relied on to determine succession to MIL shares. Ms Adlam agreed that there is a close relationship between the Wai 411 and Wai 46 claims but said that the forest venture had created tribal disharmony.<sup>26</sup> As chapter 9 reveals, the efforts of Ngati Awa to obtain the return of Putauaki appear to have been at the centre of that discord. The Tribunal hearing may have had a unifying effect, however, because the Wai 46 claimants made it plain to us that they no longer assert an exclusive claim to the mountain.<sup>27</sup>

### 1.3.2 The claim

The Wai 411 claimants alleged that conduct and legislation inconsistent with Treaty principles blighted the process of developing and implementing the Tarawera Forest joint-venture scheme and caused the claimants to lose ownership of their lands and suffer financial prejudice.<sup>28</sup> The relevant Treaty principles, discussed later in this chapter, concern the Crown's responsibility to protect Maori interests, particularly their interests in land, and to deal with Maori reasonably and in good faith, including when consulting on matters of importance.

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22. Document A22, paras 95–98

23. Document A16, para 27

24. *Ibid*, para 36

25. Oral comments of Ms Adlam in response to questions from Mr Harvey, 7 June 2000

26. Oral comments of Ms Adlam in response to questions from Mrs Walker, 7 June 2000

27. See, for example, document A27, para 16. At the Tribunal hearing, Te Rau o Te Huia Cameron stated that 'all the various tribal groups around the area have some right to associate themselves to the mountain' (7 June 2000, after presenting document A18), and Hirini Mead acknowledged that other iwi have customary interests in some places, like the mountain, which Ngati Awa hold dear (8 June 2000, after presenting document A21).

28. The general summary in this section is based on Dr Harrison's opening and closing submissions to the Tribunal (docs A22, B80).

The claimants asserted that, although the creation of the joint venture spanned a period of several years and involved a number of meetings with Maori landowners, the Maori owners were never meaningfully involved in the design or refinement of the venture's terms. Instead, they said, the Crown assumed for itself the role of representing and safeguarding the Maori landowners' interests when negotiating the joint venture with Tasman but failed to discharge that responsibility for reasons connected to its own conflicting interests in the venture. The alleged Crown conflict of interest arose, it was said, from a number of factors, including the Crown's roles as a minority shareholder in Tasman and as the recipient of taxation revenue from it. The result, the Wai 411 claimants asserted, was that the great majority of Maori landowners who became involved in the joint venture did so without knowing anything about it or without understanding the terms of their involvement. Accordingly, they could not and did not consent to the joint venture's terms, including the terms by which they lost ownership of their lands. Further, the claimants asserted that the financial returns to MIL from the joint venture have been inadequate; first, because the Maori landowners were promised a higher return and, secondly, because they would have obtained an even higher return had the Crown fulfilled its Treaty responsibilities.

The claimants contended that a variety of officials and bodies conducted themselves in ways that breached the Crown's Treaty responsibilities. Of particular importance, they said, were the acts and omissions of officials in the New Zealand Forest Service, the Department of Maori Affairs, and the Treasury, who participated in assessing the Tasman joint-venture proposal, publicising it to Maori landowners, and supporting it in the Maori Land Court and to the Maori Trustee. Also important and in breach of the Crown's Treaty responsibilities, the claimants said, was the conduct of the Maori Land Court and the Maori Trustee in examining and approving the joint-venture proposal, thereby paving the way for its implementation. Finally, the claimants asserted that the policy and provisions of certain Acts of Parliament involved in the venture's implementation were in breach of Treaty principles.

The primary prejudice which the Wai 411 claimants maintained that they have suffered is the unnecessary and non-consensual loss, to the individual owners, of 'ancestral lands in short supply in the region, including what was and is the most spiritually significant piece of land for the tangata whenua of the vicinity, Putauaki Maunga'.<sup>29</sup> In the words of Ms Adlam:

The loss of the Maori land which is now called Tarawera 1 has meant a significant loss of mana to the former owners and to the Maori people of the Region generally. It has resulted in a loss of spiritual inheritance, and also the development of inter-tribal disharmony and divisions between those iwi, hapu and whanau who belonged to this land. This loss of mana has been made greater, because all other Maori who became involved in forestry ventures, whether with the Crown or with private enterprise, have retained their lands and the mana associated with those lands.<sup>30</sup>

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29. Document B80, para 50

30. Document A16, para 13

The land loss was non-consensual, the claimants said, because the great majority of the Maori owners of the land at the relevant time were either uninformed, ill-informed, or misled about this critical effect of the project. Further, a minority of owners were actively opposed to losing ownership of the land,<sup>31</sup> including the members of the closely related Savage and Edwards families, who were represented in the 1966 Maori Land Court proceedings which facilitated the joint venture's implementation. The loss of ownership was unnecessary, they said, because at the time the joint venture was implemented in 1968, or shortly afterwards, there were viable alternatives for utilising the land which did not require its alienation. In this regard, the claimants emphasised, and the Crown acknowledged, that neither before nor since the Tarawera Forest project has there been any other forestry development utilising Maori land that has involved its alienation. Instead, the leasing of Maori land for forestry purposes has become the norm; a trend that began shortly after the Tarawera project was implemented.

The claimants put forward alternative arguments about the likely timing and terms of a lease of the former Maori land that was instead acquired by TFL. At best, they contended, the land could have been leased to Tasman in 1967 or shortly afterwards on terms similar to those negotiated between the Lake Taupo Forest Trust and the Crown. Such terms, the claimants said, would have given a better financial return than the joint venture, while still retaining the land in Maori ownership. At the very least, they said, the land could have been left as it was in the late 1960s until such time as a forestry lessee offered terms that would have given a financial return equivalent to or even lower than that received from the joint venture. Since that outcome would have retained Maori ownership of the land, the claimants asserted that it would still have been more favourable to them than the joint venture's outcome.<sup>32</sup>

In addition to the land loss grievance, the Wai 411 claimants said that they have been disadvantaged financially, because, as a result of the Crown's conduct and legislation in breach of Treaty principles, the outcome of the joint venture has been less favourable to them than it would otherwise have been. The alternative grounds on which the claimants advanced this grievance were summarised by their counsel, Dr Harrison, in closing submissions, as follows:

- ▶ Crown officials joined with Tasman in misrepresenting to the Maori landowners at the important Kokohinau Pa hui in December 1965 that the Maori shareholding in TFL would be 14.43 per cent; or
- ▶ the Crown failed to take up on behalf of the Maori landowners or, at least, to pass on to them, Tasman's August 1965 offer to include in the joint venture heads of agreement a minimum guarantee for Maori of 15 per cent of the venture; or
- ▶ the Crown was ultimately responsible for a variety of causes (including failing to consult with Maori, pushing the Tasman proposal through despite Maori opposition, and failing

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31. Document B80, paras 37–54

32. *Ibid*, paras 46–48

to ensure that the Maori landowners received adequate representation and advice) which led to the Maori land being undervalued when it went into the venture and then not being protected against the consequences of inflation.<sup>33</sup>

### 1.3.3 Remedies sought

Dr Harrison emphasised the primacy of the Wai 411 claimants' land loss grievance but made plain his clients' understanding that the Tribunal cannot recommend the return of the 38,067.5 acres of land acquired by TFL in 1968. That loss, Dr Harrison said, is:

seemingly, permanent, and certainly irreparable by the Tribunal's processes. There is and can be no mana in a share certificate, and again the contrast for the iwi, hapu and whanau affected, with the Lake Taupo Forest Trust, and indeed with every other forestry venture on Maori land in the country, is inevitable.<sup>34</sup>

