CHAPTER 1

OVERVIEW

Hei ahau koe e whai piringi taku ukaipo? Hei a koe ranei taua e pahuahua ai? Kahore, hei a taua tonu, paringa tai moana, tumunga tai tangata te purapura e ruia ai, te reanga tangata e puta ai, puta ki te whei ao, ki te ao marama.

Is it through me that you will gain a place at my mother's breast? Is it through you that we will be replete? No, it is only together as a single ebbing tide, a flooding tide of people that the seed can be properly sown and the new generation can emerge into the world of light.

Muriwhenua proverb (cited by Shane Jones)

The main alienations were before 1865 . . .

Even before British government was established in New Zealand, the pick of the Muriwhenua land was thought to have been sold; and once British government came it was in Muriwhenua that the first official land deed was executed. The Muriwhenua claims involve some of the very early private and official land transactions between Maori and European: the pre-Treaty transactions from 1834, and the Government transactions from 1840 to 1865. They show how transactions posited as land sales by one race were contracts for long-term social relationships for the other. They concern a people whose economy was in jeopardy through land losses even before 1865. While most other tribes still held their estates at that time, many, conscious of the experiences of tribes whose lands had been settled first, had recently been to war to prevent similar losses happening to them.

. . . which created early poverty

Thus the Muriwhenua hapu were at risk from land loss before most others. The loss was also greater in Muriwhenua, for, once the hapu were parted from their lands, the only available industry was in gumdigging, which was heavily controlled and manipulated by European traders. Despite some initial prosperity, the district showed little potential for growth once the timber was extracted and whaling ended. It became a depressed area and, with nearly all their usable land gone, Muriwhenua Maori were reduced to penury, powerlessness, and, eventually, State dependence. To this day the district has one of the worst records of Maori social and economic disadvantage. Family cohesion has been affected, too, as most Maori have shifted to cities like Whangarei and Auckland.

An independent Maori polity existed

Essential to understanding the issues affecting the early land transactions is a fact so obvious as to be easily overlooked: that at all times before, during, and after the land arrangements in question, Muriwhenua Maori had their own world-

view. They maintained a distinctive social and economic order, which had evolved through a millennium of experience and which was settled and regularly maintained. Accordingly, they enjoyed an independent polity and had no reason to think that, when they entered into the transactions, those transactions should be seen on other than Maori terms or would somehow threaten their independent existence. Likewise, and contrary to the assumptions of some of the early Europeans, Muriwhenua Maori had no cause to consider that their ancestral laws should be abandoned. Although the hapu were later obliged to accept Western law, their own traditions and values were not forsaken and survive today.

Maori would keep their own laws and authority

In the same way, their independence and freedom from outside domination were things they could treasure. It was natural for them to assume that their own laws and standards would continue without let or hindrance. Indeed, they knew no other law or standards. Whatever may be said about the Treaty of Waitangi and the proclamation of sovereignty as introducing a new legal regime, no such regime could have been given serious thought until it could be seen to be established in fact and to be working on the ground. Moreover, throughout the crucial period from first contact to 1865, Maori were by far the majority population in this district. It was their way that prevailed, and it must have seemed to them that their arrangements with Europeans would be determined according to no other laws and customs than their own.

Official influence may be exaggerated

The fact that Maori had their distinctive and time-honoured laws, policies, and methods of doing business needs constant emphasis. Some historical focus on the records of Government agents could suggest that official edicts and opinions had more influence on Maori than they did in fact, as though Maori had no more than blank minds awaiting intelligence. In reality, the officials who operated in Muriwhenua were few and lacked the means to enforce their views. Their influence was unlikely to have been as great as their reports to the Government portrayed.

