

CHAPTER 11

FINDINGS AND PROPOSALS

[T]hey must not be permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injuries to themselves. You will not, for example, purchase from them any territory, the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence. The acquisition of land by the Crown for the future settlement of British subjects must be confined to such districts as the natives can alienate, without distress or serious inconvenience to themselves.

From the royal instructions, Marquis of Normanby to Captain Hobson RN, 14 August 1839

11.1 CHAPTER OUTLINE

This chapter examines the Tribunal's jurisdiction, the construction of the Treaty of Waitangi and the Treaty's principles. Thereafter findings are made in terms of the Tribunal's jurisdiction. The claims are held to be well founded and it is determined that recommendations are appropriate to compensate the claimant groups or remove the prejudice. Finally, the steps necessary to determine the appropriate recommendations, including binding recommendations, are reviewed.

11.2 JURISDICTION

11.2.1 The application of the Treaty of Waitangi

The Government's policies and practices should be seen in light of the standards of the day, as Crown counsel contended. In terms of the Treaty of Waitangi Act 1975, however, they must also be assessed by the principles and the standards for settlement established in the Treaty of Waitangi. A lower test cannot be sanctioned simply because it later became the norm. It was basic to the assumption of rights of settlement and governance that Maori interests would be protected, and Maori would be treated fairly, equitably, and in accordance with the high standards of justice that a fiduciary relationship entails. The canons of justice and protection apply to all ages.

The principles apply to all ages

The Tribunal's task is to measure State action against the principles of the Treaty of Waitangi. More particularly, section 6 of the Act requires claimants to establish that they have been prejudiced by State action, and that the action

Jurisdiction

complained of is contrary to the principles of the Treaty of Waitangi. If that is established, not only may the Tribunal recommend relief, but it may make binding recommendations to transfer substantial assets.¹ It is clearly important to establish what the Treaty principles are.

Principles and
terms

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 Justice Somers held in the Court of Appeal, 'a breach of a Treaty provision . . . must be a breach of the principles of the Treaty'.² 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.

Treaty
construction

Conversely, a focus on the terms alone would negate the Treaty's spirit and lead to a narrow and technical approach. In illustration, to satisfy the terms of article 2 one might ask only whether the land was knowingly sold, when the principle from the Treaty as a whole is whether, in all the circumstances, any sale was fair. Similarly, based upon the Treaty's terms, tribal rights may depend on whether article 2 is subservient to article 3, when the principle is that the reasonable expectations of two different peoples, as parties to the Treaty, must equally be respected. 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.

The Treaty is also a treaty, not a unilateral declaration. It is necessary to inquire of the Maori view as well. Although some of the assumptions are dated, the approach adopted by the United States Supreme Court is still sound:

In construing any Treaty between the United States and an Indian tribe, it must always (as was pointed out by Counsel for the appellees) be borne in mind that the negotiations for the Treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the Treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all forms of legal expression, and whose only knowledge of the terms in which the Treaty is framed is that imparted to them by the interpreter employed by the United States; and that the Treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.³

1. See ss 5(1), 6(1)–(3), 8A, 8HB Treaty of Waitangi Act 1975
 2. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 693
 3. *Jones v Meehan* (1899) 175 US 1, 10

Decisions of the Supreme Court of Canada affirm the need for a broad approach, and as something more than an extension of the rule of *contra proferentem* as applied to the treaties of major State powers. In *R v Taylor and Williams* it was held that surrounding circumstances and contemporary statements may be brought into account though on its face the treaty is not lacking for certainty.⁴ The court considered:

Cases on Indian and Aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the Treaty, relied on by both parties, in determining the Treaty's effect . . .

Further, if there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible . . .

Finally, if there is evidence by conduct or otherwise as to how the parties understood the terms of the Treaty, then such understanding and practice is of assistance in giving content to the term or terms.⁵

In view of the North American experience, the Tribunal engaged Professor Bradford W Morse of Ottawa to report on the judicial interpretation of contractual arrangements with the indigenous peoples.⁶ Some of the important principles are these:

- The treaties should be given a fair, large, and liberal construction in favour of the Indians.
- The treaties must be construed not according to the technical meaning of the words, but in the sense that they would be naturally understood by the Indians.
- As the honour of the Crown is always involved, no appearance of 'sharp dealing' should be sanctioned.
- Any ambiguity in wording should not be interpreted to the prejudice of the Indians if another construction is reasonably possible.
- Evidence by conduct or otherwise as to how the parties understood the Treaty is of assistance in giving it content.
- Oral promises form part of the Treaty too.

The prevailing view in North America, and now New Zealand, is that it is the spirit of the treaties that most counts.⁷

These same rules, in our view, apply to the early deeds, particularly those of the Government before 1865 when the lands were still tribally owned. The circumstances surrounding the early New Zealand land conveyances are

Application to
deeds

4. *R v Taylor and Williams* 1981 62 CCC (2d) 227

5. *Ibid*, pp 232, 235–236

6. See Bradford W Morse and R Irwin, 'Treaties, Deeds and Surrenders: An Analysis of Canadian and American Law' (doc 02)

7. See Cooke P, *New Zealand Maori Council v Attorney-General*, p 663

sufficiently the same as those for the treaties with North American Indians for the principles of treaty interpretation developed in North America to be applied to them.

The Te Roroa
approach

‘We have used the vital essence of the Treaty [of Waitangi] as our yardstick,’ the Tribunal reported in the Te Roroa claim. Seeking the essence from the bicultural matrix that applied at the time, the Te Roroa report took the following stance:

- The Treaty is an arrangement between two parties, one of whom had an oral culture, the other a literate culture. To understand its meaning we must consider what was said and agreed as well as what was written down; and also whether it was subsequently acted on or acquiesced in, and by whom. As an oral arrangement, it can be understood only in the context of the debate among Maori that preceded its signing. The Treaty as a written document can be understood only in the context of other sources in documents, such as Normanby’s instructions to Hobson.
- The Treaty is essentially a contract or reciprocal arrangement between two parties, the Crown and Maori, a ratification of the terms and conditions on which Europeans were allowed to settle in the country. It set down the terms on which the Queen was to establish a government to maintain peace and deal with lawlessness. In return for ceding sovereignty to the Queen, the chiefs, the hapu and all the people were guaranteed their tino rangatiratanga. It involves continuing obligations to give, receive, and return.
- The Treaty is a sacred covenant entered into by the Crown and Maori ‘based on the promises of two peoples to take the best possible care they can of each other’. Both parties have a common moral duty to abide by the values it embodies.⁸

II.2.2 Applicable Treaty principles

Applicable Treaty
principles

What, then, are the Treaty’s principles? We would not repeat that already written by the Tribunal and the courts, or range beyond that most pertinent to this case.⁹ The principles of the Treaty flow from its words and the evidence of the surrounding sentiments, including the parties’ purposes and goals. Four are important in this case: protection, honourable conduct, fair process and recognition, though all may be seen as covered by the first.

