

## PART I

# INTRODUCTION

### **PTI.1 BACKGROUND**

#### **PTI.1.1 *Te Whanganui-a-Orotu Report 1995***

In our *Te Whanganui-a-Orotu Report 1995*, we concluded that the claim by Te Otane Reti and others on behalf of seven claimant hapu lodged in 1988 and heard in 1993 and 1994 was well founded. By failing actively to protect the claimants' customary and Treaty rights to tino rangatiratanga over their resource and taonga in exchange for the right to kawanatanga (governance), the Crown had breached the general overarching principle of partnership, involving the duty to act responsibly and in good faith and to consult its Treaty partner. A list of the Treaty breaches found is reprinted in appendix III of this report.

#### **PTI.1.2 A remedies hearing proposed**

Having found that the Te Whanganui-a-Orotu claim was 'well founded' under section 6(3) of the Treaty of Waitangi Act 1975, we could have proceeded and, 'having regard to all the circumstances of the case', recommended to the Crown that action be taken to compensate the claimants or remove the prejudice. At that stage, however, we considered it inappropriate to make final recommendations for the following reasons:

- (a) the question of remedies was not extensively argued at the hearing;
- (b) we were considering a recommendation that the Landcorp farm be returned to the claimants and were conscious that such a recommendation would potentially be binding; and
- (c) we felt that the claimants should have the opportunity of reformulating the recommendations that they sought in light of the contents of our report.<sup>1</sup>

Instead, we set aside the week starting 30 October 1995 for a remedies hearing. To aid the remedies hearing process, we asked that several interim steps be taken and we offered a list of nine suggestions on possible recommendations on the information then available to us (see app iv).

In a joint memorandum of 27 September 1995, counsel for the Crown and claimants requested that the October hearing date be adjourned until February 1996. This was granted. A hearing date was eventually set for the week starting 12 August 1996.

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1. Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, 1st ed, Wellington, Brooker's Ltd, 1995 (doc 118), sec 12.4.2

**PTI.1.3 Remedies hearing and report**

The remedies hearing was held at the Great Wall Conference Centre in Napier on 12 and 13 August, by which time both parties had carried out the interim steps we had asked to be taken. The purpose of this report is to recommend the remedial action required to compensate the claimants for the loss of their taonga, Te Whanganui-a-Orotu. It is divided into two parts: the first provides background to the remedies hearing and summarises evidence given to us on remedies; in the second part, we set out our recommendations.

We greatly regret the long delay in the presentation of this report. There were two reasons for this delay. The first was that, as noted in the 1995 report at sections 12.4.1 and 12.4.2, the making of a recommendation that the Landcorp farm within the claim area be returned to the claimants was a possibility. Because the corporation is a State-owned enterprise, sections 8A to 8H of the Treaty of Waitangi Act 1975 (as inserted by the Treaty of Waitangi (State Enterprises) Act 1988) could apply. As yet, these provisions have not been applied by the Waitangi Tribunal. Their application raises a number of difficult legal issues. We are aware that, in the Turangi township claim (Wai 84), these issues are being considered in considerably more depth than they were in the remedies hearing before us. We had hoped that, before we reported on remedies, the Turangi township claim would have advanced to the point where this Tribunal would have the benefit of the consideration and determination in that claim of the legal issues that arise.

The second reason is that in 1993 the Te Whanganui-a-Orotu claim was accorded urgency by the Tribunal because of the possible freeholding of leasehold land owned by local bodies within the claim area. In the event, the enactment of the Treaty of Waitangi Amendment Act 1993 prevented the Tribunal from making any recommendations in respect of that land.<sup>2</sup> The consequence of the grant of urgency was, however, that the Te Whanganui-a-Orotu claim was required to be considered in isolation from other claims involving adjacent areas; in particular, claims Wai 168 (the Waiohiki lands claim), Wai 299 (the Mohaka–Waikare raupatu claim), and Wai 400 (the Ahuriri block claim). These claims are among the 20 that are currently being considered together by the Tribunal in the Mohaka ki Ahuriri regional claims inquiry. The issue of whether recommendations on the Te Whanganui-a-Orotu claim can be made in isolation of the wider claims is examined in the next section.

Notwithstanding the above issues, we accept that the Te Whanganui-a-Orotu claimants cannot be expected to wait indefinitely for our report, and accordingly this is now presented. As we said in our 1995 report, we do not want to see the question of relief delayed unnecessarily.<sup>3</sup>

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2. *Te Whanganui-a-Orotu Report 1995*, secs 1.5.5, 12.4.1

3. *Ibid*, sec 12.4.2

**PTI.2 WHY SHOULD RECOMMENDATIONS BE MADE?****PTI.2.1 Crown counsel's submissions**

In his submissions to us at the remedies hearing, Crown counsel Brendan Brown QC argued that it was 'premature to make recommendations at this time'.<sup>4</sup> The thrust of his submission on this point was that the Wai 55 claimants have a 'substantial interest' in other claims to the Tribunal, and that the Tribunal should consider all the claims of a claimant group before any recommendations are made. He noted that it was not the Crown's intention to have issues concerning Te Whanganui-a-Orotu isolated from a claim to the wider Ahuriri area. He submitted that the reason for urgency being granted to this claim no longer existed, following the enactment of the Treaty of Waitangi Amendment Act 1993.<sup>5</sup> The inappropriateness of addressing remedies in isolation, Mr Brown submitted, was demonstrated by 'the fact of Wai 400 and its overlapping focus', and a similar situation existed with Wai 201 and possibly Wai 168.<sup>6</sup>

He added that, even if the Tribunal did feel it appropriate to make some recommendations, no recommendation pursuant to section 8A(2)(a) (ie, a binding order) should be made.

