

CHAPTER 10

FINDINGS

10.1 THE CONFISCATIONS

10.1.1 The Crown's position

In the hearing of the current claims, the Crown acknowledged that the Ngati Awa confiscation constituted 'an injustice' and was therefore in breach of the principles of the Treaty of Waitangi.¹ That admission was appropriate in helping to requite a long outstanding grievance. To the best of our knowledge, this was the first time that such an acknowledgement has been made in a legal forum during the 130 years since the land was taken. None the less, the claimants sought the Tribunal's own determinations. In this jurisdiction, which is to inquire into claims and to report thereon to Ministers and to claimants, they are entitled to such findings.

10.1.2 Whether contrary to the Treaty of Waitangi

In terms, the confiscation of the Ngati Awa land must be contrary to the Treaty of Waitangi. Confiscation was simply contrary to the Treaty guarantee that Maori would retain the possession of their lands for so long as they wished to keep them. However, in this case it is pertinent to ask whether the Treaty could be suspended on account of the general state of war at the time and, if so, whether the denial of Treaty rights to Ngati Awa was justified in their case. By a 'general state of war', we refer to the war begun in Taranaki and continued in Waikato and Tauranga, which spilt over into the eastern Bay of Plenty in the form of attempts to join those wars, some proselytising from Taranaki, murder, and a campaign to effect arrests.

In this case, we need not ask whether the Treaty could have been suspended on account of the war, for we consider that, even if it could have been, it was not justly suspended to deny the Treaty rights of Ngati Awa. We refer first to the war generally and, secondly, to the presumption that there had been a war, or rebellion, in this district.

The Treaty was effectively suspended by the New Zealand Settlements Act 1863 on account of the war that began in Taranaki and that was continued soon after in Waikato. It has been seen, however, that both these wars were of the Governor's own making. We refer to the finding to that effect in the *Taranaki Report* and the opinion

1. Document K17, para 74

earlier in this report on the Waikato invasion.² In both cases, the Governor was the invader, and an invader without just cause. Standing back and taking an even broader view of matters, the wars arose from the Governor's failure to respect the autonomy of the tribes within their own spheres, an autonomy that the Crown had previously recognised in the Treaty of Waitangi.

Nor could events in this district be seen as a separate war, assuming that there was a war in this district at all. The plain fact is that Völkner and Fulloon would not have been killed and there would thus have been no action to arrest individuals of Whakatohea and Ngati Awa, for the resistance to which the land was taken, but for the war that the Governor started in Taranaki. The events in the causative chain flowed naturally from one to the other.

The next question is whether there had in fact been a rebellion in this district to justify the Ngati Awa land confiscation in terms of the New Zealand Settlements Act 1863. Taking a dictionary definition of 'rebellion', since it is not defined in the Act, it refers to organised opposition to the Government. There is a necessary element of corporate intent to have the Government defeated or overthrown. It is usually associated with a recourse to arms. However, to define it as any recourse to arms against official forces would cast the net too wide. That would bring in individual action normally dealt with under the ordinary criminal law; for example, action to avoid arrest.

As referred to in chapter 6, 'rebellion' in Ngati Awa territory could not relate to other than resistance to arrests following the murder of Fulloon. First, it could not relate to any involvement in the campaign of certain East Coast tribes to reach Waikato or Tauranga. The action there was not against the Crown but against Te Arawa, and concerned the right of access over lands that Te Arawa claimed. Nor could it relate to the imposition of aukati. The runanga aukati was clearly intended to keep the peace and was not in itself antagonistic to the Crown. The Pai Marire aukati was made in opposition to the further encroachment of the Crown but was not in itself an attempt to overthrow the Government. At any rate, all this had occurred prior to 5 September 1865, and the proclamation of peace had pardoned all acts of rebellion prior to then.

For the further reasons given in chapter 6, we are of the opinion that there was no rebellion when certain of Ngati Awa subsequently resisted the arrest of those charged with the murders of Fulloon and some crew of the *Kate*. Those who joined together to resist the Arawa force were organised not against the Government but for their self-defence, and such action was reasonable in the circumstances.

2. See Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wellington, GP Publications, 1996, pp 78–81, where it states:

The causes of war are many. In this case, however, they point generally to the conclusion that the Governor started it. Most especially, he disregarded Maori law and authority . . . Maori law and authority with regard to the ownership and possession of land were Treaty guaranteed, and thus the Governor's actions, which caused the war, were contrary to the Treaty.