8. Waitangi Tribunal, *The Te Roroa Report 1992*, Wellington, Brooker and Friend Ltd, 1992, p 42

9. For some of the more recent expositions on Treaty principles, see Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, pp 215–242, and the detailed discussion of the status of the Treaty, the Crown and Maori perspectives on the Treaty provisions, the surrounding circumstances of the Treaty, and the related principles. See also *The Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992, pp 267–273; *Ngawha Geothermal Resource Report 1993*, Wellington, Brooker and Friend Ltd, 1993, pp 99–102; *Te Whanganui-a-Orutu Report 1995*, Wellington, Brooker’s Ltd, 1995, pp 201–202; *The Turangi Township Report 1995*, Wellington, Brooker’s Ltd, 1995, pp 284–288.

Priority is due to the principle that, in the settlement of the country, Maori interests would be protected. The Treaty's opening and closing words so specified, and the intention is abundantly apparent from the associated royal instructions under the hand of Lord Normanby and from addresses at the Treaty signings. The degree of responsibility required is indicated by the extent of that which Maori gave over – settlement rights and governance – and by the extent to which consensual annexation was achieved only by assuring Maori that they and their lands were not at risk.¹⁰

The accompanying royal instructions shed light on the form of protection the British Government had in mind at the time – the audit of the Government's policies and practices through the appointment of an independent Protector of Aborigines, and the assurance of adequate land reserves. In reading the instructions as a whole, the principle behind the reserves would appear to be that Maori would retain sufficient resources to be full participants in the projected new economy, and would have sufficient land to provide an economic base for the future.¹¹

In further elaboration of the protective role, Normanby required:

- all dealings with Maori were to be conducted on the basis of sincerity, justice, and good faith;
- Maori must be prevented from entering into contracts which would be injurious to their interests. Thus Government agents were not to purchase from Maori any land 'the retention of which by them would be essential, or highly conducive to their own comfort, safety or subsistence'; and
- Government purchases for land settlement were to be confined to such districts as Maori could alienate 'without distress or serious inconvenience to themselves'.

In addition, Normanby discussed the undesirability of direct dealings between Maori and settlers, and the need for the Government to maintain a right of pre-emption on the purchase of Maori land. The Tribunal has earlier considered that such a monopoly carried a concomitant duty to ensure that sales were understood, and that the hapu retained a sufficient endowment of land to meet present and future tribal needs.¹²

Fiduciary responsibilities arose also from the marked imbalance in knowledge and power. The Government alone knew the likely outcome in terms of the Western legal and economic system which was likely to prevail. The relationship

10. See Claudia Orange, *The Treaty of Waitangi*, Wellington, Allen and Unwin, 1987, chs 3–4

11. See also the *Report of the Waitangi Tribunal on the Orakei Claim*, Wellington, Brooker and Friend Ltd, 1991, pp 137–147, where the Tribunal took into account Lord Normanby's instructions and the oral assurances in formulating the principle that article 2, read as a whole, imposed on the Crown the duty, first, to ensure that the Maori people in fact wished to sell; secondly, to ensure they were left with sufficient land for their maintenance and support or livelihood or, as the chairperson put it in the *Report of the Waitangi Tribunal on the Waiheke Island Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1987, p 38, that each tribe maintained a sufficient endowment for its foreseen needs.

12. See *Report . . . on the Orakei Claim*, pp 143–144, and *The Ngai Tahu Report 1991*, pp 237–238

between the Government and Maori could not therefore be addressed in commercial terms alone.

In various reports the Tribunal has stressed that active protection was required. The Court of Appeal in 1987 endorsed this view. The president of the court, then Sir Robin Cooke, said:

the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's *Te Atiawa*, *Manukau* and *Te Reo Maori* reports which support that proposition and are undoubtedly well-founded.¹³

Principle of
honourable
conduct

It would be consistent with Maori custom if Maori had seen matters in terms of honourable conduct rather than protection. Either way, however, the outcome is the same. The allusions to protection in the rhetoric of the Treaty debate do not gainsay the reality that Maori saw themselves as holding the military power, while yet being anxious not to prejudice their access to Europeans and the trade they brought. Custom gives the clue to the Maori perception that a working relationship required a generous giving and an absolute trust in an honourable rejoinder. We have seen how this was a customary trait. The position for Maori is not unlike the finding in the Court of Appeal that the Treaty required the parties to act reasonably towards each other and with the utmost good faith.¹⁴

Principle of fair
process

The Treaty promised 'the necessary laws and institutions'. Normanby stipulated for the appointment of an independent Protector of Aborigines to maintain an oversight of State action in the interests of Maori people. Hobson promised Maori, following their complaints, that the pre-Treaty transactions would be inquired into and lands unjustly held would be returned. The principle, as we see it, is that the Government should be accountable for its actions in relation to Maori, that State policy affecting Maori should be subject to independent audit, and that Maori complaints should be fully inquired into by an independent agency.

Principle of
recognition

A principle intrinsic to the Treaty was that Maori would recognise and respect the Governor and the Governor's right of national governance, while the Governor would recognise and respect Maori and their rangatiratanga, by which was meant their laws, institutions, and traditional authority. The relationship between the two has been seen as a partnership.¹⁵

Rangatiratanga was provided for in the Maori Treaty text. A question on the status of Maori custom and law was raised in the Treaty debate, and, as has been seen, it was undertaken by or for the Governor that Maori custom and law would also be respected. The aspects of rangatiratanga important to this case include the

13. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 664 (CA). This decision has been applied by the Tribunal in many subsequent reports.

14. See *New Zealand Maori Council v Attorney-General*, p 642

15. See the *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1988, p 192; *New Zealand Maori Council v Attorney-General*, p 642

right to have acknowledged and respected the hapu's system of land tenure and of contracting, and also the hapu's customary preferences in the administration of their affairs or the management of natural resources.¹⁶

11.2.3 Proof and discretion

In reviewing historical matters, the Treaty of Waitangi may be seen as imposing an impossibly high legal standard; but, as we see it, the Treaty of Waitangi Act does not call for a strictly legal result. The Tribunal is not called upon to determine actionable wrongs, to quantify particular losses or to award damages for property losses and injuries upon legal lines. The Treaty is not a commercial contract, nor is the Tribunal a court.

The Tribunal has a wide discretion as to the action to be taken, or whether to take action at all. Section 6(3) of the Treaty of Waitangi Act provides that the Tribunal may make recommendations 'if it thinks fit having regard to all the circumstances of the case'. Its recommendations shall be 'that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future'. By section 6(4) such recommendations 'may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take'. How the Tribunal's discretion should be exercised is an important issue in this case.

Claimants have none the less to establish their claims in terms of the Act; that is, they must show the matter complained of is an act or omission of the Crown, that the act or omission has caused prejudice to them, and that the act or omission was contrary to the principles of the Treaty. Notwithstanding the onus so placed on the claimants, we do not see the statutory framework as relieving the Government of the burden it would otherwise have had to account for the performance of its Treaty duties. As part of its protective responsibility, the Government must demonstrate the probity of its conduct and establish, for example, the propriety of its acquisition of Maori land. It must show, in other words, that its extinguishment of native title was valid. As we understand it, that is also demanded as a matter of general law.