Therefore, by way of remedy for the alleged prejudice suffered as a consequence of the loss of ownership of the land, the Wai 411 claimants sought:

- ▶ an apology from the Crown; and
- ▶ the transfer to MIL of the Crown's shareholding in TFL, for distribution pro rata to the existing MIL shareholders.<sup>35</sup>

In addition, as a remedy for the alleged financial prejudice, the claimants sought an amount equal to the difference between the returns MIL has received from TFL and the amount it would have received had it had a 15 per cent shareholding in TFL (estimated by the claimants, as at 1999, to be \$26,149,717).<sup>36</sup>

In his written closing submissions, Dr Harrison also requested the Tribunal to recommend that the Crown cooperate with MIL to achieve legislative amendments to enable MIL to deal with unclaimed money or shareholdings, and the profits from these, to the greater benefit of the MIL shareholders and their whanau.<sup>37</sup> That request was later amended, however, when Dr Harrison stated that the board of MIL did not regard its powers as being unduly impeded by legislation and was open to suggestions from the Tribunal as to how MIL could be improved as a potential recipient and distributor of any financial remedy from the Crown.<sup>38</sup>

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33. Ibid, paras 6, 9, 11

34. Ibid, para 52

35. Ibid, paras 76.1–76.2

36. Ibid, para 76.3; doc B76(a), paras 12.1–15.1. We note, however, that in a submission to the Tribunal in February 2001, Dr Harrison stated that it was 'unnecessary and inappropriate' for the Tribunal to become preoccupied with precisely assessing the claimants' financial losses: paper 2.48, para 11.

37. Document B80, para 76.4

38. Oral submissions made by Dr Harrison at conclusion of presenting document B80(a), 22 September 2000

**1.4 WAI 46**

The Wai 46 claim was brought by Hirini Moko Mead for and on behalf of himself and Te Runanga o Ngati Awa. Originally filed in 1988, the comprehensive Wai 46 claim has been amended several times since, including for the purposes of the present inquiry.<sup>39</sup> The Ngati Awa claimants, represented by Layne Harvey, participated in the Tarawera Forest inquiry both to support the Wai 411 claim and to advance that part of the Wai 46 claim that relates to the inclusion of Putauaki in the forest venture.

In fact, a claim solely concerned with Putauaki's inclusion in the forest was lodged with the Tribunal in 1985. Registered by the Tribunal as Wai 23, the claim was made by Te Rau o Te Huia Cameron on behalf of her father, Eruera Manuera, the paramount chief of Ngati Awa during the period in which the Tarawera Forest scheme was developed and implemented. In elaborating on her claim, Mrs Cameron stated that Dr Eruera and many other Maori owners were unaware that the sacred mountain would be included in the lands taken over by the scheme. The Maori Trustee, she said, 'acted incorrectly in allowing it to be included in the deal'. As a remedy, she asked that the mountain be 'returned to the "iwi" and the title (mana) held by the Minister of Maori Affairs on behalf of the Maori people'. Mrs Cameron stressed that her father 'wanted the mountain to be returned to the "iwi" not a particular tribe'.<sup>40</sup> At the Tribunal hearing of the Tarawera Forest claims, Mrs Cameron gave evidence as a witness for the Wai 411 claimants. Subsequently, her Wai 23 claim was subsumed within Ngati Awa's Wai 46 claim.<sup>41</sup>

Ngati Awa's amended claim recorded the significance of Putauaki and the surrounding lands for Ngati Awa and other iwi and hapu. It noted that 2700 acres of 'Putauaki land' remained in Maori ownership until they were transferred to TFL. That alienation, the Wai 46 claimants alleged, was brought about by Crown conduct in breach of Treaty principles and has prejudicially affected them. The alleged deficiencies in the Crown's conduct match some of those identified by the Wai 411 claimants and relate to the Crown's role in promoting the joint venture when Maori involvement in, and understanding of, its design was inadequate to protect their interests.<sup>42</sup> As is detailed in chapter 9, the essence of Ngati Awa's complaint is that they did not know that Putauaki was to be transferred to TFL until after that had happened and, in their persistent efforts to reclaim the mountain ever since, they have been treated as if they have no special interest in it.

A fundamental difficulty with the Wai 46 claim concerning Putauaki was noted by the eastern Bay of Plenty Tribunal: even if the claim were to be upheld, the Tribunal lacks jurisdiction to recommend the one remedy fervently desired by the claimants – the return of the mountain to Maori ownership.<sup>43</sup> This is because the mountain, along with the rest of the land

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39. Claim 1.3(d)

40. Wai 23 ROI, claim 1.1

41. Claim 1.1(c)

42. Claim 1.1(d), para 14

43. Paper 2.9, p 2

comprising the Tarawera 1 block, is now privately owned by TFL and, by section 6(4A) of the Treaty of Waitangi Act 1975, the Tribunal is unable to recommend the return to Maori ownership, or the acquisition by the Crown, of any private land.<sup>44</sup> Mr Harvey stated that, while the Wai 46 claimants accept that the Tribunal lacks the relevant power, ‘they do not accept that as fair, just or consistent with the principles of the Treaty of Waitangi’.<sup>45</sup> Dr Mead explained, ‘We know you cannot recommend the return of private land, but we believe you can find that what was done to us was wrong.’<sup>46</sup> Accordingly, the Wai 46 claimants sought Tribunal findings on the cultural and historical importance of the mountain and on the sense of loss and grievance felt at the change in its ownership effected by the Tarawera venture.<sup>47</sup>

In his submissions to the Tribunal, Mr Harvey referred frequently to the loss of several blocks of ‘Ngati Awa land’ that were included in the forestry joint venture, allegedly as a result of Crown conduct that was inadequate in Treaty terms. In addition to the 2700 acres of ‘Putauaki land’ noted earlier, the largest block he identified as Ngati Awa land which went into the forest was Pokohu D, of around 9000 acres.<sup>48</sup> The Wai 46 claimants’ understanding that all the Maori-owned lands put into the forest venture were ‘tribal lands belonging to particular iwi and hapu’<sup>49</sup> set them apart from the Wai 411 claimants and explains their different approach to the remedies that would be appropriate should the Tribunal uphold the claims. In his closing submissions, Mr Harvey asked the Tribunal to recommend, as specific remedies relating to ‘the loss of Putauaki and other Ngati Awa lands including Pokohu D’, that the Crown:

- ▶ pay financial compensation to Ngati Awa; and
- ▶ apologise for ‘the wrongful, improper and unnecessary taking’ of the mountain and the land, for ‘the failure of the Crown to properly consult with Ngati Awa over Putauaki’, and for Ngati Awa being ‘treated as outsiders’ since 1966 with regard to Putauaki.<sup>50</sup>

### 1.5 WAI 872

Claim Wai 872 was made by David Potter in September 2000, during the course of the Tribunal hearing of the Wai 411 and Wai 46 claims about the Tarawera Forest venture.<sup>51</sup> As a shareholder in MIL, Mr Potter is also one of the Wai 411 claimants and, in that capacity, gave evidence to the Tribunal at the June 2000 hearing before lodging his own claim.<sup>52</sup>

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44. Section 6(4A) was inserted by section 3 of the Treaty of Waitangi Amendment Act 1993.