Written and oral traditions

Indeed, there are problems with the surviving documentary record. Its one-sided nature has hindered a bicultural understanding of the societies that existed at the time. Further, the documentary record may be given a higher status than it deserves. Since the authors cannot be cross-examined, their opinions may appear more reliable than they are, and views may be perpetuated that in fact reflected personal agendas, temporary aberrations in public opinion or individual eccentricities. In addition, the pervasive written account presents only a European view. The understandings, the thinkings and the arguments are European, the chronicling of events is self-serving, and the repetition of opinions may be confused with corroboration. The general assumption has been that the future debate will likewise be on European terms.

Even a 'Maori account' may in fact represent a European understanding of a Maori position, amounting to no more than the perception of one culture through the lenses of another. As linguists have pointed out, translations reflect the bias and understandings of the interpreter, not the speaker. The use of language

equivalents, or the ascription of special meanings to words by one side alone, expands the areas for miscommunication. 'I sold the land,' a Maori is reported to have said, and that may seem to be a simple translation until it is appreciated that Maori had no word for 'sale'.

Yet, in the past, the written account has been relied on and oral tradition has been distrusted. What may seem from a European view to be liberties taken in relating details over time are taken to discredit the entire Maori opinion. Thus, in Muriwhenua tradition, the land was 'confiscated', but, as was often pointed out in rejoinder, confiscation applied only to those who had taken up arms against the Government. If the land was not technically confiscated, to Maori it still was confiscated if it was not freely given. Whether land is taken by a trick of Western law or through warfare, it is taken just the same. While the metaphors of oral tradition needed to sustain messages over generations have resulted in powerful accounts, the tradition may remain vitally honest for the inner truths conveyed. In reviewing Muriwhenua history, therefore, our greater concern has been not with the vagaries of oral tradition, but with the power of the written word to entrench error and bias.[1]

Cultural mind-sets

The existence of Maori law also needs stressing in the light of official presumptions of the time that Maori had no law worth considering, and therefore transactions could be assessed in European terms alone. Elements of that prejudice survive even today. Outside the academic community, it is still asked, for example, at what point Maori understood the meaning of 'sales', as though, on receipt of that intelligence, they would have ceased to act by their own customs and blithely accept those of another country. It needs still further emphasis because, both then and now, a little knowledge of Maori matters has been seen as sufficient for Europeans to make large judgements on Maori affairs. And, commonly, the presumption that indigenous culture has not survived, despite current proof of its resilience, still influences the view that all things should be measured in assimilationist terms. Even now, it is assumed that the age of Maori contracts has long passed, when in fact they are still maintained.

The continuing existence of Maori law is not negated by the lack of informed settler opinion about it. European ignorance of Maori law shows only how Maori were expected to know the English system, while the settlers were unwilling or unable to reciprocate; and yet the settlers had the greater opportunity to learn, for they lived in a Maori world. This lack of comprehension, however, was probably due most to the settlers' mind-set against any system but their own, and their expectation that their initial subjection to Maori law would be temporary, lasting only until English law could reign.

The nature of Maori law

For lack of an adequate record, no precise statement of Maori intent can be attributed to particular transactions, but a likely position is construable from regular Maori practices and beliefs. It is usual in all societies to interpret, even

1. For an analysis of the evidence on cross-cultural miscommunication, see Professor Evelyn Stokes, 'Muriwhenua: Review of the Evidence', May 1996 (doc P2), ch 19.

unconsciously, what people think and do according to the society's norms. In this case, in view of the strengths of the customary opinion about land, it would be overly speculative to assume that land sales were intended, unless a major change of thinking can be shown to have taken place. This is not just because land sales were antithetical to Maori views on the relationship between land and people, as has often been stressed. More importantly, it is because Maori contracts were not about transferring property but about defining relationships between people. There appears to have been no Maori law of property transfer entirely divorced from continuing personal responsibilities between the parties.