See also chapter 4 of this report.

In any event, there was no emergency to justify the suspension of the Treaty or the confiscation of the land at the time that the land was taken. When the land was taken, in 1866, any organised resistance to the Government had been put down. There was no one in arms. Those wanted for murder had been arrested and were about to go on trial for their lives. Those not on trial had been required to take an oath of allegiance, and the tribal leaders had done so.

For all those reasons, we find that the confiscation was contrary to the principles of the Treaty, in that the Treaty did not allow of it and the circumstances did not justify the suspension of the Treaty rights amongst the Ngati Awa people. That is our principal finding.

10.1.3 Comparison with the Sim commission

We distinguish the finding of the Sim commission, which was appointed to investigate numerous Maori petitions, including those relating to the confiscations, in 1928. That commission was charged with determining whether the confiscations ‘exceeded in quantity what was fair and just’.³ It was not permitted to inquire into the legality or justness of the confiscations or empowered to consider the Treaty of Waitangi.

The commission was also under considerable pressure. In eight months, it was required to report on all the confiscations, including those in Waikato, Taranaki, Tauranga, and the eastern Bay of Plenty, as well as respond to 56 petitions from places ranging from Hawke’s Bay to Northland. The hearings to consider the confiscation of the entire eastern Bay of Plenty district were undertaken in approximately five hearing days between Wednesday 23 and Tuesday 29 March 1927.⁴

The commission found that, ‘except in the case of the Whakatohea Tribe, the confiscations in the Bay of Plenty did not exceed what was fair and just’.⁵

10.1.4 Ancilliary findings

In addition, we find that:

- The Ngati Awa confiscation appears to have been beyond the authority of the New Zealand Settlements Act 1863, resulting in far more land being taken than lawfully could have been. We follow in that respect the opinion in the *Taranaki Report*.⁶ The Governor was obliged to prescribe districts where there had been rebellion, to define the areas suitable and necessary for military settlements, and then to confiscate only those areas. There was no proper and lawful basis on which the Governor could declare a district and then confiscate everything within it, without any attempt at selection, as he did in this instance.

3. AJHR, 1928, G-7, p 2

4. The Sim commission’s report on the eastern Bay of Plenty confiscation can be found at AJHR, 1928, G-7, pp 20–22. The minutes of the hearings in Opotiki and Whakatane have been lost, but see RDB, vol 50, pp 19,272–19,295. For an overview of the inadequacies of the Sim commission, see *The Taranaki Report*, pp 293–296.

5. AJHR, 1928, G-7, p 22

6. *The Taranaki Report*, pp 126–134, 309

In terms of the Treaty of Waitangi, Maori were obliged to accept the Governor's law, but the Governor himself was equally obliged to follow it. The failure to comply strictly with the punitive provisions of the New Zealand Settlements Act was also contrary to the Treaty principle that the Treaty partners should act towards each other with the utmost good faith. Our historical overview is that the Governor and his advisers were more intent on simply gaining the land that Maori were refusing to sell.

In illustration, it was impossible to have lawfully confiscated the rugged hill country that could not have been settled at the time. In addition, it was not possible to have confiscated that part of Mount Putauaki that lay within the confiscation boundary, the whole of the Rangitaiki Swamp (now the greater part of the Rangitaiki Plains), and the sacred sites of Ngati Awa. These were clearly unsuited to military settlements at the time.

It matters not that events were put beyond judicial intervention by subsequent validating legislation.⁷ This declared that everything done had been done legally, but in Treaty terms that merely compounded the wrong.

- More land was taken than was necessary for the purpose of installing military settlers. Military settlers were not in fact installed over most of the confiscated area. They probably took less than one percent of it. Part of the land was in fact eventually given over for a university endowment.
- Assuming that the Treaty could be set aside for extraordinary circumstances, it could be set aside only to the minimum degree necessary, but in this case land was so taken as to include even the land of those hapu that had not been involved in the acts complained of. There was simply no proper inquiry.

It was also unnecessary to take that much land. The purpose of the Act was to prevent future insurrection by establishing military settlements on confiscated land. If there had been hapu in rebellion, it would not have been necessary to confiscate from other than those in rebellion in order to establish military settlements.