45. Document B79, para 79

46. Document A21, para 52

47. Document B79, para 82

48. Document A27, para 62

49. *Ibid*, para 29

50. Document B79, paras 82–83

51. Claim 1.2

52. Document A19

Mr Potter is the son of Thomas Tangihia Savage Potter, a former landowner in several of the Pokohu blocks that were amalgamated into Tarawera 1 by the Maori Land Court in 1966.<sup>53</sup> Thomas Potter was a member of the Savage–Edwards family group of landowners who were represented in court and opposed the application in so far as it applied to their land. Evidence was before the court that the entire Savage and Edwards family group owned more than 1100 acres in the Pokohu A2 and B3 blocks, which had a total area of some 3000 acres.<sup>54</sup> While not all family members were part of the group that opposed the application to the court, it appeared that the court group included those who owned the largest land interests, and it is clear that the court group owned a majority of the shares in some of the Pokohu A2 and B3 blocks.<sup>55</sup>

Mr Potter claimed that Crown conduct in breach of Treaty principles in connection with the Tarawera project caused him particular prejudice which warranted a specific remedy. He asserted that the Crown ‘totally disregarded’ not only his family’s clearly stated wishes to retain its land for farming purposes but also the ‘well researched farming proposal’ which it presented to the court and which would have enabled him to ‘productively farm upwards of a thousand acres of Savage family land’.<sup>56</sup> Mr Potter told the Tribunal that his elders had long promised him that he could farm in the Pokohu Valley and that, in anticipation of that future, he had, by the time he was 18 years old, saved for and bought a tractor and plough, discs and harrow.<sup>57</sup> Mr Potter also gave evidence about the nature of the Pokohu Valley land that he had always intended to farm and its use by members of the Edwards family, who were the sole inhabitants of any of the 40 blocks of Maori land that were amalgamated to become the Tarawera 1 block:

There was 230 acres of farm land up there. It was all fenced and grassed. It had a house on it and a nice orchard. It was actually a modern farm. It was a beautiful bit of land, flat on the river bank, the river ran along one side of it. From the hills above when you looked down on this farm it was really quite a picture in the valley there. We regarded the valuations put on it by Tasman as ridiculous and way under value. It was agreed amongst all the cousins including my father that the Savages did not want to sell. Between all of them, they had about 1010 acres, the Savage family. Our land was particularly good, flat, the best in the area. That is what the Savage family objected and fought against the Tasman proposal. We knew we had a valuable property. . . .

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53. Document A19, para 3

54. Document A4, vol 2, p 55

55. The number of blocks was not established in court but was between four and seven: see sec 6.11. The conclusion that the Savage–Edwards family members represented in court included those with the largest interests follows from a comparison of the court group with the Savage family ownership interests and whakapapa: doc A4, vol 2, pp 148, 157–158.

56. Claim 1.2

57. Document A19, para 5

My cousin Henry Edwards had worked the farm. He died in I think about 1952. He had two or three sons and his widow and sons stayed on the farm. They did not really farm it much after his death. They had enough stock on it to keep the weeds down. The boys were not very old at the time, but they maintained the property reasonably well considering that the family had no father.<sup>58</sup>

The remedy Mr Potter sought for the specific prejudice he claimed to have suffered was compensation for the loss of income he would have had from the land for the period, now some 35 years, since the creation of the amalgamated Tarawera 1 block and its subsequent transfer to TFL.<sup>59</sup>

### 1.6 THE CROWN'S RESPONSE TO THE CLAIMS

The Crown denied that it had breached Treaty principles in the process by which the Tarawera Forest joint venture was developed, finalised, and implemented. Accordingly, it denied that the claimants had suffered prejudice as a result of a Treaty breach.

On the matter of process, Crown counsel, Peter Andrew, took care to remind the Tribunal of the social and economic context within which the Tarawera venture was developed. In particular, he highlighted the concern that the Crown and Maori then held for the fragmented state of Maori land title, the desire to develop unproductive Maori land to achieve greater economic opportunities for Maori, and, in those circumstances, the general acceptance of the Crown's paternalistic role in Maori land development.<sup>60</sup> Mr Andrew acknowledged that the paternalistic philosophy of the 1960s meant that the Maori owners of the 40 blocks that became Tarawera 1 were reliant on the Crown to obtain a fair outcome for them.<sup>61</sup>

The commercial nature of the Tarawera Forest venture was another contextual element emphasised by the Crown. Observing that there are risks and uncertainties in any commercial transaction, Mr Andrew submitted that the Crown's Treaty obligation to act reasonably does not require it to 'provide absolute protection against unanticipated variables, such as rampant inflation'.<sup>62</sup> Similarly, it was submitted that the Treaty does not oblige the Crown to guarantee the best outcome to Maori in a situation where there is a range of commercial views (for example, about the relative merits of a sale or lease of land or the value of land to be used for forestry).<sup>63</sup> Further, Mr Andrew said, the Crown is not required by its Treaty duties to sacrifice its own interests in a commercial venture in favour of Maori interests so that the

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58. Ibid, paras 4, 6

59. Claim 1.2

60. Document B81, paras 2.7–2.12

61. Ibid, para 3.9

62. Ibid, para 2.20

63. Document A30, paras 1.4–1.5

Maori party alone would obtain the benefit of a guaranteed protection against the inherent risks and uncertainties of the venture.<sup>64</sup>

Tasman's independence from the Crown was a further factor emphasised by the Crown when denying the claimants' allegations of a Crown conflict of interest. Mr Andrew also contended that there was no evidence that, at the time of the joint venture's development, anyone apprehended that a Crown conflict of interest was an issue.<sup>65</sup> Accordingly, he submitted, the claims that the Crown did not provide the Maori landowners with full information, or independent advice about the venture, or legal representation in the Maori Land Court, rested heavily on 'contemporary notions of transparent and open Government'.<sup>66</sup>

While accepting that the Tribunal's task inevitably involves it in the retrospective application of Treaty standards which have been articulated more recently, Mr Andrew urged the Tribunal to take a 'balanced' view of the situation, so as not to create a 'fictional past'.<sup>67</sup> Such a view, he submitted, would find that the process by which the joint venture was developed and implemented was not perfect but was reasonable, as is required by the Treaty. In particular, he submitted, while there were 'some inevitable raw aspects of the process',<sup>68</sup> the following factors made it reasonable overall:

- ▶ The fact that there were six consultation meetings with Maori leaders and landowners about the venture over a lengthy period.<sup>69</sup>
- ▶ The crucial role of the New Zealand Forest Service, with its 'independent and critical view' of Tasman's proposal and its careful consideration and analysis of the proposal.<sup>70</sup>
- ▶ The time that was available to Maori landowners to obtain independent advice, and the fact that some did obtain it.<sup>71</sup>
- ▶ The independent protection of the Maori landowners' interests that was provided by the Maori Land Court and the Maori Trustee.<sup>72</sup>
- ▶ The fact that opponents of the joint-venture proposal were represented in the Maori Land Court.<sup>73</sup>

Mr Andrew also submitted that the outcome of the Tarawera scheme for the Wai 411 claimants was crucial to an overall assessment of whether the claim was well founded. In fact, he contended that the questions of prejudice and Treaty breach were so entwined in the present situation that the central issue for determination by the Tribunal is whether the scheme 'has