The custom of incorporation

Most early traders and settlers, being seen to have a contribution to make to a community, were invited by enterprising hapu leaders to join it. In the Maori scheme, the focus was on gaining people for the tribe, and the allocation of land was incidental. This practice of incorporating foreigners into local communities has often been remarked upon as a Pacific phenomenon. It was accompanied by an assumption so obvious to Maori as to require no specification: that the arrangement endured only for so long as the newcomers, like Maori, contributed to the community to the best of their ability and were committed to the community's best interests. It should be borne in mind that mana, the primary motivator of Maori action, accrued to those who provided for the people and not at all to those who looked after only themselves. If property rights flowed from the arrangements, they soon ceased to flow if residence and a regular contribution to the community were not maintained.

The Government purchase programme; the extent of change

Such fundamental views on land and society were unlikely to be easily displaced. The question is whether matters had so changed, by the time of the main Government purchasing between 1856 and 1865, that by then Maori must be taken to have understood the likely consequences of a sale in Western terms. The evidence for a change of that sort is unconvincing. Maori action remained consistent with Maori custom. Conversely, it was inconsistent with European custom. Despite changes in the form of religion, the nature of the leadership, the protocols for trade and many other areas, Maori society remained distinctly Maori. Behind a wealth of new trappings, the underlying value system retained its distinctive Maori flavour.

This is hardly surprising, though. Against several thousand Maori there was only one resident official, with a constabulary of three, for the whole district. There was only a handful of Europeans. There was certainly nothing to compel a change in the Maori view. And, following nearly every so-called purchase that the Government made before 1865, virtually no one took possession of the land. The meaning and effect of both European government and a land sale still existed only on paper in Muriwhenua, and were yet to be demonstrated on the ground.

Maori policy

The Maori policy in Muriwhenua had been, and continued to be, the promotion of European settlement. The purpose was still the same: to enhance the economy and standing of the hapu. After the Treaty of Waitangi was signed,

however, the pursuit of an alliance with the Governor was added to this. The expectation appears to have been that, by this course, the status and authority of the hapu in the district would be guaranteed, and the hapu, provided they gave freely of their land for the Governor's allocation, would be major beneficiaries from European settlement. Massive land transfers were the consequence, but they were not simply 'sales' in a Western sense.

Government responsibility

For the purposes of our jurisdiction, however, the intention of the Maori party in transacting, at this time, is not as important as the integrity of the Government in buying. Circumstances had changed. The purchasers were no longer private Europeans but the Government, for it was agreed in the Treaty of Waitangi that the Government should have a monopoly on the purchase of Maori land. In return, the Governor was obliged, and had undertaken in fact, to stand as a protector of the Maori people and as a guardian of their interests. The importance of such a fiduciary role could not have been overstated. Indeed, there had been no modesty when he presented a caring father image during the discussion of the Treaty of Waitangi. The Government knew what Maori could not have known: 'sovereignty' for the British meant that the British land system applied and, under this system, the extensive alienation of land by Maori would not produce the results Maori intended unless they kept sufficient land in reserve. It required no special knowledge for the Government to see that this was the case. Lord Normanby had written from London stating his instinctive concern that, without protection, Maori would be the 'unintentional authors of injuries to themselves'. The matter could not have been put more simply, honestly, or forcefully.

That protection was not given, however. Fiduciary responsibilities and Maori understandings were ignored in favour of a policy of total extinguishment of native title. No matter that the policy may have been intended as benign when first formulated, and no matter that adequate reserves may have been contemplated, when the policy was actually applied Maori interests were indeed very nearly extinguished totally. Maori became confined to the least fertile or the most remote parts of the Muriwhenua territory. They became excluded from a stake in the economic order for which they had bargained and for which, in terms of their customs, they had given generously.

The findings focus on the following acts or omissions of the Crown:

Whether 'sales' were valid alienations

(a) The Government's confirmation of the pre-Treaty transactions as though they were valid purchases. We find that the transactions did not effect, and could not have effected, valid and binding alienations. We consider that Maori entered into these transactions with entirely different expectations: that the transactions imposed obligations on the settlers, of which they ought reasonably to have been aware, but which they generally did not fulfil.

Was a proper inquiry made?