In the following section, we discuss the appropriateness of making recommendations at this time. In a later section, we address the question of binding orders.

**PTI.2.2 The Tribunal's view**

In our view, it is entirely appropriate to make some recommendations at this stage. First and foremost, we think that redress is long overdue to the claimants for the loss of their taonga, Te Whanganui-a-Orotu. Concern about the Crown's assumption of ownership of the inner harbour first surfaced in 1861. A petition was sent to Parliament and was discussed by a Native Affairs select committee in 1875. There were nine petitions between 1875 and 1965 protesting against the loss of Te Whanganui-a-Orotu. Numerous applications to courts and other inquiries were also made; the claimants had to wait 14 years for one report.<sup>7</sup> Moreover, there is strong circumstantial evidence that a past Prime Minister and Minister of Maori Affairs, Peter Fraser, made an offer in 1949 to return to the claimants' tipuna what was then the Landcorp farm. The offer was apparently declined because the claimant elders at the time wanted full redress for their loss.<sup>8</sup> Clearly, the claimants have waited long enough, and remedies for the loss of Te Whanganui-a-Orotu should not be unduly or unreasonably delayed once more.

The Crown has submitted that it was not its desire to negotiate and settle the issues concerning the Te Whanganui-a-Orotu claim in isolation, particularly because the reason for urgency has passed. We accept that the reason was removed by the Treaty of Waitangi Amendment Act 1993. We also note the claimants' expression of dismay

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4. Document κ13 (synopsis of submissions of Crown counsel on remedies, 13 August 1996), p 28

5. Ibid, pp 28–29

6. Ibid, p 31

7. The 1932 petition of Hori Tupaea resulted in a Native Land Court inquiry in 1934, which Judge Harvey reported on in 1948: see *Te Whanganui-a-Orotu Report 1995*, secs 10.3–10.11.9.

8. *Te Whanganui-a-Orotu Report 1995*, sec 10.12.1

that the Act effectively denied them the opportunity to have parts of Te Whanganui-a-Orotu returned to them,<sup>9</sup> and claimant counsel Charl Hirschfeld's unsuccessful attempt to argue the amendment had no application either because it was enacted after the hearing had commenced or, alternatively, because it breached the Treaty.<sup>10</sup>

The claimants have continued to bring this claim before us and have asked us to address the remedies required to settle it. Furthermore, they have not sought to reintegrate Te Whanganui-a-Orotu issues with those of other claims. Indeed, they filed a new claim, which was registered with the Tribunal in 1993 as Wai 400, to deal with land issues arising from the 1851 Ahuriri purchase. As we see it, it would be unfair and unnecessary to delay relief for this claim until the Mohaka ki Ahuriri report is completed.

### PTI.2.3 Pukemokimoki

A further submission from Mr Brown concerned definitions of the claim area. This was directed principally to the inclusion of the wahi tapu Pukemokimoki in the claim area. Mr Brown questioned claimant witness David Compton about its inclusion and was told that Pukemokimoki was included because of the Tribunal's suggested recommendations in the 1995 report, and on the advice of the claimants.

In our 1995 report, one of our suggested recommendations was that 'compensation should be paid for the taking of . . . Pukemokimoki'. This was made on the basis of the evidence from the claimants about the importance of Pukemokimoki to them and from others on its loss. And where was Pukemokimoki? On the Ahuriri deed plan, this hill is shown on the southern end of Mataruahou.<sup>11</sup> In our 1995 report, we discussed how the red line on the deed plan delineating the external boundary of the Ahuriri purchase was redrawn at the time of the negotiations to exclude Pukemokimoki.<sup>12</sup> We also quoted the description of the boundaries in the English translation of the original deed, which states that Pukemokimoki was 'the only portion of Mataruahou reserved for ourselves'.<sup>13</sup> In the report, we described the 1856 purchase of a piece of land adjoining Mataruahou 'that had been excluded from the Ahuriri purchase by the reservation of Pukemokimoki'.<sup>14</sup> We also included a separate section on the removal of the hill to make way for a railway.<sup>15</sup>

Mr Compton showed Mr Brown where Pukemokimoki was in relation to the area defined as the Te Whanganui-a-Orotu boundary. Mr Compton agreed with Mr Brown that Pukemokimoki had always been land, rather than water. Mr Brown submitted that Pukemokimoki was not a part of Te Whanganui-a-Orotu, nor was it an island of Te Whanganui-a-Orotu. It was land that was excluded from the Ahuriri purchase and became part of a later purchase. For those reasons, Mr Brown argued

9. See, for example, doc K8 (brief of evidence of Heitia Hiha on redress)

10. *Te Whanganui-a-Orotu Report 1995*, sec 12.4.1

11. *Ibid*, p 69; see also p 128 for the 1865 plan.