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64. Document B81, para 1.15

65. Ibid, para 2.22

66. Ibid, para 3.4

67. Oral comment made by Mr Andrew during presentation of document B81, at para 2.5

68. Document B81, para 3.5

69. Ibid, paras 3.37-3.56

70. Ibid, paras 3.25-3.36

71. Ibid, para 3.42

72. Ibid, paras 3.57-3.80

73. Ibid, paras 3.57-3.59

been so unfair and inequitable to Maori that it can properly be said that the Crown conduct in the formation of the scheme was in breach of Crown Treaty duties of protection'.<sup>74</sup>

With regard to the claimed prejudice of land loss, the Crown emphasised that the Wai 411 claim was different from many historical Treaty claims where there has been 'an outright alienation of land and consequential lost opportunity for the provision of the future economic needs of the claimants'.<sup>75</sup> By contrast, Mr Andrew submitted, the joint venture:

was conceived precisely to appeal to Maori by avoiding an outright alienation, and it was envisaged that Maori should receive significant financial benefits from a stake in the ownership of the company that held the land. In this sense there was no complete severance of ties or interests with the land itself. Furthermore, the Maori landowners would have the opportunity to participate in the business and management of running the forest.<sup>76</sup>

Further, the Crown submitted that there was 'a tension' between the claimants seeking compensation for land loss on the one hand and, on the other:

the fact, as the Crown contends, that the Tarawera Scheme has provided a significantly better financial return than the claimants would have received had the land been leased. A lease would have, of course, not involved an alienation in the sense now understood, but would not have provided the best financial return to Maori.<sup>77</sup>

As for the claimants' assertion that they have suffered financial prejudice from the terms of the joint venture, Mr Andrew explained that, 'in a general sense', the Crown's response was that the Tarawera venture has in fact been a favourable bargain for them.<sup>78</sup> That response rested not only on the Crown's view that the joint venture has been more favourable financially than a lease but also on its view that all the joint venture's terms, including those regulating land value and log price, have proved to be fair to the Maori venturer.

The Crown's response to the Wai 411 claimants had equal application to Mr Potter's Wai 872 claim, and Mr Andrew did not make any further submissions responding to that claim. He did, however, respond separately to the Wai 46 claimants' specific concerns for the loss of ownership of Putauaki.

With regard to the inclusion of Putauaki in the Tarawera Forest, Mr Andrew stated that the Crown:

admits that the proposal could have been more explicit in stating how Putauaki was to be included in the scheme. However, it is submitted that the evidence of [Crown witness] Dr

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74. Document A30, paras 1.6–1.8

75. Document B81, para 1.2

76. *Ibid*, para 1.4

77. *Ibid*, para 1.9

78. Oral comment made by Mr Andrew during presentation of document B81, at para 1.12

Battersby establishes that there was sufficient information and material before the Maori owners for them to reasonably deduce that Putauaki was to be included.<sup>79</sup>

In his closing submissions to us, Mr Andrew said that, while the Crown did not accept the claimants' view of the events which led to the inclusion of Putauaki in the Tarawera Forest lands, the outcome was regrettable.<sup>80</sup> Noting that the mountain's status as private property limited the Crown's ability to provide redress, he stated that the Crown is 'prepared to facilitate a practical resolution to the claimants' concerns about Putauaki'.<sup>81</sup>

The extent to which the Crown is prepared to do that is now evident from the terms of the ratified Ngati Awa deed of settlement. To put the particular undertakings concerning Putauaki in their context, it must be appreciated that the proposed Ngati Awa settlement package is made up of three major elements: the Crown's acknowledgement of, and apology for, Ngati Awa's historical grievances; its provision of cultural redress by granting Ngati Awa various rights in relation to numerous sites of significance; and its provision of financial and commercial redress by the transfer to Ngati Awa of various properties and cash. Within the cultural redress provisions of the proposed settlement, the following specific undertakings are made with regard to Putauaki:

- ▶ the Minister will write to TFL, the owner of Putauaki, to ask that it consider meeting with Ngati Awa to discuss whether it 'would be willing to divest its interests in Putauaki and liaise with relevant iwi interests to explore appropriate options for acquiring title to Putauaki' from TFL;
- ▶ Ngati Awa will acknowledge that the Crown cannot compel TFL to attend any such meeting and, subject to the following point, the Crown will not have any further involvement in, or obligations in respect of, any discussion between Ngati Awa and TFL; and
- ▶ if such a meeting takes place within 24 months of the date of settlement, the Crown will meet the reasonable costs of hosting the meeting – in particular paying for the venue and for a facilitator agreed between the parties – but will not pay such costs for any subsequent meeting.<sup>82</sup>

Finally on this matter, it is provided in the initialled deed of settlement that, if Ngati Awa approve the proposed settlement (as they have now done), the legislation giving effect to it will preclude the Waitangi Tribunal from making any inquiry, finding, or recommendation in respect of the claims included in the settlement.<sup>83</sup>

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79. Document B81, para 11.10

80. Oral comment made by Mr Andrew during presentation of document B81, at para 11.1

81. Document B81, para 11.20

82. Office of Treaty Settlements and Ngati Awa, 'Deed of Settlement to Settle Ngati Awa Historical Claims', cl 5.12

83. Ibid, cl 1.7(e). We note too that clause 1.3.1(b)(ii) identifies claim Wai 23 (in so far as it relates to Ngati Awa) as a claim that will be settled.

### 1.7 ISSUES FOR THE TRIBUNAL

Crown counsel's opening submissions identified four major areas of contention between the Wai 411 claimants and the Crown. These concerned the adequacy of the Crown's conduct, in terms of its Treaty responsibilities, in connection with:

- ▶ the consultation that occurred with Maori landowners before the joint venture was finalised;
- ▶ the alienation, rather than the leasing, of the Maori land to TFL;
- ▶ the joint venture's method of valuing the former Maori land; and
- ▶ the price Tasman paid for wood from Kaingaroa Forest and its relevance to the price that Tasman would pay for TFL's wood.<sup>84</sup>

The exploration of these matters certainly occupied the majority of the nine days of the Tribunal's hearing. The first purpose of the Wai 411 claimants' arguments about them was to establish that, in addition to losing the ownership of their land, the claimants had suffered financial loss as a result of their involvement in the joint venture, rather than in some other kind of forestry scheme that they might have entered (the likelihood of which was itself a matter in contention). By contrast, the Wai 46 claimants' arguments were directed specifically at establishing that inadequate consultation with Maori was a major cause of their loss of ownership of Putauaki.

Another purpose of the Wai 411 claimants' arguments was to establish that their involvement in the joint venture had not delivered the financial returns that they claimed they were promised, let alone the higher returns that they contended they should have obtained. In support of their claims, the claimants produced a collection of evidence ranging from historical records of Crown activity to specialist forestry opinions and financial analyses. In defence of its position, the Crown – which had readier access to certain relevant information – produced an even more extensive collection of historical material and specialist analysis. The result, we believe, was that those involved in the Tribunal proceedings obtained a far more comprehensive view of the Tarawera Forest situation than had ever before been possible. The Wai 411 claimants acknowledged this during the hearing by modifying their original argument about the importance of the Kaingaroa-based log price clause in the joint-venture agreement and changing the emphasis of their arguments about land valuation.

Although the issues mentioned above occupied most of the hearing time, in fact there was a further set of complex points in issue between the parties. These arose from their diametrically opposed views of the nature and relevance of the involvement of the Maori Land Court and the Maori Trustee in the Tarawera Forest scheme. In brief, these issues concerned:

- ▶ whether the process by which the Maori Land Court amalgamated the 40 blocks and vested the land in the Maori Trustee was independent of inappropriate influence by Crown officers;

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84. Document A30, para 2

- ▶ whether the Maori Trustee's examination of the joint venture's terms was conducted independently of inappropriate influence by Crown officers;
- ▶ whether the Maori Trustee is, in law, an officer who acts 'by or on behalf of the Crown'; and
- ▶ whether any of the legislation involved in implementing the joint venture was inconsistent with Treaty principle.