(b) The Government's inquiry into pre-Treaty transactions to determine whether they should be confirmed. We find that no inquiry at all was made in most cases, and only an ineffectual inquiry into the rest; and yet

the Maori interest was presumed to have been extinguished in all of the lands submitted to the Government's adjudication.

The surplus land issue

(c) The Government's allocation to purchasers of only part of the lands they were said to have purchased, and its retention of the surplus. We consider that the Government's surplus land claims are unsustainable on several counts. The assumption was that the land had been 'sold', whereas, in our view, that was not the case. It was further overlooked that the transactions were personal to the Europeans concerned, and neither the Government nor anyone else could enter upon that land without the hapu's agreement. In addition, some reliance upon a legal theory about the Crown's radical title was inappropriate for the circumstances of the colony, where the radical title was already spoken for. Moreover, the Governor's intention to take the surplus land had not been stated during the Treaty of Waitangi debate when the matter was raised. Instead, the opposite impression was given. That same impression was given also by later governors. Finally, to be valid, the pre-Treaty transactions needed Maori affirmation. In Muriwhenua, Maori affirmed the transactions, as they understood them to be, on the express condition that the surplus would return to them.

Adequacy of the Government purchase process

(d) The Government's purchase of most of the remaining land. Here again, none of the transactions was proven before an independent authority at the time, and none can now be shown to have been intended as an absolute sale. On the evidence, they were not. Nor was there contractual mutuality or common design. Further, the Government was in a conflict situation, yet no independent audit of its actions was arranged. Maori contractual expectations of long-term benefits were known, or were abetted, but there were no plans to provide for them. There was no protection for Maori interests generally and, most especially, reserves were so minimal as barely to warrant mention.

Land tenure reform

(e) The alienation of Maori interests in the remaining Muriwhenua lands through land tenure reform and Native Land Court operations. In earlier reports, we have considered that land reform and the operations of the court were inconsistent with the principles of the Treaty of Waitangi, and prejudicial to Maori by contributing substantially to land loss, social dislocation and political disempowerment. Our concern at this stage of the inquiry is for the individualised Crown grants and reserves made before 1865, as there were no grants or reserves for hapu.

Proof and accountability

(f) The Government's assumption that its own purchases of Maori land were valid and fair. We find that the Government did not establish at the time, and has not shown since, that its own acquisitions were 'fair and equal', in terms of Lord Normanby's instructions, as it was obliged to do as a matter of Treaty principle.

The Government, in our view, had become a judge in its own cause. Although the royal instructions were that a Protector of Aborigines

should watch over Government actions affecting Maori, the Protectorate had been abolished, and at the relevant times there was no provision for an independent audit of any kind. Moreover, the Government did not find it necessary to prove the validity of its own purchases. Even allowing for the destruction of some documents by fire, the Government did not keep a proper account of its actions, or enrol in the lands and deeds register a statement of how it came by Maori land. Maori were prejudiced, and remain prejudiced to this day, by the lack of clear evidence concerning the extinguishment of native title. The Government's onus of establishing the fairness and equity of extinguishment became replaced by a burden on Maori to show a wrong in English legal terms. That burden was placed on Maori, and still exists today, even though the Government alone possessed the record of its actions and even though Maori were without practical access to the courts. Maori were left as supplicants to officials, who treated their petitions with small regard, when it was the officials who should have been obliged to establish affirmatively the justice of the Government's claim to the land.

Particular irregularities

(g) The irregularities affecting particular transactions. These are documented in the report and concern inadequacies in terms of land description, the alienors' right and title, purchase price, the information supplied, and the process adopted.

Failure to ensure reserves

(h) The failure to ensure that sufficient reserves were created for Maori. Serious shortcomings in the way particular transactions were completed may have amounted to naught if a fair share of the land had been secured for Maori at the time, and if, as a result, Maori had been participants in the new economic order that the Treaty ushered in. It is clear that Maori had expected that result and certainly, in return for the gift of settlement rights, they were entitled to no less. It is equally clear that the royal instructions accompanying the Treaty had required that sufficient reserves be allocated.