12. *Ibid*, secs 4.8.1–4.8.5

13. *Ibid*, sec 4.3.3. Note that 'ourselves' refers to the Maori owners of Mataruahou.

14. *Ibid*, sec 5.3.2

15. *Ibid*, sec 6.2

that the Tribunal should be careful when considering the inclusion of Pukemokimoki in any calculation of loss suffered by the claimants.

We agree with the thrust of Mr Brown's submissions on this issue. Accordingly, we exclude the area of Pukemokimoki from the claim area. We expect that remedial action for the loss of Pukemokimoki will be addressed by the Wai 400 or Ahuriri block claimants.

#### **PTI.2.4 Overlapping claims**

##### ***(1) The Wai 400 claim***

Mr Brown submitted that Wai 400 has an overlapping focus, and that this is one reason why it is inappropriate for recommendations on remedies to be made in isolation of wider claims. The basis for Mr Brown's submission is the amendment to the Wai 400 statement of claim filed with the Tribunal on 29 May 1996.<sup>16</sup> The amendment reads: 'We allege that as a result of Crown purchase of Mataruahou (Scinde Is), Petane Block, Te Pahau Block, and Roro o Kuri we are prejudicially affected.'

We note first that neither this amendment nor the primary Wai 400 statement of claim mentions Te Whanganui-a-Orotu. Secondly, we note that no representative for Wai 400 wished to make submissions at the remedies hearing. And, thirdly, we note that Heitia Hiha, the chairperson of the Wai 55 claimant committee, assured us that this issue (of any overlap) would be resolved among the claimant groups. This has occurred. Following the remedies hearing, a letter was received from Haami Harmer, a representative for the Nga Hapu o Te Ahuriri Claimant Roopu (Wai 400) Charitable Trust.<sup>17</sup> In his letter, Mr Harmer explained that, in light of the recommendations sought by the Wai 55 claimants, the Wai 400 claimants wished to delete Roro o Kuri from their claim. Furthermore, we understand that the Wai 400 claim has now been heard as part of the Mohaka ki Ahuriri regional claims inquiry and note that the most recent and particularised Wai 400 statement of claim does not include Roro o Kuri or Te Whanganui-a-Orotu.<sup>18</sup> We conclude that it is understandable that, given that both claim areas were within the ambit of the Ahuriri deed of 1851, some confusion over the Wai 55 and Wai 400 claim boundaries may exist. But we believe that the evidence examined on the external boundary of the remedies claim in section PTI.3.2 of this report will resolve this issue.

##### ***(2) Roro o Kuri***

Because of the May 1996 amended statement of claim filed for Wai 400, Mr Brown asked us to be careful when considering the inclusion of Roro o Kuri as part of any remedial action. In our 1995 report, we mentioned Roro o Kuri many times. This reflected its importance as a site of many former pa, as a wahi tapu, and as a base for mahinga kai.<sup>19</sup> We detailed how it was alienated, as part of the Te Pahou block, and to

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16. Wai 201 ROI, claim 1.23(b) (amendment to Wai 400 statement of claim, 27 May 1996)

17. Wai 201 ROI, claim 1.23(c) (amendment to Wai 400 statement of claim, 30 September 1996)

18. Wai 201 ROI, claim 1.23(d) (amendment to Wai 400 statement of claim, 26 September 1997)

19. *Te Whanganui-a-Orotu Report 1995*, sec 4.5

whom it was sold. We concluded that the sale of Te Pahou was inconsistent with Treaty principles, and we found that the Crown had failed to take appropriate action to remedy this situation and to reserve fishing and access rights to Maori.<sup>20</sup> The whole of Roro o Kuri (and two other islands, Te Ihu o Te Rei and Parapara), but not all of the Te Pahou block, has been included in the map defining the claim area (see facing page).

In our view, it is entirely appropriate that Roro o Kuri remains included within the Wai 55 claim area. We also think that the other islands in the Te Pahou block, Te Ihu o Te Rei and Parapara, should be included in the claim area, along with any other part of the Te Pahou block that is within the claim boundary.