In support of their positions on those matters, the Wai 411 claimants and the Crown produced a large amount of written evidence, including the 300-page typed transcript of the relevant Maori Land Court proceedings. Among the legal submissions that were made to us, the claimants made available the extensive submissions that had been presented by different claimants to an earlier Tribunal (the Wellington Tenth's Tribunal) about the Maori Trustee's status.

The result was that, in our hearing of the Tarawera Forest claims, the Tribunal was presented with arguments based on a large amount of detailed and technically complex evidence. Some of those arguments (for example, those about the various Crown agencies' roles in the process by which the joint-venture proposal was developed) could be tested only by a painstaking check of the evidence that was said to support them. That task could not be performed by the Tribunal within the confines of a relatively brief hearing and has had to be performed since. Other arguments made at the hearing required our comprehension of such diverse areas as forestry, economics, and law. They too have demanded considerable thought on our part since the hearing ended. Therefore, the task of examining the parties' claims and counterclaims in order to produce this report has proven unusually time-consuming. Further, despite our desire to produce a short and more easily read report, we have found it necessary to present our analysis of the evidence relevant to each of the issues in some depth, so that the reasons for our conclusions and findings are plain. The advantage of this approach is that it allows the story behind the claimants' grievances to be told in what we trust is as full a manner as it has ever been, and ever will be, told.

### **1.8 RELEVANT TREATY PRINCIPLES**

The Tribunal is required by section 6(1) of the Treaty of Waitangi Act 1975 to inquire into certain claims that legislation or Crown policy or conduct 'was or is inconsistent with the principles of the Treaty [of Waitangi]'. Section 5(2) of the Act directs the Tribunal to have regard to both the Maori and the English texts of the Treaty, and to decide issues raised by the differences between them. If claims are well founded, the Tribunal may, if it thinks fit, recommend to the Crown that 'action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future' (s6(3)).

In the years that have elapsed since the Act was passed, a great deal of judicial and Tribunal thought has been dedicated to elucidating the principles of the Treaty of Waitangi and applying them to widely varying circumstances.<sup>85</sup> A helpful explanation of the difference between Treaty principles and the Treaty's actual words has been provided by the Privy Council:

The 'principles' are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty. . . . With the passage of time, the 'principles' which underlie the Treaty have become much more important than its precise terms.<sup>86</sup>

A vital feature of the Treaty, especially when an inquiry is concerned with contemporary or recent circumstances, is its 'positive and enduring role'.<sup>87</sup> The Tribunal explained this in its *Report on the Motunui–Waitara Claim*:

The Treaty was an acknowledgement of Maori existence, of their prior occupation of the land and of an intent that the Maori presence would remain and be respected. . . .

The Treaty was also more than an affirmation of existing rights. It was not intended to merely fossilise a status quo, but to provide a direction for future growth and development. The broad and general nature of its words indicates that it was not intended as a finite contract but as the foundation for a developing social contract.<sup>88</sup>

The forward-looking nature of the Treaty does not mean, however, that its principles change over time – a prospect that would surely give rise to concerns about 'presentism'.<sup>89</sup> Rather, as was said in *New Zealand Maori Council v Attorney-General* (the *Lands* case):

The principles of the Treaty must I think be the same today as they were when it was signed in 1840. What has changed are the circumstances to which those principles are to apply. At its making all lay in the future.<sup>90</sup>

The Tribunal explained this further in the *Muriwhenua Land Report*:

Although the Act refers to the principles of the Treaty for assessing State action, not the Treaty's terms, this does not mean that the terms can be negated or reduced. . . . As we see it, the 'principles' enlarge the terms, enabling the Treaty to be applied in situations that were not foreseen or discussed at the time.

85. A useful guide to judicial and Tribunal statements about the Treaty principles is Te Puni Kokiri, *He Tirohanga o Kawa ki te Tiriti o Waitangi* (Wellington: Te Puni Kokiri, 2001).

86. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC)

87. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 673 (CA), per Richardson J

88. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 52

89. 'Presentism', as explained by Crown counsel (see, for example, secs 1.6, 2.1) is the assessment of past events by contemporary standards that are inappropriate for judging the past.

90. *New Zealand Maori Council v Attorney-General* (CA), p 692, per Somers J

Conversely, a focus on the terms alone would negate the Treaty's spirit and lead to a narrow and technical approach. . . . The Treaty cannot be read as a contract to build a house or buy a car. It was a political agreement to forge a working relationship between two peoples and it must be seen in light of the parties' objectives. The principles of the Treaty are ventilated by both the document itself and the surrounding experience.<sup>91</sup>

When discussing the principles of the Treaty of Waitangi, there is a risk that they will be regarded as somehow separate from one another, like distinct items on a checklist. In fact, the unity of the Treaty's principles explains why there is considerable overlap between the various explanations that have been given of them. With that in mind, we turn now to discuss the principles that have guided our approach to the present claims.

### 1.8.1 Active protection of tino rangatiratanga

A fundamental principle of the Treaty of Waitangi is the principle of active protection, which signifies that the cession of sovereignty (kawanatanga) to the Crown by Maori in article 1 of the Treaty was in exchange for the protection by the Crown of Maori tino rangatiratanga, as stated in article 2.<sup>92</sup> Accordingly, both the Crown's right of governance and Maori authority and control are qualified by the unique relationship that was forged by the Treaty. The Muriwhenua Land Tribunal saw the principle of active protection as embracing three other key elements of the Treaty relationship – honourable conduct, fair process, and recognition – each of which can also be regarded as a Treaty principle.<sup>93</sup>

The essence of the principle of active protection is that, to the extent that is consistent with the Maori cession of sovereignty, the Crown is obliged to take positive steps to ensure that Maori interests are protected. Exactly which steps and what degree of protection are required in particular circumstances are questions that regularly face the Waitangi Tribunal. Critical to the search for answers is the nature of the Maori interests that are involved. In the context of tribal claims to natural resources, the courts and Tribunal have been concerned to elaborate on the nature of tino rangatiratanga. So, for example, in the Tribunal's *Report on the Muriwhenua Fishing Claim*, it was said:

There are three main elements embodied in the guarantee of rangatiratanga. The first is that authority or control is crucial because without it the tribal base is threatened socially, culturally, economically, and spiritually. The second is that the exercise of authority must recognise the spiritual source of taonga (and indeed of the authority itself) and the reason for stewardship as being the maintenance of the tribal base for succeeding generations.