The broad nature of the claims

In all, the Muriwhenua claims are about the acquisition of land under a show of judicial and administrative process. They concern Government programmes instituted to relieve Maori of virtually the whole of their land, with little thought being given to their future wellbeing or to their economic development in a new economy. There is little difference between that and land confiscation in terms of outcome, for in each case the long-term economic results, the disintegration of communities, the loss of status and political autonomy, and despair over the fact of dispossession are much the same.

The area affected

The area affected by pre-Treaty transactions was about 150,000 acres (60,705 ha), with 20,000 acres (8094 ha) passing as settler grants, 26,000 acres (10,522 ha) as surplus, and the balance being claimed by the Government through assignments from settlers. The settlers' claims were never proven, however, and

in this inquiry the right to those lands was claimed instead on the basis of certain purchases.

By the time the pre-Treaty transactions were finalised, Maori were already excluded from the best of the Muriwhenua land, though this may not have been apparent to them at the time. Government purchases, which began as the pre-Treaty transactions were finalised, accounted for a further 280,177 acres (113,388 ha) by 1865, which left most Maori considerably compromised on marginal lands in the most isolated parts of the district. The policy of aggressive land-buying simply continued to roll on. By 1890, a further 75,774 acres (30,665 ha) had been acquired by the Government and there was no hapu that could be said to have held sufficient lands for its present or future wellbeing. Even before 1865, however, in our view, Maori were effectively excluded from the economic equation, for the lands then alienated were the most fertile, and the most strategic in terms of the district's future growth.

Maori were soon to learn of the gross inequities that arose from the Government's management of land. On the northern peninsula, for example, one European could own as much as 68,667 acres (27,790 ha), and lease more besides, while a whole community of Maori nearby, at Te Hapua in this instance, had access to only 800 acres of marginal land, where living conditions were squalid and large parts of the land were so liable to flooding as to be unusable at certain times of the year. At no place and at no time was evidence found of an attempt to achieve a comparable equity in Maori and European land holdings.

Most Maori became gumdiggers, ensnared in a system of debt peonage, where children laboured with the adults and where conditions were such that a quarter of all infants died before reaching the age of three years. There followed forlorn attempts to farm what were clearly remote and marginal lands. Communities disintegrated as people moved away. Social controls could not be maintained. The Maori people in Muriwhenua became, and still are, a people at risk.

Their powerlessness after land loss was illustrated in responses to their numerous complaints and petitions over their exclusion from the land. The Government set the rules on which their complaints would be considered. The Government alone possessed the relevant documentary record, and there was no practical access to the courts for their type of grievance. The petitions and complaints were rarely fully inquired into as a result. Blocks were presented in the hope that the supplicants might eventually go away, or the complaints simply disappeared into official files.

The struggle over land rights continued just the same. As late as the 1960s, Maori were removed from lands on which they had resided for generations and which they genuinely believed they owned. According to the Government, however, the lands had been sold over 120 years previously. In rejoinder, Maori challenged the Government's rights wherever those rights seemed uncertain, most notably with regard to Lake Tangonge, and in Supreme Court proceedings with regard to Ninety Mile Beach. In 1975, when all else had failed, some joined

with other Maori to carry the protest in a land march from Te Hapua to Parliament in Wellington.

This report concludes that the claims are well founded and that recommendations should now be made to transfer assets in recompense. These may include binding recommendations in respect of Crown forest licensed land and State enterprise property. However, the Tribunal wishes first to hear counsel on a number of relevant matters. What is the proper basis for assessing relief? Is it to calculate the areas where valid purchases have been proven to the fullest extent, or is it to restore the hapu to a reasonable economic base? In what circumstances may binding recommendations be made, and in whom should the assets vest? These issues are set out in chapter 11. The Tribunal considers that they should be addressed and that recommendations be made as soon as possible, so that relief for Muriwhenua should not be further delayed.