### **(3) *The Wai 201 claim***

Mr Brown also submitted that Wai 201 had a similar overlapping focus to Wai 400. Again, we note that no counsel or representative for Wai 201 appeared at the remedies hearing. Mr Hiha told us that to his knowledge no one was prosecuting the Wai 201 claim any more. This appears to be confirmed by the progress of the claim within the Mohaka ki Ahuriri inquiry. Following correspondence with one of the named claimants, the Tribunal directed that no further inquiry take place into the parts of the Wai 201 statement of claim that relate to the Mohaka ki Ahuriri inquiry.<sup>21</sup> The Tribunal stated that it was satisfied that all the matters in the claim that relate to the inquiry were included in other statements of claim and would be fully inquired into by the Tribunal. We are also of the view that the parts of the Wai 201 claim that relate to Te Whanganui-a-Orotu (ie, para 3.5) have been sufficiently covered in the second amended statement of claim for Wai 55 before us.<sup>22</sup>

### **(4) *The Wai 168 claim***

Mr Brown also submitted that there was a possibility of overlap with the Wai 168 claim, but he was not able to substantiate this possibility. That claim has been heard as part of the Mohaka ki Ahuriri regional claims inquiry. A particularised statement of claim was filed by the claimants on 25 November 1996. At paragraph 3.2 of that claim, it is noted that no prayer for relief was sought regarding Te Whanganui-a-Orotu.<sup>23</sup> We note that counsel for the present claimants, Mr Hirschfeld, also appears for the Wai 168 claimants. Presumably, therefore, there is no conflict of interest between the two groups.

### **(5) *The Tribunal's conclusion***

We acknowledge that the Crown has a responsibility to ensure that any overlapping interests in the Wai 55 claim area are identified, and therefore acted entirely properly in raising possible areas of overlap for our consideration. We accept that recommendations should not be made on this claim if overlapping claims exist and those

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20. *Te Whanganui-a-Orotu Report 1995*, sec 5.5.4

21. Wai 201 ROI, paper 2.235 (Tribunal direction advising that there will be no further inquiry into those parts of the Wai 201 statement of claim that relate to the Mohaka ki Ahuriri inquiry, 14 July 1997)

22. Wai 201 ROI, claim 1.1 (Wai 201 statement of claim, 14 May 1991)

23. Wai 201 ROI, claim 1.9(c) (amended Wai 168 statement of claim, 1 December 1996), p 3

Location map

claimants have not had the opportunity to be heard. Indeed, it was precisely for this reason that we heard Ngati Pahauwera's claim (Wai 432). We believe, however, that there was ample time and opportunity for any other overlapping claims to be included within the hearings on this claim. We are satisfied, therefore, that no other claims to Te Whanganui-a-Orotu exist.

### PTI.2.5 Wider claims

Mr Brown submitted that we should not make recommendations on remedies until all the claims of the claimant group are considered.<sup>24</sup> We accept that the seven hapu of Wai 55 do have considerable interests in other claims; notably, Wai 400, Wai 299, and Wai 168. But we also note that only seven hapu – Ngati Parau, Ngati Hinepare, Ngati Tu, Ngati Mahu, Ngai Tawhao, Ngai Te Ruruku, and Ngati Matepu – are tangata whenua of Te Whanganui-a-Orotu.<sup>25</sup> Indeed, this is the reason that these seven hapu have come together to bring this claim. We understand that the Wai 400, Wai 299, and Wai 168 claimant groups represent different groups of hapu. While these groups include some or even all of the seven hapu, they do so for their own purposes.

It is our understanding that, as a claimant group, the only claim of the seven hapu is to Te Whanganui-a-Orotu. We have, therefore, heard all the claims of this group. But the Crown raises a wider issue. Mr Brown told us that it was the Crown's policy to address all the claims of a claimant group comprehensively, and that it did not consider that remedies for certain breaches can be proposed on a sectional basis in isolation from all claims of the claimant group.<sup>26</sup> Presumably, this means that remedies should not be assessed for a hapu or group of hapu until all the claims of that or those hapu have been considered. In amplifying the Crown's position, Mr Brown said that:

An example is the issue of whether the sellers of Te Whanganui-a-Orotu were left with a sufficient endowment for their maintenance and support or livelihood. The Crown submits that this can only be considered in the context of the wider claim. This goes to the heart of assessing whether there is prejudice that should be addressed by Tribunal recommendations at this stage.

First, it should be noted that this example is premised on a fact that we do not accept: namely, that there were at any time Maori 'sellers' of Te Whanganui-a-Orotu. In our 1995 report, we concluded that Te Whanganui-a-Orotu was taken 'without consultation with or the approval of Maori and was therefore in breach of the principles of the Treaty [of Waitangi]'.<sup>27</sup> Issues of 'sufficient endowment', therefore, are perhaps better left to be assessed within the context of purchases where the Maori sellers knew that they were selling something. This was not the case for Te Whanganui-a-Orotu.