Accordingly, while the claimants must establish a claim, a point may be reached where the onus must shift to the Government to establish the propriety of its actions or acquisitions, or to show how it came by certain lands.

Onus of proof

16. The principle of recognising Maori law and authority has been developed over a number of Waitangi Tribunal reports from the *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1983, and the *Report of the Waitangi Tribunal on the Manukau Claim*, Wellington, Government Printer, 1985. The development of the principle in the context of historical claims was advanced in the *Report . . . on the Orakei Claim*, pp 143–144, the *Report . . . on the Muriwhenua Fishing Claim*, p 187, *The Ngai Tahu Report 1991*, pp 237–238, and most recently in *The Taranaki Report: Kaupapa Tuatahi*, Wellington, GP Publications, 1996, p 19.

11.3 FINDINGS

The claims relate principally to:

- the disposal of the pre-Treaty transaction land by grant or the presumptive acquisition of the scrip lands and surplus;
- contemporaneous land purchases by the Government; and
- consequential impacts in terms of land tenure reform and disempowerment.

We now consider the first.

11.3.1 The status of the pre-Treaty transactions

Pre-Treaty
transactions were
not sales

Following the consideration of the issues in chapters 2 and 3, we find that the pre-Treaty transactions did not effect, and could not have effected, binding sales, and that the parties were not of sufficiently common mind for valid contracts to have formed. Maori contracted with Europeans on the basis of Maori law, which was the only law known to them and the only cognisable law in New Zealand before 1840. As a consequence, the pre-Treaty land transactions were not sales but at best conferred a personal right of occupation conditional upon acceptance of the norms and authority of the local Maori community as represented in the rangatira. The transactions imposed obligations on the settlers, of which the settlers ought reasonably to have been aware but which they did not generally fulfil.

We are reminded of the warning sounded by the Privy Council as late as 1921, when Viscount Haldane in delivering judgment said:

Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under the English law. But this tendency has to be held in check closely.¹⁷

As we have earlier noted, by Maori customary law there existed no interest in land independent of the local community which was freely transferable outside of it. All such land rights as any individual possessed flowed from membership of, or at least an abiding relationship with, the associated ancestral groups.

Despite changes in form, style, or protocols, the use of books and money, the fundamental value system which is the basis for Maori law was largely unaffected. The Europeans' attribution of new meanings to Maori words and practices does not mean that they had acquired the full or any such meaning in Maori minds. Our more particular opinions are at sections 3.7 and 5.6.

17. *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, 402–403

11.3.2 The management of the pre-Treaty transactions

Inquiries into the pre-Treaty transactions were made first by Commissioner Godfrey under the Land Claims Ordinance 1841 and later by Commissioner Bell under the Land Claims Settlement Act 1856. Our findings are given under five headings:

- The provisions of the Land Claims Ordinance 1841.
- The investigations under that ordinance by Commissioner Godfrey.
- The provisions of the Land Claims Settlement Act 1856.
- The investigations under that Act by Commissioner Bell.
- The inquiry as a whole.

(1) *The Land Claims Ordinance 1841*

This ordinance was virtually identical to the New Zealand Land Claims Act passed by the New South Wales Legislative Council in 1840, which in turn was modelled upon a New South Wales Act of 1833. We have earlier recounted the background to the New South Wales Act at section 4.7. This Act concerned Australians who had purchased lands from earlier Australian squatters without title. Unlike the New Zealand legislation, it had nothing to do with the indigenous people as the Aboriginals were not seen as having any land rights. The intention was to give a title where none had previously existed. The only issue was whether one European had sold to another European. Little reliance was placed on the form of evidentiary document, given the low level of literacy of the early New South Wales population and the shortage of lawyers. It was accepted that any such transaction would be governed by English law, as that was the law common to both parties.

In New Zealand, however, the pre-Treaty land transactions were with Maori, who were governed by their own distinctive land laws. English law had no currency here prior to 1840. This critical difference between the Australian situation and that in New Zealand appears to have been overlooked or disregarded by those responsible for both the New South Wales enactment relating to New Zealand and the Land Claims Ordinance 1841 which copied it. The underlying assumption was that the transactions fell to be considered in the context of English not Maori law, although only Maori law applied at the time. Consequently, the minds of the commissioners were not directed to the real issue, which was the true nature of the transactions under Maori law.

We now consider the provisions of the 1841 ordinance. For the reasons discussed in chapter 4 and more succinctly set out at section 5.6, we find that the Land Claims Ordinance 1841 omitted:

- (a) to sufficiently particularise the nature and scope of the investigation needed;
- (b) to require the commissioners to ascertain the true nature of the transactions; and

- (c) to require the commissioners to determine the adequacy of the consideration, the expectation of future benefits, the absence of fraud or unfair inducement, the measures needed to accommodate any special arrangements such as joint-use understandings, implied trusts or service obligations, the sufficiency of other land in the possession of Maori, the certainty of the alienor's right to enter into the transaction, the clarity of boundaries, the fairness of the apportionment of land between the parties, the on-going obligations to be met, and appropriate provision for reserves.

We find the claimant hapu were prejudicially affected by the above omissions in that their effect was to circumscribe the inquiry that was needed, impede ascertainment of the true nature of the transactions, and allow the conditional occupations of Maori law to be changed into absolute sales.

The Tribunal further finds that the omission of such requirements in the Land Claims Ordinance 1841 was inconsistent with the Treaty principle which requires the Crown actively to protect Maori rights to their land, to ensure that they maintain an economic base, and to respect tribal autonomy and law.

(2) *The Godfrey inquiry under the Land Claims Ordinance*

Chapters 4 and 5 considered the nature and scope of the commissioner's inquiry in 1843. Our conclusions were given at section 5.6 but we reiterate our main points:

- (a) The inquiry proceeded on an erroneous assumption that the land transactions constituted or could be deemed to constitute a contract for the sale and purchase of land under English law.
- (b) No examination was made of the matters previously mentioned – the true nature of the transactions, the parties' understandings and the degree of mutual comprehension, the 'title' of the Maori parties to enter into the land transactions, the adequacy of consideration, whether there was fraud or unfair inducement, the provisions needed for trusts, joint-use or other special arrangements, the true boundaries, whether Maori would retain sufficient land to maintain an economic base, or the reserves required.
- (c) The number of claims considered was limited as well. Of the 62 European land claims in Muriwhenua, only 14 were ever examined, and these ineffectually. Those not heard resulted in scrip awards, as referred to later.

We find the claimant hapu were prejudicially affected by the inadequate inquiry in that, had a full and effective inquiry been made, it would or should have been ascertained first that the Maori and European parties, in 1843 (and previously), were not sufficiently of one mind for valid contracts to have been concluded and, on the Maori understanding of the transactions, Maori interests in the land had not been extinguished.

The Tribunal further finds that the failure of the Crown to ensure that an adequate inquiry was conducted into the pre-Treaty land transactions in question, and into the equity of outcomes, was inconsistent with the Treaty principle which requires the Crown actively to protect Maori rights to their land, to ensure that they maintain an economic base, and to respect tribal autonomy and law.

