

PART II

RECOMMENDATIONS

PTII.1 THE LAND TO BE RETURNED

PTII.1.1 The Landcorp farm

One possible recommendation suggested in our 1995 report was that the area of Crown land to be considered for possible return to the claimants should include the Landcorp farm and Roro o Kuri.¹ Having heard the parties on remedies, our belief that the Landcorp farm and Roro o Kuri should be returned to the claimants has been confirmed for three main reasons. First, the farm is the largest single property of those that were formerly under the waters of Te Whanganui-a-Orotu.² Secondly, it includes the former islands of Roro o Kuri and Tapu Te Ranga. Both are of inestimable value to the claimants, because they bear the imprint of illustrious ancestors and are wahi tapu.³ Thirdly, to restore the claimants' mana and tino rangatiratanga, it is vital that any settlement enable the claimants to be physically reunited with at least part of Te Whanganui-a-Orotu. The Crown should, we think, therefore return the Landcorp farm, Roro o Kuri, and Tapu Te Ranga, and recognise Tapu Te Ranga as Maori customary land.

We emphasise, however, that at this stage our proposal is not a binding order pursuant to section 8A(2)(a) of the Treaty of Waitangi Act 1975. We would prefer the Landcorp farm to be returned as part of a negotiated settlement.

PTII.1.2 The Ahuriri Estuary

(1) Introduction

Included in the area of Crown land we suggested for possible return was the Ahuriri Estuary.⁴ This is, in effect, the last remaining portion of Te Whanganui-a-Orotu that is still largely water. It is owned by the Crown and managed as part of DOC's estate. Another possible recommendation we suggested was that a new management regime be developed that would ensure that the claimants have effective representation. We

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1. Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, 1st ed, Wellington, Brooker's Ltd, 1995 (doc 118), sec 12.4.4
 2. Document k7 (list of Crown and State-owned enterprise properties within Te Whanganui-a-Orotu bounded by the deed map of the 1851 Ahuriri purchase)
 3. For further information on the importance of Roro o Kuri, see *Te Whanganui-a-Orotu Report 1995*, sec 4.5; for information on the importance of Tapu Te Ranga, see sec 2.2.3.
 4. *Ibid*, sec 12.4.4

added that, in developing a proposed model, the claimants should not feel bound by conditions that the Resource Management Act 1991 requires to be imposed upon the handing over of any part of the conservation estate.⁵ In this section, we discuss whether the Ahuriri Estuary should be returned to the claimants. In a later section, we will discuss the development of a new management regime for the conservation land (see sec PTII.5.2).

(2) Claimant counsel submissions

In reviewing how conservation land could be transferred to the claimants, claimant counsel Caren Wickliffe noted that there had been a shift in Government policy following the 1994 publication of the Crown's proposals for Treaty settlements.⁶ She listed the Crown's three mechanisms for re-vesting conservation land in Maori, and went on to analyse each mechanism in light of the remedies appropriate to this claim.

The first mechanism involved the Crown directly re-vesting land in Maori. Ms Wickliffe pointed out that, if this were done, the Crown would probably seek legal encumbrance on the title to secure conservation and public access objectives. Such restrictions would be greater than those under the Resource Management Act 1991 for private landowners. Counsel expressed her concern that this mechanism was appropriate only in limited circumstances and that these circumstances might not include the return of Te Whanganui-a-Orotu. Consequently, alternative settlement options should be considered.⁷

Ms Wickliffe dismissed the third mechanism, whereby the Crown retained title but transferred a significant management role to Maori. She conceded that it correctly distinguished between management and ownership of conservation land, in which case, she argued, there was no need for the Crown to retain the ownership of its part of the Ahuriri Estuary. Indeed, the Crown had a duty to return the part of the estuary that it owned.⁸

Ms Wickliffe preferred the second mechanism, whereby the Crown returned land to Maori under the Reserves Act 1977 or through special legislation. Returning it under the Reserves Act would provide the Crown with too wide a discretion to revoke the return of the land if the conditions of the vesting were not met and, for this reason, counsel submitted that the enactment of special legislation was the best way of returning conservation land to Maori. Such legislation should include the special statutory conditions necessary for the continued management of the conservation values of the land.