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24. Document K13, p 29

25. *Te Whanganui-a-Orotu Report 1995*, sec 1.3

26. Document K13, p 30

27. *Te Whanganui-a-Orotu Report 1995*, sec 12.3.5

Secondly, it should be noted that it is not now possible for this Tribunal to have an opportunity to assess 'wider claims'. A new Tribunal has been constituted to consider those that have been grouped into the Mohaka ki Ahuriri regional claims inquiry. Conversely, it is our understanding that the Mohaka ki Ahuriri Tribunal has not been asked by the claimants in that inquiry to include in any assessment of relief the prejudice suffered as a result of the loss of Te Whanganui-a-Orotu. Indeed, to do so, that Tribunal would presumably have to return to the evidence and come to its own conclusion on whether or not the present claim is well founded. If we were to accept the general thrust of the Crown's submission on 'wider claims', it is possible that no Tribunal would ever report on the remedies required for this long-standing claim. And if the Crown, having concluded its consideration of our 1995 report, were not to accept our findings, there is a danger that no compensation would ever be made for the loss of Te Whanganui-a-Orotu. In our view, this would be a denial of justice to the seven claimant hapu.

### **PTI.2.6 Conclusion**

As we have already said, the Treaty of Waitangi Act 1975 in section 6(3) allows the Tribunal, if it finds the claim submitted to it to be well founded, to make recommendations 'if it thinks fit having regard to all the circumstances of the case'. We have found that the claim is well founded. The 'case' before us is claim Wai 55, which concerns the despoliation and loss of Te Whanganui-a-Orotu, not land in the Ahuriri and other Crown purchases. We believe that we have had regard to all the circumstances of the case. Consequently, we consider that we should make recommendations at this stage. Section 6(4) of the Treaty of Waitangi Act 1975 states that:

A recommendation under subsection (3) of this section may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take.

At this stage, we have decided to make mostly general recommendations on how the claimants' rangatiratanga should be restored and how other Treaty breaches by the Crown should be compensated for and otherwise remedied. The main thrust of these recommendations is that the Crown and claimants should negotiate.

In our 1995 report, we concluded that the Crown had breached the overarching or central principle of the Treaty by failing actively to protect the claimants' rangatiratanga over their taonga, Te Whanganui-a-Orotu.<sup>28</sup> The Crown now has a fiduciary duty to ensure that the rangatiratanga of the claimants over their taonga is restored. Indeed, this should be a primary goal of the negotiations. These negotiations should commence immediately and not be unduly or unreasonably delayed. We sincerely hope that they will result in a comprehensive agreement for settlement of all aspects of this claim.

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28. Ibid, sec 12.3.6

Because we have decided to make mostly general recommendations, we propose to grant the claimants leave to return to us to seek more detailed recommendations if negotiations with the Crown are unsuccessful.

### PTI.3 INTERIM STEPS TAKEN AND EVIDENCE PRESENTED

#### PTI.3.1 Introduction

In our 1995 report, we outlined the interim steps that should be taken prior to a remedies hearing. We asked that the Crown identify the boundaries and precise ownership details of all Crown and State-owned enterprise land within the pre-European settlement boundaries of Te Whanganui-a-Orotu. We sought an update of the present-day land utilisation of the Landcorp farm. We suggested that there should be no further alienation of Crown or State-owned enterprise land within the boundaries of Te Whanganui-a-Orotu. We asked the claimants to file a schedule of the recommendations that they sought. Finally, we proposed that, if the claimants lacked sufficient resources to prepare those recommendations, they should approach the Crown for financial or expert assistance or both.<sup>29</sup> In the following sections, we discuss the evidence filed by the claimants and Crown in response to these directions. We also discuss other evidence presented to us at the remedies hearing.

#### PTI.3.2 Identification of pre-European settlement boundaries

The claimants filed with the Tribunal a map of Crown, State-owned enterprise, Crown health enterprise, and local authority properties within Te Whanganui-a-Orotu.<sup>30</sup> It contained a defined boundary of the Te Whanganui-a-Orotu area. This map was produced by the then Department of Survey and Land Information (DOSLI), now Land Information New Zealand. The Crown filed an amended copy of the same map.<sup>31</sup> The Crown's version, which was only slightly modified and which did not alter the boundary of Te Whanganui-a-Orotu, was used at the hearing.

In our 1995 report, we noted that, in its pre-European settlement state, Te Whanganui-a-Orotu was estimated to be 3840 hectares or 9500 acres in area.<sup>32</sup> The boundary of Te Whanganui-a-Orotu in the DOSLI-produced maps presented to us as documents κ3 and κ6 was calculated by claimant witness David Compton to encompass 3627 hectares or 8959 acres. The difference can be explained by how much of the swamp and mudflats in south Napier are included. These maps then do not represent the whole Te Whanganui-a-Orotu in its pre-European settlement state. Yet, since the claimants and Crown agree on the boundary of Te Whanganui-a-Orotu, we accept

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29. *Te Whanganui-a-Orotu Report 1995*, sec 12.4.3

30. Document κ3

31. Document κ6

32. *Te Whanganui-a-Orotu Report 1995*, secs 9.2, 12.4.3. This was taken from Wai 201 ROD, doc 19(e) (Hastings District Council, Hawke's Bay Regional Council, City of Napier, and DOC, *Ahuriri Estuary Management Plan*, September 1992), p 13.

that this boundary should be used to define the claim area for the purposes of this report. As we have previously stated, the claim area excludes Pukemokimoki.