(3) *The Land Claims Settlement Act 1856*

The Land Claims Settlement Act 1856 was intended to facilitate a final settlement of old land claims not previously heard or not finally settled by valid Crown grants. It provided for a commissioner to define the previous awards by more appropriate Crown grants and to determine claims not already heard. However, claims in respect of which awards had been made could not be reheard, only adjusted, and the scrip lands specifically could not be investigated, by virtue of section 15(2) of the Act, even though they had never been heard. The Government had effectively purchased the inchoate rights of the European claimants, and had then converted them into binding sales without any independent hearing.

A particular circumstance in Muriwhenua is that Maori had imposed a condition on any confirmation of the pre-Treaty transactions: that any surplus would return to them. On the evidence, Godfrey paid no regard to that condition. None the less, he faithfully recorded and reported the Maori statement to the Government, and passed no judgment on it. He simply determined the amount to which the European was entitled in accordance with the legislation, and made no comment on the disposal of the balance lands. It was the subsequent legislation and Government action which ignored the condition that Maori had legitimately laid down.

For reasons discussed in chapter 5 and particularised in section 5.6, we find that the Land Claims Settlement Act 1856 omitted:

- (a) a requirement that the commissioner should review the workings of the first Land Claims Commission in the light of the defects in the 1841 ordinance as referred to;
- (b) a requirement that the commissioner should hear and determine those claims not investigated by Commissioner Godfrey and which led to the awards of land scrip;
- (c) a requirement that Maori should be provided with adequate reserves in the areas alienated;
- (d) a requirement to respect any conditions on which the transactions had been affirmed, or any express or implied trusts or joint-use arrangements;
- (e) a requirement that Maori should be heard on any steps taken to settle and define the settler's grant, the right to the surplus and any Maori reserves.

We find that the claimant hapu were prejudicially affected by these omissions in that they circumscribed the inquiry that was needed, prevented the true nature

of the transactions from being ascertained, failed to ensure that the hapu were left with sufficient lands, and allowed the majority of the claims, those affected by scrip, to be treated as valid sales without any inquiry into them.

In addition, the legislation enabled the condition that the surplus lands return to Maori to be ignored; so that the transactions could be treated as though they were sales, as though they had been affirmed as sales, and as though such affirmations were unconditional. In similar vein, joint-use arrangements and trusts were negated.

The Tribunal further finds that the omission of such requirements in the Land Claims Settlement Act 1856 was inconsistent with the Treaty principles which require the Crown actively to protect Maori rights to their land, to ensure that they maintain an economic base, and to respect tribal autonomy and law.

(4) *Commissioner Bell's investigations*

Although inhibited by legislation from conducting appropriate inquiries, Bell none the less augmented his statutory role, which was mainly to define the Europeans' grants and any Maori reserves, to a mission to recover for the Europeans, and the Government, as much Maori land as he could.

As noted in chapter 4, Bell devised and gazetted rules for grantees to survey the whole of their original claims. In return, their grants were substantially increased. Since Maori were claiming the surplus land not occupied by Europeans, this ensured that the maximum was either taken up by the Europeans or secured for the Government. As Commissioner Bell noted, it became the claimants' interest, when told they would receive an allowance in acreage of 15 percent on the area surveyed, to define with Maori the whole of the land originally 'sold'. The result was that the Government recovered a large surplus.

In addition, as noted in chapters 4 and 5, and as summarised at section 5.6, Maori were not properly heard on the question of reserves. It is doubtful whether there was ever a proper hearing in a judicial sense. Reserves were reduced to a minimum or not provided at all. In those few cases where scrip had not been taken and the European claims were heard, there was no proper hearing as was necessary and required.

The Tribunal finds that the commissioner took positive and deliberate steps to maximise the amount of land which went to Europeans or the Government, and to minimise that retained by Maori, that he allowed Maori no or no sufficient hearing, and that he had insufficient regard for their use of the land, their future needs or their other interests.

The Tribunal further finds that the claimants were prejudicially affected by the foregoing, which deprived them of lands in which they had a legitimate interest. As concluded at section 5.6, we consider there was never a sufficient ground for treating any transaction as a full and final conveyance of the land described in it.

The Tribunal finds, in addition, that the foregoing acts of the commissioner were inconsistent with the Treaty principles which require the Crown actively to

protect Maori rights to their land, to ensure that they maintain an economic base, and to respect tribal autonomy and law.

(5) *The inquiry as a whole*

With regard to the pre-Treaty transactions as a whole, our finding is that the confirmation of those transactions was an act of the Crown pursuant to legislation and to policies and practices adopted in fact, and that the legislation, policies, and practices were inconsistent with the principles of the Treaty of Waitangi, for the reasons earlier given. We find further that the hapu were prejudiced as a result. The prejudice to the claimant hapu was the erosion of their social, economic, and political base, and the extinguishment of hapu interests in respect of most of the Muriwhenua land that would be crucial for the future development of the district. They were deprived of their underlying interest in the lands granted, their rights of shared user, the benefit of the occupiers' services for the use of the land, their interests as beneficiaries of a tribal trust, and their traditional authority over it. They were also denied their absolute right to the surplus.

The area affected was about 150,000 acres (60,705 ha). Deducting those lands that were later claimed by subsequent purchases (Muriwhenua East, Mangonui, Oruru, and Muriwhenua North), the pre-Treaty lands finally alienated by the land claims process totalled 46,000 acres (18,616 ha), some 20,000 acres (8094 ha) in grants to settlers, and some 26,000 acres (10,522 ha) as Government surplus. In addition, however, the Government was implicated in the loss by private treaty of 65,000 acres (26,306 ha) of Muriwhenua North, by virtue of the Government's surplus claim; and its claim to the surplus also affected its claimed purchases of Muriwhenua East, Mangonui, and Oruru.

II.3.3 Scrip lands

The substitution of scrip for a land grant, in Muriwhenua East, Mangonui, and Oruru, as considered in chapter 4, was not legislatively prescribed. As a Government policy it was contrary to the Land Claims Ordinance and to previous proclamations that European land rights were not to be recognised until proven before land commissioners. None the less, the Government assumed that, from the grant of scrip, and the presumptive assignment of the claimants' claims, it had a full right to the land in question. In the result, none of the scrip lands was inquired into.

The presumptive acquisition of the scrip lands appears to have derived from the opinion that the Government should not be obliged to prove its acquisitions or the valid extinguishment of native title. Whatever the merits of that proposition, the Government's right in this case could not have been better than that of the individual from whom it was derived, and the individual's right had

II.3.4

not been proven. Moreover, by Maori law, once the individual left the area the land reverted to source.

The Tribunal finds that the Crown's failure to investigate the pre-Treaty transactions for which scrip was given, and the presumption that the Government was entitled to the scrip lands, was inconsistent with the Treaty principle which requires the Crown actively to protect Maori rights to their land. The failure was prejudicial to the affected hapu in that lands which should have reverted to them, according to their understanding of the transactions, passed to the Government.