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91. Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), p 386

92. See, for example, Waitangi Tribunal, *The Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995), p 284

93. Waitangi Tribunal, *Muriwhenua Land Report*, p 388

Thirdly, the exercise of authority was not only over property but of persons within the kinship group and their access to tribal resources.<sup>94</sup>

Likewise, in the earlier *Report on the Orakei Claim* (1987), the Tribunal had emphasised that, given the nature of Maori ownership and possession of their lands, recognition of tino rangatiratanga carries with it:

all the incidents of tribal communalism and paramountcy. These include the holding of land as a community resource and the subordination of individual rights to maintaining tribal unity and cohesion.<sup>95</sup>

In examining Wai 414, a claim by Te Whanau o Waipareira, however, the Tribunal was required to consider tino rangatiratanga outside the tribal context. Emphasising that rangatiratanga resides in a community of leaders and members, the Tribunal described it as ‘a value that is basic to the Maori way of life, that permeates the essence of being Maori’.<sup>96</sup> It continued:

the principle of rangatiratanga appears to be simply that Maori are guaranteed control of their own tikanga, including their social and political institutions and processes and, to the extent practicable and reasonable, they should fix their own policy and manage their own programmes.<sup>97</sup>

The Waipareira Tribunal also identified an important question to ask when considering whether the Treaty’s protection of tino rangatiratanga has been furnished: whether the Crown policies and practices at issue ‘enhance the solidarity and integrity of Maori communities and empower the people, or whether they divide and rule them’.<sup>98</sup>

The different views of the Wai 46 and Wai 411 claimants about the nature of Maori land ownership in the Tarawera Valley in the 1960s raise the question of whether the Treaty promises protection not only of communally based Maori interests in land but also of individual interests. The answer is clear. Both kinds of interest are protected. The English version of article 2 of the Treaty confirms and guarantees:

to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession;

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94. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 181

95. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker and Friend Ltd, 1991) p 149

96. Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: GP Publications, 1998), p 26

97. Ibid

98. Ibid, p 215

The Maori version guarantees to ‘nga Rangatira ki nga hapu ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa’.

Dr Harrison submitted that the Maori owners in the Tarawera Valley lands were entitled to expect from the Crown a very high level of protection of their ownership interests. He cited the following explanations, from two Tribunal reports, of the Crown’s obligations in this regard. From the *Turangi Township Report 1995*:

Maori insistence on their right to retain tino rangatiratanga over their land resulted in the inclusion of article 2 in the Treaty, and was a measure of the depth and intensity of their relationship to their land and other natural resources. It follows that if the Crown is ever to be justified in exercising its power to govern in a manner which is inconsistent with and overrides the fundamental rights guaranteed to Maori in article 2 it should be only in exceptional circumstances and as a last resort in the national interest.<sup>99</sup>

And, from the *Ngai Tahu Ancillary Claims Report 1995*:

there is no provision in the Treaty enabling the Crown to dispossess Maori of any of their lands or forests or other properties without their consent. These were guaranteed to them by Article 2.<sup>100</sup>

Dr Harrison also maintained that, in the evolution of the Tarawera Forest joint-venture scheme, the Crown, without Maori knowledge or agreement, took upon itself the responsibility of representing Maori in the negotiations with Tasman, which heightened the Crown’s protective duty to that of a fiduciary or very much akin to it.<sup>101</sup> The analogy of the Treaty partnership with a fiduciary relationship was drawn by the Court of Appeal in the 1987 *Lands* case and has been widely considered and explained since.<sup>102</sup> For example, the Tribunal in its *Te Maunga Railways Lands Report* described that type of relationship and its relevance for the Crown and Maori in this way:

A fiduciary relationship is founded on trust and confidence in another, when one side is in a position of power or domination or influence over the other. One side is thus in a position of vulnerability and must rely on the integrity and good faith of the other. When the Treaty of Waitangi was signed the Crown undertook to protect and preserve Maori rights in lands and resources in exchange for recognition as the legitimate government of the whole country in which Maori and Pakeha had equal rights and privileges as British subjects. Because the Crown is in the powerful position as the government in this partnership, the Crown has a fiduciary obligation to protect Maori interests.<sup>103</sup>

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99. Waitangi Tribunal, *The Turangi Township Report 1995*, p 285

100. Waitangi Tribunal, *The Ngai Tahu Ancillary Claims Report 1995* (Wellington: Brooker’s Ltd, 1995), p 10

101. Document B80, paras 40–43

102. *New Zealand Maori Council v Attorney-General* (CA), p 664, per Cooke P

103. Waitangi Tribunal, *Te Maunga Railways Land Report* (Wellington: Brooker’s Ltd, 1994), p 68

Crown counsel Mr Andrew accepted that the Crown's Treaty duties are analogous to fiduciary obligations and that 'the reality' of the situation with which we are concerned 'was that Maori were reliant on the Crown'.<sup>104</sup> However, he denied Dr Harrison's submission that the law on fiduciary obligations – in particular, the reverse onus of proof as to the effect of duty breach – was to be imported into Treaty jurisprudence.<sup>105</sup> Our own view is that, for the purpose of elucidating Treaty principles, it is not necessary or desirable to equate them with specific legal principles – even those which originated in the equitable jurisdiction of our superior courts. The Treaty always warrants an approach that is focused on its own purpose and spirit. That is evident from the consistent reliance that is placed, by the courts and by the Waitangi Tribunal, on the context of the Treaty's signing.

Mr Andrew maintained that the Crown had met the required, quasi-fiduciary, standard of conduct with regard to the Maori landowners in the Tarawera Valley through the various efforts of Crown officers to obtain for those owners an outcome as beneficial as the joint venture had proven to be. As well, Mr Andrew highlighted the Crown-created roles of the Maori Land Court and Maori Trustee in providing what he described as further 'safeguards' protecting the Maori landowners' interests.<sup>106</sup>

For the Wai 46 claimants, Mr Harvey relied on specific elements of the Crown's obligation actively to protect Maori – namely, its obligations to ensure that Maori groups are left with sufficient resources for their future needs and to be particularly vigilant to protect taonga of great importance to Maori.<sup>107</sup> He submitted that in the 1960s the Crown, as a result of its previous dealings with Ngati Awa and other eastern Bay Plenty Maori, knew or ought to have known about the 'parlous state of the Ngati Awa tribal base'.<sup>108</sup> With particular regard to Putauaki, Mr Harvey cited the Tribunal's opinion in the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* that:

the degree of protection to be given to Maori resources will depend upon the nature and value of the resource. In the case of very highly valued, rare and irreplaceable taonga of great spiritual and physical importance to Maori, the Crown is under an obligation to ensure its protection (save in very exceptional circumstances) for so long as Maori wish it to be so protected. . . . The value attached to such taonga is essentially a matter for Maori to determine.<sup>109</sup>

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104. Document B81, para 3.9

105. *Ibid*, para 2.6

106. Document A30, para 3.4

107. See, for example, Waitangi Tribunal, *Report on the Orakei Claim*, p 147, and Waitangi Tribunal, *Muriwhenua Land Report*, pp 389–390

108. Document B79, para 68

109. Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: Brooker and Friend Ltd, 1993), p 32

**1.8.2 Partnership and consultation**

Another vital principle of the Treaty is that of partnership, which denotes the mutual obligations of the Crown and Maori to act towards each other in good faith, fairly, reasonably, and honourably.<sup>110</sup> One memorable explanation which conveys the essence of this principle is that ‘Maori must recognise those things that reasonably go with good governance just as the Crown must recognise those things that reasonably go with being Maori’.<sup>111</sup>

At our hearing, Mr Andrew emphasised the Treaty standard of reasonableness, urging the Tribunal to assess the Crown’s conduct – which, he maintained, was honest and fair – in light of what it was reasonable to expect of the Crown at the time. In particular, he warned against importing contemporary notions of what is reasonable into the very different State sector of the 1960s.<sup>112</sup> In support, Mr Andrew relied on a description of the relationship envisaged by the Treaty that was given by the Privy Council in 1994. The Treaty relationship, it was said:

should be founded on reasonableness, mutual co-operation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.<sup>113</sup>

Similarly, Mr Andrew emphasised the notions of ‘mutuality, accommodation and compromise’ in the Treaty relationship, referring to these statements in the Tribunal’s 1983 *Report on the Motunui–Waitara Claim*:

In our view it is not inconsistent with the Treaty of Waitangi that the Crown and Maori people should agree upon a measure of compromise and change.