### **PTI.3.3 Identification of ownership details of Crown and State enterprise land**

The Crown filed a schedule of Crown and State-owned enterprise properties within Te Whanganui-a-Orotu bounded by the deed map of the 1851 Ahuriri purchase.<sup>33</sup> The bulk of the properties are designated for conservation purposes. Ten ex-New Zealand Rail properties are listed. Other Crown-owned sites include schools and kindergartens, a police station at Petane, social welfare institutions, a Public Works depot, and four former New Zealand Electricity Department properties. One former New Zealand Rail property is now administered by the Office of Treaty Settlements. The only State-owned enterprise properties in the schedule are the three titles of the Landcorp farm.

The title of the schedule indicates that this list includes only properties within a boundary defined by the 1851 Ahuriri purchase deed plan. The schedule is not explicitly linked to the DOSLI-produced map presented by the Crown as evidence.<sup>34</sup> It is possible, therefore, that there may be other Crown or State-owned enterprise properties that fall within the boundary defined in the DOSLI map.

The claimants also filed a schedule of Crown and State-owned enterprise properties 'from within the claim area'.<sup>35</sup> The claimants' schedule, prepared by K E Parker for Valuation New Zealand (VNZ), included more types of property, such as those owned by Crown entities, Crown health enterprises, and local authorities. The inclusion of these properties indicates that this schedule was prepared by reference to the DOSLI-produced map.<sup>36</sup> The information in the claimants' schedule differs in format. Title registration numbers and legal descriptions are not used; instead, valuation references and Government valuation figures are given. Also, a large number of Housing New Zealand properties are listed in the claimants' schedule.

Neither schedule lists any former State-owned enterprise properties that have been on-sold to third parties but that have memorials attached to their titles advising of an interest subject to section 27B of the State-Owned Enterprises Act 1986 (providing for the resumption of land on the recommendation of the Waitangi Tribunal). It may be that there are none. Nor does either schedule provide a separate list of any properties that have been landbanked for the future settlement of Treaty claims. Presumably, the property being administered by the Office of Treaty Settlements is held for that purpose. It appears that up to five other surplus properties are being held from sale by the office.<sup>37</sup> The direction in our 1995 report did not explicitly ask that the Crown or claimants provide this information. We note the omissions merely to highlight the

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33. Document κ7

34. Document κ6

35. Document κ9(c) (K E Parker to David Compton, 17 July 1996), p 1

36. One obvious difference between the maps at documents κ3 and κ6 is the absence of identification of the Corunna Bay Telecom property in document κ6.

37. Document κ9(b) (Office of Treaty Settlements to V L Pomeroy, 25 June 1996)

fact that other properties might be available for settlement purposes, and in order to aid negotiations between the Crown and the claimants.

### PTI.3.4 Valuations and calculations of economic loss

#### (1) *Introduction*

Much of the evidence presented by the claimants prior to and at the remedies hearing was directed to land valuations in order to calculate a quantum of economic loss suffered as a result of the expropriation of Te Whanganui-a-Orotu. In response to one of our interim steps, the Crown supplied valuation material regarding the Landcorp farm. The claimants also offered a first attempt at valuing the Hawke's Bay Airport business, because it was suggested that the Crown's interest in the airport might form part of a settlement package. In the following sections, we review the evidence presented to us on the valuations and calculations of loss.

#### (2) *The Landcorp farm*

Included in the Tribunal's recommendations on the interim steps to be taken before the remedies hearing was a request to the Crown to update the September 1982 *Ahuriri Farm Settlement Utilisation Study* and to provide further evidence identifying and advising the Tribunal and claimants of the present-day land utilisation of the Landcorp farm. In response, the Crown filed a report by W R Hawkins (for VNZ) on a market valuation of the Ahuriri Lagoon Landcorp farm property as at 28 May 1996.<sup>38</sup> The report highlighted significant and relevant changes that have occurred since 1982. The basis of the valuation was evidence of current market sales of pastoral properties within the central Hawke's Bay district. A small discount of approximately 5 percent was made to acknowledge the section 27B memorial appearing on the title.<sup>39</sup> The capital value was assessed at \$2.4 million.

The review of changes since 1982 showed that the property had continued to be farmed as a large entity, with the ongoing development of a 120-hectare deer unit. By 1996, it was specialising as a stock finishing enterprise for lambs, ewes, cattle, and deer progeny brought in from other Landcorp farms. The outfall channel, wildlife refuge, and Ahuriri Estuary areas had been transferred to the administration of the Department of Conservation (DOC). The land was no longer designated for a proposed motorway extension from Taradale to Westshore.