Although in this inquiry the Crown claimed its right to the affected scrip lands by virtue of subsequent purchases, the Government entered into those purchases on the basis that the lands affected by scrip awards had already passed to the Government. The Crown's regular presumption that it was not obliged to establish the validity or equity of its direct or derivative acquisitions was also contrary to Treaty principles, in that the duty to protect requires an accounting for the protection given, and thus an accounting for the Government's acquisitions.

II.3.4 Surplus lands

The issue of surplus lands was discussed in chapters 4 and 5 and assessed at section 5.7. As noted, if the transactions were not sales in the first instance, there was no surplus that the Government could claim, and if the Maori transactions were personal to the Europeans concerned, and their issue, there was again no basis for the Government to assume an unencumbered right to any part. The Government's claim, moreover, was founded upon a legal theory that the radical title was vested in the Crown; but that legal theory was inappropriate to the circumstances of the colony, where the radical title was already spoken for. The claim, moreover, was not consistently made. Lord Normanby made no mention of such a proposal, and his pronounced solicitude for the protection of Maori interests, and his directions for Government acquisitions to be always fair and equal, demonstrate that acquisition by a legal sidewind was not approved by him. During the Treaty debate, Governor Hobson did not raise any matter relating to the Government's intention to take the surplus lands, when circumstances required that he should do so if there was an intention to take the surplus at that time. Governor FitzRoy and officials advising Governor Grey may also be quoted as denouncing an intention to take the surplus lands.

The doctrine of tenure, moreover, had not been agreed with Maori, although it seriously affected their rights. The doctrine was contrary to the Maori tenet that an entry onto hapu land required an agreement between the hapu and each entrant; and the pre-Treaty transactions had been affirmed by Maori, in the terms that Maori understood them, on the basis that the surplus would be retained by Maori.

Finally, no inquiry was made as to whether it was necessary to secure all or part of the surplus for Maori in order to provide adequately for their present wants and future needs, as Lord Normanby had required. Looking at the matter now, it can be seen that the pre-Treaty transactions covered the most significant of the Maori lands, and that the substantial exclusion of Maori from those lands would jeopardise their future contribution to the community.

The Tribunal finds that the Crown policies and practices and acts and omissions which gave rise to the appropriation of the surplus lands were inconsistent with the Treaty principles which require the Crown actively to protect Maori rights to their land, to ensure that they maintain an economic base, and to respect tribal autonomy and law. As a consequence, Maori were wrongly deprived of land they had not sold and over which they had continued to exercise rangatiratanga.

II.3.5 The Government transactions

The Government transactions from 1850 to 1865 were considered in chapters 6, 7, and 8, and also at section 9.6. In summary:

- On the evidence, no transaction can be shown to have been an absolute sale (see sec 6.2). There was also no contractual mutuality or common design, but a fundamental ideological divide.
- Conversely, the Government did not prove the transactions as sales at the time (or subsequently).
- There was no independent audit of Government action for fair and equitable contracts, no judicial confirmation process, and no access for Maori to independent and informed advice to enable proper decisions to be made. There was no independent monitoring of issues of title, representation, boundaries, land descriptions, fair prices, and reserves, and there is evidence of considerable looseness in each of these areas, as summarised at section 8.4. In fact, there were no protective arrangements overall. The Government's purchase monopoly and fiscal interest in buying and selling Maori land at this time made independent advice essential.
- There is no evidence that the Government was buying the land in excess of Maori needs, as was required, or that any inquiry was made on that account. The evidence is that the Government was buying the better land in the central band where Maori were concentrated.
- Long-term benefits were clearly anticipated by Maori, as officials were aware, in accordance with expectations created over many years. It was also apparent that Maori had in mind a much larger design than mere sales (see secs 6.3.7–6.3.10). In the meantime, the Government was funding immigration and colonisation costs from the sale of Maori land, so that Maori had a prior claim on such funds for their own agricultural training and development. There were no settlement plans to accommodate Maori,

Shortcomings in the Government purchase programme

however. There were no arrangements to secure long-term benefits for Maori either, yet nor were they disavowed, and there is some evidence that the Maori opinion was capitalised on to secure extensive acquisitions.

- The absence of a necessary sense of duty to protect Maori interests stands in contrast to some extraordinary measures to buy, as the exhumation of the remains of Panakareao and Erenora shows.
- The foregoing – the fact that the transactions were not sales and no proper protective arrangements were in place – need not have mattered so much in achieving the original goals of Maori and the Crown in the completion of the Treaty, had fair shares in the land been maintained. For that reason, we see the failure to provide adequate reserves as the main cause of Maori dissatisfaction. No adequate reserves policy was implemented or adhered to, and insufficient reserves were provided. The evidence points convincingly to an alternative policy of acquiring as much Maori land as could be, as soon as practicable and with as few reserves as possible.

Finding on the
Government
purchases

We find that there was an omission to protect Maori interests, in the respects given above, and that the omission was contrary to the Treaty duty to provide that protection and ensure an economic base for each hapu. The policy of extinguishment was also contrary to the principles of the Treaty of Waitangi in that grossly insufficient reserves were made.

The prejudice to Maori is highlighted in the gross distortions in land ownership that followed. It was this that precluded Maori from participating in the eventual benefits of settlement, for their exclusion from the land was such that they could not be stake-holders in the new social and economic order that Europeans knew would follow. From the very beginning, one European could hold up to 2560 acres (1036 ha) (or more if the Governor allowed, and as he did in fact allow), while reserves for a Maori community of some 100 or more people might be 200 acres (81 ha) or less.

Later, no ceilings for Europeans applied. The Government enabled and facilitated Europeans to acquire 7710 acres (3120 ha) on the southern Aupouri Peninsula when that was the last of the Maori land in that area; and allowed a European to purchase 68,607 acres (27,765 ha), and then to lease more, on the same peninsula, while more than 100 Maori had access to only 820 acres (332 ha), much of which in winter was under water. Consistently, Maori were allocated far less than was seen as necessary for a European. The laws to control land allocation simply did not include any adequate provision to maintain fair shares with Maori.

The prejudice to Maori is also that they were deprived of 280,177 acres (113,388 ha) by 1865. Through the continuation of the same policies after 1865, a further 75,774 acres (30,655 ha) was to pass by 1890, by which time there were no hapu with sufficient land for their subsistence, let alone future growth. The broad result was the virtual exclusion of Maori from the central Muriwhenua bowl, and their marginalisation on the rims – politically, socially, and

economically – as outlined in chapter 10. They were excluded from most strategic lands even before 1865.

The Tribunal notes that these findings are consistent with those of other tribunals separately constituted for the hearing of claims under the Treaty of Waitangi Act about the Government's purchase of land. This Tribunal has been concerned with the confirmation of private land transactions said to have been effected before 1840, and with Government land transactions from 1840 to 1865. The Ngai Tahu Tribunal was concerned with land transactions from 1848 to 1864, and the Te Roroa Tribunal with transactions after 1874. The Ngai Tahu Tribunal emphasised, among other things, the responsibility on the Government to ensure that the Maori concerned had the right to sell, and to be satisfied, on proper inquiry, that finality was understood, that no ongoing contractual relationship was intended, that no residual interests were retained, that there would be no further claim on the buyer, and that the buyer would not be obliged to share the land or the fruits of the land with them. In both the Ngai Tahu and Te Roroa reports, it was considered that the purchase prices were nominal, and were precursors to anticipated benefits and development opportunities in future.