In illustration, it appears that some Te Arawa land was taken, even though Te Arawa had assisted the Crown's military action. Amongst the Ngati Awa, the lands of hapu from Whakatane to Ohiwa were included in the confiscation, yet these had a record of cooperation with the Government, limited only by the fact that the Government had not been very active in this area. These hapu were not involved in the killing of Fulloon. In fact, they objected, Fulloon being closely related to a principal rangatira of the area, Wepiha Apanui. Wepiha supported the arrest of Te Hura and others who were involved. He also testified against each of those charged. His lands were none the less taken.

For the Whakatane hapu, there was a particular irony. The military were in fact settled not on the lands of those most involved in the acts complained of but on the Whakatane land. Another large part of the land of the Whakatane hapu

7. *The Taranaki Report*, pp 118–120. The New Zealand Settlements Act 1863 was amended every year from 1863 to 1867 and seeded new legislation, such as the Confiscated Lands Act 1867, the Richmond Land Sales Act 1870, and the Whakatane Grants Validation Act 1878.

was then used to relocate ‘offenders’. Sections of land at Whakatane were allocated to persons of Te Arawa. In this case, the ‘innocent’ were penalised nearly as harshly as those deemed to be rebels.

It was claimed at the time that the confiscation of everyone’s land was necessary to secure the best military posts and because it was not possible to determine the extent of hapu culpability.⁸ We think the opinion self-serving and implausible. It ought to have been known at the time, or to have been discoverable on but a small inquiry, that the hapu around and south of Whakatane were not implicated and had a record of cooperation with Government officials. The confiscation was an overly blunt response and had at the very least to be more selective.

The action of taking the land of the hapu that had not been involved was also probably unlawful. In terms of the New Zealand Settlements Act 1863, the land of a tribe could be confiscated if the tribe or any section of it was in rebellion. ‘Tribe’ in our view must refer to hapu. This was a punitive Act, and as such it had to be read restrictively. If ‘tribe’ was meant to refer to the whole of Ngati Awa, it would have been necessary to refer to a tribal collective or federation. Whether or not it was unlawful, the confiscation of the land of non-participating tribes was contrary to the Treaty.

There was precedent for the taking of property on account of a crime, just as today land and other property may be taken under the Proceeds of Crime Act 1991, section 84 of the Criminal Justice Act 1985, section 107B of the Fisheries Act 1983, and section 32 of the Misuse of Drugs Act 1975. However, there was no precedent for taking the land of a general class of persons irrespective of culpability, save only for the confiscations in Ireland and Scotland.⁹

Against the contention that the ‘innocent’ suffered with the ‘guilty’ was the provision in the New Zealand Settlements Act for compensation to be paid to those who established that they were either loyal to the Crown or neutral. This provision was totally inadequate as a protection for the innocent. Apart from the shift of the onus of proof to the innocent, these people were often also required to leave their ancestral lands. Such customary land as was left or returned to them was then subject to a foreign land tenure system that compromised their tribal rights and customary authority and exposed their lands to alienation. Moreover, the Compensation Court did not in fact inquire as to compensation entitlements. Matters were handled administratively and there was no proper adjudication.

- Similarly, there was no adequate endeavour to determine tribal territories. The confiscation boundaries were simply defined by straight lines to encompass a huge district. We accept that, in this case, any closer definition of tribal boundaries would have presented difficulties. None the less, we cannot see how

8. Confidential instructions from Native Minister Fitzgerald to Pollen, 3 September 1865, AGG-A1/1, NA Wellington (cited in doc A2, p 30; doc A2(1)(3))

9. See the discussion on confiscations in Scotland, Ireland, and elsewhere in *The Taranaki Report*, p 133.

those difficulties could have justified the taking of any land in the area from the western edge of the Rangitaiki Swamp through Whakatane, and on to Ohiwa.

- It was contrary to the principles of the Treaty that the confiscation was effectively posited as an unreviewable act of State. There was no right of hearing on the Governor's finding on rebellion and no appeal. There is no evidence that the Governor sought an impartial inquiry on what had actually happened; no reasons were given to justify the finding of rebellion; and there was no inquiry into whether the confiscation was actually necessary at the time in order to keep the peace. On the evidence now available, it was not necessary. The war was over and oaths of allegiance had been given.
- It was contrary to the principles of the Treaty that the Governor did not abandon the confiscation once it was obvious that further military settlement was no longer necessary in order to keep the peace and that he made no inquiry on that matter.