The property was no longer used for community, recreational, educational, and research purposes, as it was in 1982, although there was a public walkway over Roro o Kuri (except at lambing time, when the walkway was closed for six weeks). Given these changes, it appears to us that the conclusion reached in the 1982 study – that the farm's existence for public and community purposes 'justifies its existence as public land' – no longer applies.<sup>40</sup>

38. Document K5

39. Ibid, p 5

40. Wai 201 ROD, doc D6(a), vol 3, pp 1057–1059 (Department of Lands and Survey, *Ahuriri Farm Settlement Utilisation Study*, Napier, September 1982, pp 29–31)

### ***(3) Present-day valuations and calculations of economic loss***

One of the key pieces of evidence presented to us by the claimants comprised valuations of Te Whanganui-a-Orotu, made in order to assess the monetary value of the loss they suffered. The claimants commissioned David Compton, a chartered accountant of the Napier firm Oldershaw and Company. Mr Compton's principal report was filed with the Tribunal in early July 1996.<sup>41</sup> At the hearing, Mr Compton presented a summary of his evidence, and tabled a supplementary brief and three sets of correspondence (see sec PTI.3.2).

Mr Compton's evidence set out how he had calculated the current value of the land within the former boundaries of Te Whanganui-a-Orotu. It also calculated the extent of the claimants' economic loss through their being deprived of the use of the reclaimed sections of Te Whanganui-a-Orotu, and it attempted to identify the value of properties available to the claimants for possible return as compensation.

To calculate the current value of the land, Mr Compton used the DOSLI and VNZ reports presented as part of his evidence in order to locate the properties within boundaries identified by the claimants. A series of matching exercises was carried out in order to eliminate the duplication of properties from the different lists provided. Land valuations were then reduced by VNZ to their 'unimproved state', that being the value of the land less any improvements made.<sup>42</sup> This value totalled \$16,065,000. Mr Compton also had VNZ itemise valuations of Te Pakake and six former islands.<sup>43</sup>

The second part of Mr Compton's evidence related to the past loss of Te Whanganui-a-Orotu as a taonga, of both tangible and intangible value, and as a hapu or iwi economic base. As Mr Compton explained, his brief was limited to calculating economic loss. Losses of an intangible value would be additional to this. Therefore, no value was attached by him to the land that is still covered by water and administered by DOC and to the other waters comprising the inner harbour and the 'Iron Pot'. Nor was any attempt made to quantify the loss of kaimoana or the cultural and spiritual importance of Te Whanganui-a-Orotu to the claimants.

The calculation of economic loss suffered by the claimants was carried out by VNZ working from instructions provided by Mr Compton. No attempt was made to quantify any economic loss suffered before 1900, probably because relatively little land had been reclaimed by that date.<sup>44</sup> Rather, VNZ focused its calculations of economic loss on the twentieth century and, in particular, on the development of land reclaimed after the 1931 earthquake. Economic loss was calculated by estimating what rentals could have been earned if reclaimed land had been leased by Maori under the Glasgow system of 21-year terms, which was adopted when a good portion of the land

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41. Document k1 (financial statements prepared by Oldershaw and Company). This document contains a report by David Compton of Oldershaw and Company, a report by K E Parker of VNZ, supplementary documents submitted by Compton, a further report from VNZ on unmatched land parcels, and reports and maps generated by DOSLI. Each report has its own pagination.

42. Document k9 (brief of evidence of David Compton), p 6

43. Document k9(d) (K E Parker, to David Compton, 7 August 1997)

44. Document k1, VNZ report, pp 4-5; see also *Te Whanganui-a-Orotu Report 1995*, secs 6.5.1-6.5.7, for a discussion on pre-1900 reclamations.

was initially developed. Based on an annual return of 4 percent for urban land and 5 percent for rural land, VNZ estimated that the economic loss suffered by the claimants totalled \$7 million.<sup>45</sup> Deductions for management, servicing, and taxation were factored into the final figure. Although citing the ‘considerable difficulties’ associated with this task, Mr Parker, for VNZ, stated that his institution had produced valuations that provided a ‘fair and reasonable basis to measure the compensation items arising from the Wai 55 claim’.<sup>46</sup>

Mr Compton added the current valuation of the land in its undeveloped state, \$16,065,000, to VNZ’s figure of estimated economic loss, \$7,000,000. This equalled \$23,065,000, which Mr Compton believed was the total amount of monetary compensation due to the claimants for ‘tangible losses’.<sup>47</sup>

If this figure of \$23,065,000 is to be referred to in negotiations between the claimants and the Crown, the following points should be taken into consideration: the exclusion of the 2.07-hectare Pukemokimoki area from the claim area would decrease this figure<sup>48</sup> and, in response to questions from the Tribunal, Mr Compton stated that it was likely that the value of one or more of the islands was double-counted in his calculations.