Consistency with
other Tribunal
findings

11.3.6 Particular complaints

While the main losses to the hapu arose from Crown actions and omissions in relation to the pre-Treaty and Government transactions as a whole, certain hapu and individual families are mainly or equally concerned with particular land areas. We find that Crown conduct was inconsistent with the principles of the Treaty of Waitangi and prejudicial to Maori, with regard to the following lands, for the general reasons given above and also for the more particular reasons indicated below:

Whakapaku block: The lack of proper process and formality was evident in the gross misdescription; there was also no inquiry into the right and title of the alienors (see sec 7.3.2).

Mangonui block: The improper assumption, behind the whole of the Government's approach, was that most of the land had been validly purchased by the Government in 1863 when that had not been proven and was not the case, and when the pre-Treaty transactions had not been examined as required by law. The further lack of appropriate formality in the completion of the transaction was described earlier (see sec 7.3.3).

Mangonui township: Again, the pre-Treaty transactions had not been investigated as required by law, the Waikiekie purchase lacked sufficient specificity, Rangikapiti headland and other areas should not have been included in a mopping-up clause, and the 'vendor' could have given no more than use rights (see sec 7.2.2).

Taemaro reserve: The Taemaro reserve was wrongly reduced by over 65 acres (26 ha) (see sec 7.3.3).

- Oruru Valley:* No thought was given to whether this area should have been secured to Maori in accordance with original intentions. Then, the subsequent purchase wrongly proceeded on the basis that the lands had been validly acquired by prior transactions, when these had not been investigated or proven, and after the Government had allocated the land and possession had been taken (see secs 3.5, 4.10, 5.3.5, 7.2.3).
- Raramata block:* Maori were wrongly deprived of 2600 acres (1077 ha) (see secs 3.3.4, 5.3.1–5.3.4, 7.2.6).
- Mangatete block:* The Government's right to 4414 acres (1786 ha) was not established, and it appears to us this area should have been retained by Maori (see secs 5.3.1–5.3.4, 7.2.6).
- Puheke block:* The size of the Puheke purchase was grossly under-estimated, again indicating the regular looseness in proceedings (see sec 7.2.6).
- Okioire block:* The evidence of a trust was not investigated, a trust in respect of some 6000 acres should have been imputed, and there were obviously inadequate reserves (see secs 3.3.4, 5.4.6, 8.2).
- Awanui block:* The reserves were inadequate and a promised reserve was not provided (see secs 5.4.6, 8.2).
- Tangonge block:* In all the circumstances, the Government should have reserved the Tangonge block for Maori (see secs 3.3.4, 5.4.6, 8.2).
- Victoria Valley:* Having regard to the surrounding alienations, and Panakareao's wishes, the whole of this land should have been reserved by 1865, and made inalienable, as Panakareao had expected (see sec 9.3.3).
- Ruatorara block:* There was no basis for the Government's right to 1482 acres (see sec 8.3.2).
- Muriwhenua South and Wharemaru:* The assessed acreage was grossly incorrect and no proper consideration was given to reserves, despite the large area involved (see sec 8.3.3).
- Houhora block:* Having regard to the surrounding alienations, the Houhora block should have been reserved before 1865, and made inalienable (see secs 8.3.3, 9.5.1).
- Muriwhenua North:* The Government enabled and facilitated one European to acquire the vast area of Muriwhenua North, creating gross distortions between Maori and European holdings in this significant Maori area, and compromising Maori subsistence and future economy. Having regard to the numbers of Maori and the fact that this was marginal land, a small inquiry should have revealed that the whole of this block should have been reserved for Maori in accordance with the original intentions settled between Panakareao and the missionaries (see secs 3.6, 5.5.2, 8.3.4, 9.5.2).
- Outer blocks generally:* Timber and gum interests should have been reserved to Maori in all of the outer country (see sec 7.2.9).

11.3.7 The Taemaro claim

Particular findings are made with regard to the Taemaro claim since, for the most part, it has been dealt with separately.

There is no sufficient evidence that the Ngati Kahu of this area ever agreed to the sale of any part of Muriwhenua East. More particularly:

- The lands allocated by Resident Magistrate White were based on an assumption that the pre-Treaty transactions were valid, when the pre-Treaty transactions had not been inquired into as the law required, and when, in terms of the contracts as understood by Maori, the land should have reverted to them once the Europeans involved left the area.
- There was no adequate hearing of Maori with regard to those few areas that were awarded by Commissioner Bell, and no sufficient evidence that the affected Maori understood the transactions as sales.
- There were no sufficient checks to ensure that the Mangonui purchase of 1863 was fairly and honestly effected and with the right persons. On the evidence, it was not fairly and honestly effected and with the right persons, and, in addition, it proceeded on the basis that the whole or greater part had already been purchased when that was not the case and that had not been established as the law required.
- There were no sufficient checks in place to ensure that the Whakapaku purchase was fairly and honestly effected and with the right persons. On the evidence, it was not. In addition, the price was incapable of bearing a reasonable relationship to the acreage conveyed when the acreage was so grossly uncertain.
- No inquiry was made of whether the land purchased was in excess of the needs of the hapu, or whether the lands retained would be sufficient for them to be full participants in a new economic regime; and, on the evidence, such land as was left to certain individuals was not. No land was left to the hapu as a group.
- The Crown omissions above were contrary to the principles of the Treaty of Waitangi and were prejudicial to Maori, that prejudice consisting not only of land loss and loss of use, but of tribal dispersal, the attendant social collapse, and the burden of the grievance borne over the years, either permissively, or actively in Native Land Court proceedings, complaints, and petitions.
- While remedies have still to be considered, we indicate a preliminary opinion that the return of Stony Creek farm alone would not be sufficient to compensate for past loss, or provide a sufficient economic base for the hapu in the future.

11.3.8 Conclusions

For the foregoing reasons, we conclude the Muriwhenua land claims are well founded in the respects given. The people were marginalised on marginal lands, insufficient for traditional subsistence and inadequate for an agrarian economy. The social and economic consequences for the Muriwhenua hapu have been profound, with burgeoning impacts in terms of physical deprivation, poverty, social dislocation as families dismembered in search of work elsewhere, and loss of status during the long years of petition and protest when Muriwhenua leaders were made as applicants to Government bureaucrats.

These matters, and the serious social and economic conditions that still prevail in Muriwhenua, were set out in chapters 9 and 10. In all the circumstances, we consider that recommendations would be appropriate, and binding recommendations if need be, for the transfer of substantial benefits to compensate for or remove the prejudice.

The remaining sections of this report consider the steps necessary for final recommendations to be made.

11.4 ON RECOMMENDATIONS

We have given our conclusion that recommendations should be made, and should include proposals for the transfer of substantial property. Our preliminary opinion is that, unless the parties agree otherwise, this should include binding recommendations in respect of Crown forests and State enterprise assets. This section concerns the issues that need to be resolved before recommendations, including any binding recommendations that may be appropriate, can be made.