Abandonment as to whole or part was provided for in section 6 of the New Zealand Settlements Amendment and Continuance Act 1865. While a sizeable area of the confiscation district east of Opotiki in the territory of Te Whanau-a-Apanui was abandoned, this did not occur in Ngati Awa's territory. Nevertheless, it must have been increasingly obvious that there was no further likelihood of trouble. Te Kooti effected raids into the area, and in retaliation, Ngati Awa in fact assisted the Crown in Te Kooti's pursuit.

- There is compelling evidence that the lands taken were taken for political expediency. Contemporary observations by Ministers and officials support the view that the real purpose was simply land acquisition. There was no reference to the land needed to keep the peace. The true motives appear to have been to acquire land, to break the tribal power and authority of the Ngati Awa hapu, and to effect a punishment for the Völkner and Fulloon murders. None of those motives was provided for in the New Zealand Settlements Act 1863, under which the land was taken. Murder was a criminal offence for which individuals were bound to pay, and for which those responsible did in fact pay in this instance. It was not rebellion for which a whole hapu could be liable. It is very clear that the Ngati Awa land was taken for rebellion, and equally that it was not taken for the murder. It was expressly taken under the New Zealand Settlements Act, where only rebellion applied.

There were many statements made by politicians that illustrate the true reasons for taking the land. We mention only that in 1864 William Fox, the Colonial Secretary, considered that it was 'most prejudicial to the native race' that 'the natives themselves, rebel or others' should be permitted 'to retain possession of immense tracts of land, which they neither use, nor allow others to use, and which maintains them in a state of isolation from the European race and its progressive civilization'.¹⁰ That is typical of prominent office-bearers during that time of war.

10. AJHR, 1864, E-2, app, p 18

Likewise, the statement of Premier Stafford discussed in chapter 6 discloses his view that the land was taken as punishment for the murders, when as a matter of law, it could not be taken for that purpose.

However, while it may be thought that the confiscation was normal according to the thinking of the day, it is useful to be reminded that not all Europeans agreed. Some outstanding colonists were vehemently opposed, among them Sir William Martin, the country's first chief justice, then retired.

There were also strong reservations within the Colonial Office in England, which had still to approve such legislation at the time. Somewhat misinformed of the situation by Governor Grey, in our view, the Colonial Office reluctantly agreed. In agreeing, however, conditions were imposed that were not observed.

In paraphrase, the first condition was that land should not be taken unless no agreement could be reached with conquered tribes on that which was to be ceded. No attempt was made to seek an agreement, but as a coincidence, in this case the 'loyal' Te Rangitukehu offered 10,000 acres 'for the sin of some people'.¹¹ We think that this was more than sufficient for the stated purposes of the Act.

Secondly, the Act was to apply for only two years. In fact, it did not and was 'made perpetual' in 1865.

Thirdly, a commission was to be established to determine what land might be forfeited. It was not.

Fourthly, the land of those who were not rebels was not to be touched. It was.

Though these royal instructions were 'directory' only and had no binding legal effect, the response to them is indicative of the contemporary mood in New Zealand.¹²

10.2 ARRESTS AND TRIALS

In terms of the Treaty, the Governor was entitled to make laws for peace and order for the country as a whole. While these laws applied throughout the country in a theoretical sense, in practice in Maori districts the Governor sought to introduce English law gradually. Very little had been introduced in this district. None the less, in our view it was necessary that there should be a law against murder. It was also necessary that it should apply to all Maori, even in remote places. It was also generally known that the Governor would take action against the murderers of Europeans no matter where they might be. We consider that the Governor was justified, in Treaty terms, in bringing to trial the murderers of Völkner and Fulloon, and we consider that that result ought reasonably to have been anticipated by the perpetrators.

In our view, he was also justified in taking action to arrest those suspected of murder whether or not an aukati was in force in accordance with local law.

11. Agreement between Rangitukehu and Wilson, 11 March 1867, AD1/1867/3881, NA Wellington (cited in doc 15, p 82)

12. *The Taranaki Report*, pp 115–117

Our only reservation concerns the manner in which the warrants for arrest were enforced. The usual standard – that those named in the warrants should surrender to an official force that is demonstrably fair and impartial and that will use no more force than is necessary – was not maintained in this instance. An enemy engaged by the Crown for the purpose delivered the warrants. By reputation, that enemy was likely to go on a rampage once inside Ngati Awa territory. So it did in fact, even after those sought had surrendered.