In particular, it is not inconsistent with the Treaty that the Te Atiawa hapu should accept a degree of pollution in respect of certain of their fishing grounds, on the basis that other grounds will not be spoilt.<sup>114</sup>

A vital facet of the Treaty partnership is that the Crown will make informed decisions on matters affecting the interests of Maori and will need to consult with Maori in certain situations.<sup>115</sup> With regard to the present claims, the Crown accepted that it had a duty to consult with the Maori landowners, and it maintained that the style and extent of the consultation

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110. *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, 304, per Cooke P

111. Waitangi Tribunal, *Te Whanau o Waipareira Report*, p 29 (citing Waitangi Tribunal, *Report on the Motunui–Waitara Claim*, pp 50–52)

112. One notable change since that time is the introduction of State-assisted legal representation (legal aid) in civil matters for low-income litigants.

113. *New Zealand Maori Council v Attorney-General* (PC), p 517

114. Waitangi Tribunal, *Report on the Motunui–Waitara Claim*, p 52

115. See, for example, *New Zealand Maori Council v Attorney-General* (CA), pp 682–683, per Richardson J

that was undertaken was reasonable in all the circumstances. Claimant counsel disputed that, while also highlighting an alleged absence of opportunity in the process by which the joint venture was developed for the Maori landowners to negotiate on their own behalf an arrangement that would have retained their ownership of the land.

Mr Harvey submitted that the Crown fell far short of satisfying the oft-quoted requirements of consultation identified by the Court of Appeal in *Wellington International Airport Ltd v Air New Zealand*. In summary, the court held that:

If a party having the power to make a decision after consultation held meetings with the parties it was required to consult, provided those parties with relevant information and with such further information as they requested, entered the meetings with an open mind, took due notice of what was said, and waited until they had had their say before making a decision: then the decision was properly described as having been made after consultation.<sup>116</sup>

In our view, the concept of consultation as described by the courts and the Tribunal is not appropriate to describe the totality of the interaction that was needed between the Crown and Maori in the situation with which we are concerned. Crown consultation with Maori is relevant when Maori have a particular interest in a matter that is within the Crown's authority to decide and the Crown needs to be informed about Maori attitudes to the matter. In the Tarawera Valley situation, however, it was the Maori landowners, not the Crown, who had the authority to decide what should happen with the matter at issue, because that matter was their land and the Treaty promised Crown protection of their interests in land. As owners, it was their right to accept or reject any proposal concerning their land. The fact that Crown conduct would be needed to facilitate the implementation of particular proposals did not make it the Crown's right to decide what should happen with the land. The fact that, for reasons stemming from nineteenth-century breaches of the Treaty of Waitangi, it was not easy for the owners to be identified in order to be informed about and make a decision upon proposals concerning their land, did not make it the Crown's right to decide what should happen to the land. Therefore, rather than being a situation in which the Crown had the authority to decide what would happen with a particular matter in which Maori were interested, the Tarawera Valley situation was, in its essence, one in which Maori had the authority to decide what would happen with a particular matter in which the Crown was interested. Accordingly, the concept of consultation would be relevant only to the extent that the Crown needed to inform itself of the Maori landowners' views about a matter that was within the Crown's authority to decide. One such matter, we consider, would be the nature of the measures that the Crown might employ to protect the Maori interests.

Since the concept of consultation is not sufficient to describe the quality of interaction that was needed between the Crown and the Maori landowners in the situation with which we are

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116. *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671, 672 (CA)

concerned, we must look to other aspects of the Treaty principles for the relevant standard. In addition to those we have already outlined, we have also found guidance in the principles of equity and options, outlined next. In section 1.8.5, we will return to the matter of the relevant standard set by the Treaty principles for the interaction between the Crown and the Tarawera Maori landowners.

### 1.8.3 Equity and options

Article 3 of the Treaty, which, in the English version, extends to Maori the Queen's royal protection and 'imparts to them all the rights and privileges of British subjects', is commonly regarded as the source, or one source, of the Treaty principles of equity and options. The Wai 411 claimants' declared view of themselves – as individuals whose tribal affiliations were not relevant to their claim – raised the prospect that there was guidance to be found in these Treaty principles. Mr Harvey also invoked the principle of equity, which he summarised as promising Maori 'the same standards of protection as Europeans'.<sup>117</sup> He submitted that Maori were dispossessed of their interests in the Tarawera Valley land without consent when it would have been inconceivable for an owner of general land who did not agree to sell and did not execute a memorandum of transfer to have had his or her interest alienated to another. That would have been 'more unimaginable', Mr Harvey said, if the owner had had no knowledge at all of the alienation proposal. Therefore, he concluded, the owners of the 40 blocks of Maori land did not get the protection promised by article 3 of the Treaty of Waitangi.

The principle of options has been described as assuring Maori of 'the right to choose their social and cultural path', whether that be 'to develop along customary lines and from a traditional base, or to assimilate into a new way . . . [or] to walk in two worlds'.<sup>118</sup> Since these are matters of choice, Maori should not be forced down a particular path.<sup>119</sup> The Ngai Tahu Tribunal, having described the principle as being concerned with the choice open to Maori under the Treaty, continued:

Article 2 contemplates the protection of tribal authority and self-management of tribal resources according to Maori culture and custom. Article 3 in turn conferred on individual Maori the rights and privileges of British subjects. The Treaty envisages that Maori should be free to pursue either or indeed both options in appropriate circumstances. The Crown is obliged to offer reasonable protection to Maori in the exercise of the rights so guaranteed them.<sup>120</sup>

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117. Document A27, para 42

118. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 65

119. Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, p 195

120. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 274

#### 1.8.4 Redress

The principle of redress for Treaty breaches flows from the Crown's duty to act reasonably and in good faith as a Treaty partner. The Tribunal has emphasised that the redress of Treaty grievances is necessary to restore the honour and integrity of the Crown and the mana and status of Maori. Generally, the matter of redress has been considered in connection with claims for tribal losses – and often where the losses are so extensive as to make compensation impossible. The purpose of redress for historical grievances was described by the Tribunal's chairperson in 1987 in this way:

an eye for an eye approach to reparation or an overly tortious trend, may head us on an impossible path, turning a Treaty of peace into a casus belli. . . .