11.4.1 Total package relief

Counsel for claimants asked for binding recommendations now, in respect of Aupouri State Forest and Stony Creek Station in the event the claims were held to be well founded, with other relief to be considered later. Crown counsel were right to oppose this course, in our view. The Tribunal considers the binding recommendations for the transfer of large assets should not be made except in strict accordance with the law and then, in view of the discretion involved, only after considering all relevant matters of principle. The following view is preliminary only, as counsel were not fully heard on the matter, but it appears the Tribunal cannot proceed incrementally when binding recommendations are involved. Section 6(3) of the Act provides for the Tribunal to propose the necessary action to compensate for or remove the prejudice arising from past Crown action in a well-founded case. Sections 8A(2) and 8HB(1) provide for binding recommendations to be 'included' in the recommendation under section

6(3). The effect, as we see it, is that the Tribunal must propose a total relief package and cannot deal with matters piecemeal.

This was indicated in a memorandum to counsel of 30 January 1995.¹⁸ Subject to such further submissions as counsel may wish to make, the Tribunal considers binding recommendations cannot be made for any claimant group except in the context of the total relief due to it.

II.4.2 Early relief

It is none the less apparent that relief must be given sooner rather than later. The Runanga o Muriwhenua first introduced the claim to the Tribunal in 1986. However, reforms in the fishing industry, new policies for the sale of Crown assets, and particular local body works compelled the land claims to be shelved for the Muriwhenua fishing claim, a claim in respect of the alienation of Crown assets, and a claim relating to Taipa sewerage. This involved the runanga not only in protracted Tribunal hearings, but in extensive proceedings in the High Court and Court of Appeal, and in associated negotiations with the Government. We understand that the returns to Muriwhenua have not been large. In the meantime, the runanga has had a heavy cost and crippling responsibility to bear, and the burden of advancing complex land claims from 1990. Early relief is as necessary as it is appropriate.

II.4.3 Negotiations

The Tribunal understands that negotiations have not progressed since the final hearing in 1994, and does not propose to adjourn matters for further negotiations unless all counsel consent to that course.

II.4.4 Approach to relief

The Tribunal wishes to hear counsel on the approach to be taken to the recommendations to be made. Is it to compensate each wrongful loss to the fullest extent, when, in our finding, the acquisition of most of Muriwhenua was inconsistent with the principles of the Treaty, or is it to consider what is necessary for tribal restoration? The Tribunal's preliminary opinion, which was introduced at section II.2.3, is set out below. This broadly follows the *Report of the Waitangi Tribunal on the Orakei Claim*, in principle though not necessarily in quantum.

The Tribunal is not a court required to determine an actionable wrong, quantify a particular loss, or award damages for property losses and injuries on legal lines. A different approach may be appropriate for specific claims by individuals on account of particular recent losses, but the historical claims of

18. Paper 2.125

peoples are in another category. For such claims, property losses may be validly offset by other benefits, albeit of a general nature. Thus, the statutory direction to the Tribunal is in general terms. It may recommend that action be taken to compensate for or remove the prejudice, or to prevent other persons from being similarly affected in the future. This is not the language of the courts. 'Prejudice', in this context, would appear to embrace broad social and economic consequences.

Since the case for the claims is based upon the principles of the Treaty of Waitangi, it appears the remedy, for general wrongs affecting peoples, should also have regard to Treaty principles. It may be considered that the broad object of the Treaty was to secure a place for two peoples in one country, where both would benefit from settlement, and which basically required a fair sharing of resources. On that basis, where the place of a hapu has been wrongly diminished, an appropriate response is to ask what is necessary to re-establish it.

On this basis, the remedy does not depend solely upon a measurement of past loss, and compensation for historical claims may be at less than the proven value of the total properties in question. The Tribunal is thus particularly interested in the relevant factors to be considered. They could include, for example:

- the seriousness of the case – the extent of property loss and the extent of consideration given to hapu interests;
- the impact of that loss, having regard to the numbers affected and the lands remaining;
- the socio-economic consequences;
- the effect on the status and standing of the people;
- the benefits returned from European settlement;
- the lands necessary to provide a reasonable economic base for the hapu and to secure livelihoods for the affected people; and
- the impact of reparation on the rest of the community (so that local and national economic constraints are also relevant).

The thrust, it may be argued, is to compensate for past wrongs and remove the prejudice, by assuring a better arrangement for the hapu in the future. If that is not the thrust the legislature would intend, then it may be the legislature should make the appropriate criteria more apparent; but again that is a matter on which we would prefer to hear argument.

Who should benefit? Again we indicate our preliminary thinking. Recommendations appear to be required to secure an appropriate economic base for the groups above-named, Ngati Kuri, Te Aupouri, Ngai Takoto, Te Rarawa, Ngati Kahu, and Ngati Kahu o Whangaroa, either independently or through the central agency of the Runanga o Muriwhenua.

In addition, however, there may be cases where full justice would not be met if more particular groups were not compensated for specific losses. These are referred to later.

11.4.5 Nexus

By sections 8A and 8HB, a binding recommendation may be made ‘where a claim . . . relates in whole or in part’ to forest or other land on which binding recommendations may be made. Crown counsel contended that there must be a sufficient nexus between the claim and the land in question.

Counsel may wish to be heard further on this matter, which was not fully addressed. It appears that in this case, however, the claims are substantially about the loss of land throughout the tribal area as a result of several Crown policies and practices. The question is whether the land about which binding recommendations may be made is part of the territory affected by the policies and practices complained of. ‘Relates to’ must have regard to the tribe, the tribal area, and the type of claims that may be brought under the legislation.

11.4.6 Post-1865 claims

In the preface, it was noted that the current inquiry has been limited to policies and practices established before 1865. As we see it, however, the impact of those policies and practices entitles the claimants to a very large compensation to enable their re-establishment in future. This must involve the transfer of substantial assets. Taking the approach suggested at section 11.4.4, the Tribunal does not consider the proof of further wrongs after 1865 could add anything to the relief that might now be given.

If counsel wish to proceed with a post-1865 inquiry, then, of course the Tribunal will do so; but, unless an incremental approach is acceptable, relief may need to be postponed until that has been done. It is suggested that delay is unnecessary, and that relief should be explored at this stage with matters post-1865 remaining uninvestigated.

11.4.7 Specific claims

The foregoing should not prejudice specific claims where a particular relief may be called for. These claims may be severed from the general claims, for separate hearings later. At this stage the Tribunal is aware of specific claims relating to:

- Ninety Mile Beach (Wai 45);
- Rating (Wai 117 and 284);
- Mapera 2 school site (Wai 118);
- Te Kao School site and telephone exchange (Wai 292);
- Kohumarū Station and nearby blocks (Wai 295, 320);
- Telecom depot, Kaitaia (Wai 534);
- Takahue School and other lands (Wai 544, 548);
- Konoti and other blocks (Wai 590);
- Te Kohanga No 1 (Wai 626); and
- Te Kao 76 and 77B (Wai 643).