In addition, we do not accept that the ‘sin’ inherent in the murder of Fulloon, to use the language of Maori at the time, should have been visited on Ngati Awa as a whole. The crime can be attributed only to those convicted of it. Those convicted, and even others who may have been implicated in the Pai Marire aukati that led to the event, represented only a small minority of the Ngati Awa people.

10.3 LAND RETURNS AND PURCHASES

As mentioned earlier, the New Zealand Settlements Act 1863 was approved in England on the basis that certain precautions would be taken to safeguard the innocent and to protect others from unduly harsh treatment. In the light of that, there were provisions to compensate the ‘loyal’ through the mechanism of a court and, under an amendment to the Act, to return such land to surrendered rebels as might be necessary for their survival. As considered in chapter 8, in practice this was largely window-dressing. Instead, procedures were put in place to bring all Maori land within Government control in order to overcome tribal authority and to facilitate land alienation. We recapitulate the main points.

- (a) The Compensation Court for this district was in fact comprised of Government officials who had organised or led the campaign to effect arrests for the murder of Fulloon. These could not maintain the appearance of impartiality and could justifiably be seen as having an interest in maintaining Ngati Awa in a state of subjugation.
- (b) Compensation in the form of land returns was in fact effected administratively with minimal judicial oversight. This was done through a Crown agent and Maori were not in a bargaining position to take other than that offered. In the result, those who had not participated in the events complained of were treated little better than those who had. There was also no inquiry into that which was necessary for the survival of the ‘rebel’ hapu, and they received far less than was reasonably required.
- (c) No land was returned in the condition in which it was taken. It was returned not in customary title for the hapu as a group but in individual shareholdings. The effect, and the apparent purpose, was to break the power of the tribes to resist land sales. The land was thus exposed to alienation.
- (d) As land was allocated, it was often purchased for the Government at the same time. There is a likelihood that much land was allocated only to those willing to sell it.

- (e) Despite the limited return of land, restrictions on alienation were not maintained.
- (f) The Native Land Court awarded land outside the confiscation boundary, mainly hinterland hill country, to Maori. This, too, was awarded in individual shareholdings.

The Native Land Court was strikingly similar in its operation and effect to the Compensation Court. Both were presided over by Chief Judge Fenton and both facilitated the alienation of land through the individualisation of title. Again, the Government agent responsible for returning confiscated land was heavily involved in settling the ownership of the land that had not been confiscated and in effecting purchases. We have been unable to investigate the further claim of Ngati Awa that, on account of their rebel status, they were not awarded interests in land to which they were justly entitled. They claim that the court favoured Te Arawa.

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

10.4 IMPACT

The impact of confiscation was considered in the preceding chapter. The immediate effect was that the majority of most hapu were relocated on several allotments on one side of the Whakatane River in the view or within easy reach of the military settlement at Whakatane on the opposite bank. There, they were left to survive on lands that were not their customary lands and where they would feel that the land was not really theirs to belong to. It was natural that arguments about customary entitlements would follow. They were also without access to the resource spots that they had traditionally used for food gathering, and there were enmities the moment attempts were made to use food-gathering places that habitually belonged to others. The pattern of use rights known to Maori people was thus threatened. Respect for customary rights underpinned respect for Maori law, thus important tenets in Maori social organisation, and traditional respect for law or customary rights, were threatened as well.

There were attempts to rebuild the social order through the construction of a carved house, symbolic of Ngati Awa unity. However, the house was acquired by the Government for display in an overseas exhibition and was not returned until very

recently. With Ngati Awa involved in pleas for the return of land, or the release of prisoners jailed for life or with suspended death sentences, the people were powerless to protest.

Subsequently, through the loss of land and traditional social structures, Ngati Awa as a people were unable to compete in economic development. They had not quite the same benefit of substantial advances made to other Maori for land development since they lacked the land to develop, apart from those areas returned and developed by Ngata. They fell behind in terms of health and educational progress. In terms of their own culture, their standing amongst the tribes of New Zealand was considerably diminished. They were a people without means. They were the tangata hara.

In considering the concessionary advances made to other Maori for land development, and provisions made from the 1940s for other descent groups whose lands were confiscated, we think it plain that the Government has continued to view Ngati Awa with disfavour. Much of this may stem from the 1928 Sim commission report's light dismissal of Ngati Awa's grievance. We consider that it is contrary to the principles of the Treaty of Waitangi that the Government has not dealt equally between the tribes.