#### ***(4) The Hawke’s Bay Airport***

The claimants commissioned Mr Compton to provide an estimated value for the Hawke’s Bay Airport.<sup>49</sup> Mr Compton obtained a 1993 valuation of the airport by VNZ, which gave a capital value figure of \$2,340,000. In his opinion, this figure would be appropriate only if the airport business were wound up and the assets sold. Instead, he felt the airport should be valued as a going concern. He estimated future profits based on the 1994 to 1995 financial year operating profit figures, and applied 20 and 25 percent capitalisation rates to determine a share value. Basing his valuation on a capitalisation rate of 20 percent, Mr Compton arrived at the figure of \$1,285,000.<sup>50</sup>

In the summary he read to us, Mr Compton emphasised the limitations of his estimate of the value of the Hawke’s Bay Airport. Following questions from Crown counsel and the Tribunal, Mr Compton stated that his estimate should be considered as a starting point only. He said that, if the Crown’s shares in the airport were to become part of the settlement package, a new valuation would have to be carried out. We agree. Whether the Crown’s interest in the airport should form part of the remedies for this claim is discussed below (see sec PTII.2).

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45. Document κ1 (financial statements prepared by Oldershaw and Company concerning the value of the claim), VNZ report, p 5

46. Ibid, p 6

47. Document κ9, p 8

48. The present-day undeveloped land value of this area is \$300,000 (doc κ1, p 4). From the evidence presented to us, however, it is not possible to extract from VNZ’s \$7 million figure the amount of economic loss calculated as a result of the loss of Pukemokimoki.

49. Document κ2 (David Compton to Charl Hirschfeld, 13 June 1996)

50. Ibid, p 3

### PTI.3.5 Other interim steps

In our directions on the interim steps to be taken prior to the remedies hearing, we stated that there should be no further alienation of Crown land or State-owned enterprise land lying within the pre-1851 boundaries of Te Whanganui-a-Orotu. We understand that no such properties have been alienated and that at least five ‘key surplus properties’ in the claim area have been withheld from sale pending the Tribunal’s inquiry into remedies.<sup>51</sup>

In response to our direction that the claimants should file with the Tribunal a schedule of the recommendations they seek, claimant counsel filed a third amendment to the second amended statement of claim, dated 12 July 1996. This statement of claim, and the further amendment to it, are reprinted as appendix 1 of this report.

Our final interim suggestion was that, if the claimants lacked sufficient resources to prepare the recommendations they sought, they should approach the Crown for assistance. We record that Cabinet approval was obtained for funding of up to \$20,000 for the claimants’ reasonable costs incurred in preparing for the remedies hearing.<sup>52</sup>

### PTI.3.6 The evidence of Heitia Hiha

Mr Hiha gave evidence to us at the remedies hearing. He began by acknowledging that the *Te Whanganui-a-Orotu Report* had ‘laid to rest over a hundred years of sadness and loss’, enabling the claimants to ‘move forward to a new dawn of hapu development, one based on optimism rather than grievance, frustration, and even anger’.<sup>53</sup> Reading from his prepared brief, Mr Hiha criticised the *Crown Proposals for the Settlement of Treaty of Waitangi Claims* policy released in 1994.<sup>54</sup> In particular, he addressed the Crown’s policies on natural resources and the use of DOC lands for Treaty settlements.

He accused the Crown of breaching the principles of the Treaty of Waitangi by not recognising the tino rangatiratanga of the claimant hapu. He called for the Crown to compensate the claimants with the return of land and by the payment of a sum of money, in order to ‘restore its honour now’.<sup>55</sup> On behalf of the claimant hapu, Mr Hiha rejected the Crown’s policy on natural resources, claiming that the hapu had tino rangatiratanga over Te Whanganui-a-Orotu, not just ‘use and value interests’. He also rejected the Crown’s policy of not having the lands administered by DOC ‘readily available’ for the settlement of Treaty claims: ‘We want our title to Te Whanganui-a-Orotu recognised and we want to be involved in decisions affecting this great taonga of ours,’ he added on this topic.<sup>56</sup>

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51. Document K9(b), Office of Treaty Settlements to V L Pomeroy, 25 June 1996

52. Ibid

53. Document K8 (brief of evidence of Heitia Hiha), p 1

54. Document K10 (Office of Treaty Settlements, *Crown Proposals for the Settlement of Treaty of Waitangi Claims: Detailed Proposals*, Wellington, Department of Justice, 1994)

55. Document K8, p 2

56. Ibid, pp 2–3

Mr Hiha asked that a joint management board be constituted to manage the Ahuriri wetlands and Ahuriri Estuary. He envisaged the board membership as consisting of a representative for each of the seven claimant hapu and representatives for DOC. He wanted a similarly constituted hapu committee to work with the Hawke's Bay Regional Council and the Napier City Council in order to manage areas administered by the local authorities. Finally, Mr Hiha expressed disquiet at the Crown's policy of negotiating 'full and final settlements'. The claimant hapu, he explained, believe any settlement should see the Crown and claimants 'move into a new era of cooperation and partnership that will ultimately benefit the hapu of Te Whanganui-a-Orotu, the people of Napier and the nation'.<sup>57</sup>

To support these submissions, Mr Hiha read an address that he had given on 15 March 1995 at Omaha Marae during the hui organised by the Crown in order to consult with Ngati Kahungunu about the Crown's Treaty settlement policy. He also read another short paper that defined the claimants' vision of partnership between themselves and the Crown.

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57. Document κ8, p 4