It appears the general claim could be settled without prejudice to the above.

11.4.8 Tribal representation

The Tribunal's understanding of tribal representation is also given, so that any concerns might be further debated. The claims were initially brought by the Honourable Matiu Rata for Ngati Kuri; Wiki Karena for Te Aupouri and Aupouri Maori Trust Board; Simon Snowden for Te Rarawa and Te Rarawa Tribal Executive; the Reverend Maori Marsden for Ngai Takoto and Ngai Takoto Tribal Executive; McCully Matiu for Ngati Kahu and the Ngati Kahu Trust Board; and Peter Pangari for Ngati Kahu o Whangaroa.

At the opening of the inquiry and at all subsequent times during several years of hearings, it was settled and agreed that all claims, except that of Ngati Kahu o Whangaroa, would be presented through the Runanga o Muriwhenua. The Tribunal was given to understand, however, that if the claims were well founded, the intention of the runanga was to direct any compensation to the groups above-named. As mentioned in the preface, it considerably assisted the Tribunal that the claims were brought in a unified way. Several witnesses spoke as well of the close relationships within the Muriwhenua hapu in terms of whakapapa, shared experience and locality, so that they collectively constitute a distinctive people or iwi.

Subsequent to the final hearing in 1994, however, and more particularly in 1996, another group has given notice of its desire to be heard independently. This stands under the name 'Southern Alliance'. The Tribunal has been given to understand that the chair is shared by McCully Matiu (above-named) for Te Runanga o Ngati Kahu (a separate body from the Ngati Kahu Trust Board which was represented during the inquiry), Ranareti Brown for Ngai Takoto, and John Campbell for Te Runanga o Te Rarawa.¹⁹

Further, a separate claim was filed at about the same time, for Graeme Neho on behalf of Ngati Kuri Trust Board.²⁰ For the reasons given below, any associated problems will need to be sorted out.

11.4.9 Vesting of assets

Binding recommendations for the vesting of assets may be on such terms and conditions as the Tribunal considers appropriate and shall identify the Maori or group of Maori to whom the land is to be returned.²¹

The Tribunal will need particulars of the assets in Muriwhenua that could be affected by binding recommendations.

19. See papers 2.128, 2.135

20. Ibid

21. See ss 8A, 8HB Treaty of Waitangi Act 1975

The Tribunal will need to be advised of the relief sought by the runanga and of the Maori or group of Maori for whose benefit any binding or ordinary recommendations should be made.

The Tribunal will hear such groups with an interest as may wish to be heard on those matters.

However, the Tribunal expresses the following concerns at this stage:

- The runanga and any other groups involved in earlier proceedings must be protected for any outstanding costs, including legal costs.
- The spread of assets about which binding recommendations might be made may not be even over the various tribal and geographic areas. It does not appear that Stony Creek Station alone would be sufficient for the claims of Ngati Kahu o Whangaroa, for example, and recoverable land within the central district of Ngati Kahu appears to be far less than that which would be required, having regard to the losses in that area. There is a question of whether assets might be held in a central agency for a period, to assist all the hapu to develop a reasonable asset base for the future and to ensure equity between them.

11.4.10 Boundaries

In the course of the hearing, certain hapu representatives described their understanding of their tribal boundaries. We have no difficulty with the hapu settling upon hapu boundaries as agreed between them, if they can indeed be agreed, but we would not ourselves presume to fix boundaries or even refer boundaries to the Maori Appellate Court to determine. The traditional focus was on the relationships between hapu, not on the lines that divide them, and there has been considerable mobility (see sec 2.2).

While it is certainly the case that block boundaries, or places habitually frequented, can be recited by Maori with considerable particularity, and can cover vast areas, we do not regard these as having had the same significance as the political boundaries of states. The important task is not to imagine boundaries for purposes that were once unimaginable, and once more to force Maori into a European mould, but to consider how each hapu can be restored to a reasonable economic base, having regard to comparable hapu strengths.

11.4.11 Conservation land

It may be that ordinary recommendations could be proposed in respect of Department of Conservation lands, in particular but not exclusively at Motuopao, Muriwhenua North, Kapowairua, and Karikari Peninsula. This was indicated during the course of the previous inquiry. The Tribunal would like to hear parties thereon, and whether arrangements to protect public uses would be envisaged.

11.4.12 Surplus land settlement

Claimants contended that a prior ‘settlement’ of surplus lands, following the 1946 surplus land inquiry, was not a mutual settlement. It was not agreed, nor was there a direct benefit to Muriwhenua. The Tribunal flags this matter as an issue that could be relevant to remedies.

11.4.13 Proof of acquisitions

The Tribunal considers the Muriwhenua claimants have been prejudiced by the lack of such a basic protective measure as that of requiring the Government to prove its acquisitions and to document how it came by Maori land (see sec 9.6). It is considered that other Maori may have been adversely affected in the same way and may be similarly prejudiced in future. The Tribunal foreshadows a recommendation to the effect that for all Crown land there should be a title, and that the source of the Crown’s right to the land should be clearly enrolled in an instrument lodged with the District Land Registrar. Again, however, the Tribunal would like to hear counsel on that matter first.

Any such recommendation, in the Tribunal’s view, should not relieve the Government from establishing the basis for its claim to any particular land, or how the native title thereover was extinguished, in appropriate historical cases.

11.4.14 Further hearing

The Tribunal director will be arranging as soon as practicable a time and place for the Tribunal to hear counsel and other representatives on the following:

- whether negotiations, further hearing of post-1865 matters, or recommendations are sought at this stage; and if the latter,
- whether the Tribunal is limited to a total relief package as outlined in section 11.4.11;
- the appropriate approach to relief, having regard to the comments in section 11.4.4;
- the issue of nexus at section 11.4.5;
- any other matters of jurisdiction;
- particulars of the properties on which binding recommendations may be made; and
- the arrangements necessary for a remedies hearing.

Thereafter the Tribunal director will be liaising with interested Maori groups on the extent to which issues can be agreed, or an order for hearing them can be settled.

In conclusion, Minister, we consider that all involved in the Muriwhenua proceedings, members of the public, witnesses, officials, counsel, and also the Tribunal itself, have at all times been treated with the utmost courtesy and respect by the Muriwhenua people, and their considerate demeanour has substantially

helped the inquiry. We mention also our gratitude to counsel and researchers, without whom a full inquiry could not have been completed.

Since Maori claim a special relationship with the Crown, there appears to have been some anxiety amongst certain claimants that Crown researchers, and Crown counsel, left no stone unturned in presenting a healthy response to the claimants' case. That response, however, was no less than that which the Tribunal expected to ensure all points of view were canvassed. Although we could not presume that every aspect of the complex Muriwhenua claims has been covered, or could be covered without more years of work, the Crown's submissions assisted us to make the current examination as full as could be in the circumstances, and to relieve that which has been a very old Muriwhenua complaint, that their concerns have not been fully and properly heard.

Dated at Wellington this day of 1997

Chief Judge E T Durie, chairperson

M A Bennett, member

J R Morris, member

E M Stokes, member