There is an alternative approach. To compensate a tort is only one way of dealing with a current problem. Another is to move beyond guilt and ask what can be done now and in the future to rebuild the tribes and furnish those needing it with the land endowments necessary for their own tribal programmes. That approach seems more in keeping with the spirit of the Treaty and with those founding tenets that did not see the loss of tribal identity as a necessary consequence of European settlement. It releases the Treaty to a modern world, where it begs to be reaffirmed, and unshackles it from the ghosts of an uncertain past.<sup>121</sup>

An important point made by the Tribunal in the *Report on the Waiheke Island Claim* is that it is not consistent with the Treaty's spirit that the resolution of an unfair situation for one party creates an unfair situation for another.<sup>122</sup> Notable, too, is the Tribunal's view, expressed in relation to historical grievances of Ngati Whatua, that when redress must involve a compromise, as often it will do, 'the mana to propose a compromise vests not in the Tribunal but [in] the affected claimant tribes'.<sup>123</sup>

#### 1.8.5 Treaty requirements of the Tarawera Forest situation

Our analysis has led us to identify a number of elements that were critical to the joint venture being developed, finalised, and implemented consistently with the principles of the Treaty of Waitangi. First, the Crown's duty of active protection required that it understood the nature of the Maori interests which it was obliged to protect. Consistent with Maori autonomy, only Maori can define their interests in particular matters, a fact that was underlined in the Tarawera Valley situation because Maori land was directly involved. A fundamental lesson learned by the Crown from New Zealand's history was that land was the foundation of

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121. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiheke Island Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 41

122. *Ibid*, p 47

123. Waitangi Tribunal, *Report on the Orakei Claim*, p 262

traditional Maori society and values. Another lesson was that the Crown had not always acted honourably in obtaining land from Maori. Further, as will be seen in the next chapter, it was widely known that the land remaining in Maori ownership in the mid-twentieth century was of insufficient quantity and quality to support a growing Maori population, and that the system of Maori land ownership introduced by the Crown 100 years earlier was beset with problems which had adverse social and economic consequences for Maori. Also, it was known that for many Maori the importance of owning even a small share of land was that it preserved in a tangible way their ancestral connections to that land.

All of those factors meant that there were various interests – social, economic, cultural, political, and spiritual – which the Maori landowners in the Tarawera Valley possessed as a result of their land ownership. The Crown had to understand the Maori owners' views of their interests, including their relative priority, so that it could do what was reasonable to protect them. Accordingly, unless it already had a thorough knowledge of those views, what the Crown needed to ensure was a fair process by which the owners could formulate and convey their views to it. In the circumstances, we consider that a fair process would be one which gave due weight to the fact that a very large number of owners were involved, all with property rights that were valuable for a variety of reasons. More specifically, we consider that a fair process would require the owners to be sufficiently informed about the impact on their various interests of the different options for their participation in a forestry scheme.

Only once the Crown understood the various interests of the Maori owners, and the relative priority accorded to them, could it begin to consider how it might conduct itself to protect those interests. That is because, as the discussion of Treaty principles reveals, the conduct reasonably required of the Crown to protect Maori interests depends very much on the nature of those interests. As a general assessment, however, the Tribunal considers that, whenever the Crown is involved in a situation in which it is possible that Maori could lose ownership of their land, then what is reasonably required from the Crown by way of protective conduct will be at the high end of the scale of possible responses.

The nature of the Maori interests involved is not, however, the only critical factor that influences the protective response required from the Crown. Also important is the nature of the situation that gives rise to the need for Crown protection. We consider that key features of the Tarawera Valley situation were that it was Tasman, a successful business enterprise, that wished to acquire the use of the Maori land, and that it promoted a novel approach to that end; that the Crown had a direct, although not controlling, interest in Tasman and had assisted it to achieve success (including by selling Tasman State forest wood at concessionary prices); and that Tasman's proposal would transform the land ownership of the Crown and Maori into a minority stake in a forestry company (TFL) that would be a subsidiary of Tasman's. In that situation, the Crown clearly saw that its protection of the Maori landowners'

interests was needed so that Tasman would not deal unfairly with them. However, the Crown's own various interests in the situation – ranging from being a shareholder in Tasman and a prospective shareholder in TFL through to being the driver of social and economic development in New Zealand generally and for Maori in particular – also suggested that it needed to be vigilant about the manner in which it acted to protect the Maori interests.

In saying that, we have in mind that, in any ordinary commercial situation involving large amounts of capital and unknown risks, it is common sense that each potential party should obtain independent advice and negotiate on its own behalf rather than trust the other to conduct itself so as to protect both their interests. There may be good reasons for departing from that position, however, such as, for example, where two potential parties have identical interests and one has complete faith in the other's knowledge and skills and so asks that other to act on its behalf. That was not the situation as between the Crown and the Maori landowners for a number of reasons, one of which was that the Crown stood to benefit in a number of ways from a forestry venture involving Tasman whereas the Maori owners could benefit only by contributing their land. Also, as noted earlier, history provided reasons why the interests of the Crown and Maori were not the same. A vivid reminder of this was the fact that, of all the land wanted for the venture, only the Maori land was held in multiple individual title – with all the problems to which that had given rise.

The Tribunal considers that the Crown's knowledge was such that it was well equipped to recognise that its own interests in the situation threatened its ability to protect the Maori landowners' interests and therefore that particularly strong safeguards needed to be put in place to keep separate the Crown's protection of its own interests from its protection of the Maori landowners' interests. One such safeguard would be a process of consultation with a representative group of owners who were provided with all relevant information about the matter in order to monitor the Crown's conduct.

With that introduction to the Tribunal's task, the objectives of the remainder of this report are to:

- ▶ examine the process by which the Tarawera forest joint venture was developed, finalised, and implemented; and
- ▶ determine whether the Crown's conduct involved breaches of Treaty principle.

If we find that the Crown's conduct did involve breaches of Treaty principle, we will assess whether the outcome of the joint venture for the former Maori landowners has caused prejudice to the claimants and we will consider and, if appropriate, make recommendations on the matter of redress for any such prejudice.

The next chapter sets the scene for our examination of those matters. It provides essential contextual information about Maori land and forestry, and Government policy on those matters in the 1960s.

**1.9 SUMMARY**

The key points made in this chapter are as follows:

- ▶ The Wai 411 (MIL) claimants contended that two distinct kinds of prejudice resulted from Crown conduct in connection with the Tarawera Forest joint venture which was inconsistent with Treaty principles:
  - the loss of ownership of the Maori land that was put into the forest; and
  - financial loss resulting from the joint venture not delivering what was promised to the landowners, let alone what they should have obtained from it.
- ▶ There was some ambiguity in the Wai 411 claimants' descriptions of the loss that they claimed they suffered upon the transfer of ownership of the Maori land to TFL. At times, it was emphasised that the individual owners suffered the loss despite their various tribal affiliations. At other times, the emphasis was on the loss of the owners' ancestral connections to the land.
- ▶ The Wai 46 (Ngati Awa) claimants focused on the loss of what they regarded as Ngati Awa's ownership of the land, and particularly of the sacred mountain Putauaki, as a result of Crown conduct that was allegedly inconsistent with Treaty principles.
- ▶ The now ratified draft deed of settlement between the Crown and Ngati Awa proposes to settle the Wai 46 claims concerning the Tarawera Valley land, including the claim concerning Putauaki.
- ▶ The Crown denied that it had acted inconsistently with Treaty principle in the role it took in developing, finalising, and implementing the joint venture, and it emphasised that the Tribunal's assessment should be mindful of the context of the times.
- ▶ The Treaty principles which have guided our analysis of the claims are those of active protection, partnership, equity, and redress.
- ▶ Key elements of the Treaty principles' requirements of the situation with which we are concerned are that:
  - the Crown needed to understand by means of a fair process the Maori landowners' views of their own interests and the priority they accorded them;
  - the relevant protective response from the Crown depended not only on the nature of the Maori interests but also on the interests of Tasman and the Crown; and
  - the Crown's own interests were such that it needed to be particularly vigilant to keep separate the protection of its own interests from its protection of the Maori landowners' interests.
- ▶ The major issues raised by the present claims concern:
  - the consultation with the Maori landowners;
  - the alienation, rather than lease, of the Maori land;
  - the land valuation and log price terms of the joint venture;
  - the Maori Land Court's process;
  - the Maori Trustee's role; and
  - the legislation involved in the joint venture's implementation.