It should also include a joint system of management in which hapu are sufficiently trained and resourced to manage the land in accordance with the special conditions.⁹ Ms Wickliffe went on to critique what was required in Treaty terms in any formal joint management of conservation land. We return to this in a later section (see sec PTII.5.4(1)).

5. *Te Whanganui-a-Orotu Report 1995*, sec 12.4.4

6. Document K4 (submissions of claimant counsel concerning recommendations 12.4.4(d)-(h)), p 17

7. *Ibid*, p 20

8. *Ibid*, pp 25-26

9. *Ibid*, pp 22-23

(3) Crown submissions

The Crown submitted that it was not appropriate for the Tribunal to issue final recommendations at this stage. Accordingly, it did not make any specific submissions on the suggested return to the claimants of the Ahuriri Estuary.

(4) The Tribunal's conclusion

Having heard claimant and Crown counsel on remedies, we find no reason to alter the tentative views that we expressed in our 1995 report. Accordingly, we recommend that the Ahuriri Estuary be returned to the claimants. While we support the thrust of Ms Wickliffe's submissions, we consider that the time and manner in which the return is accomplished is principally a matter to be negotiated between the Crown and the claimants. The return of the Ahuriri Estuary must occur, however, in conjunction with the development of a new regime for its management (see sec PTII.5.2).

PTII.1.3 Other Crown-owned land

We are aware of the other Crown-owned properties in the Wai 55 claim area (see sec PTI.3.3), and that they include DOC land, Ministry of Education land (school sites), former Electricity Department and Railways land owned by Land Information New Zealand, a few Police, Justice, and Social Welfare Department sites, and a former Railways site now owned by the Office of Treaty Settlements.¹⁰ We did not hear submissions directed to each of these properties or types of property. The third amendment to the second amended statement of claim states that the claimants seek, *inter alia*, 'any other Crown land, within the meaning of the Public Finance Act 1989, such as the Tribunal so directs'.¹¹

We support within limits the use of these properties for the purpose of settling this claim. We do not, however, think it is appropriate for us at this stage to make specific recommendations on other Crown-owned properties within the Wai 55 claim boundaries. The claimants should negotiate with the Crown for the return of specific properties.

If negotiations are unsuccessful, leave is granted to the claimants to request that we provide more detailed recommendations for the return of other Crown-owned properties.

PTII.2 THE HAWKE'S BAY AIRPORT

Part J of the claimants' third amendment to the second amended statement of claim asked the Tribunal to recommend that the Crown 'transfer its entire share-holding or any part thereof in the Hawke's Bay Airport Authority to the claimants without cost to them'.¹²

10. Document K7

11. Claim 1.2(g) (third amendment to the second amended statement of claim, 12 July 1996), p 3 (see app 1)

12. *Ibid*, p 7

As we described in our 1995 report, the Hawke's Bay Airport was constructed on part of Te Whanganui-a-Orotu reclaimed after the 1931 earthquake. Included in the 467-acre or 189-hectare (at 1965) area were the islands of Tuteranuku, Tirowhangahe, Awa a Waka, and Matawhero, compulsorily acquired by the Crown in 1939 without the payment of any compensation.¹³

The Crown does not own the Hawke's Bay Airport land but runs the airport as a joint venture with the Napier City Council and the Hastings District Council.¹⁴ The claimants have asked that any interest held by the Crown in the airport be transferred to them. Following the remedies hearing in August 1996, when it became apparent that the Crown was seeking to corporatise the airport business, we asked that the Crown retain its 50 percent shareholding in the airport until all aspects of the Wai 55 claim were finalised.¹⁵

On 8 December 1997, Crown counsel advised the Tribunal that the Crown is still in the process of negotiating with the Napier City Council and the Hastings District Council to terminate the joint venture agreement so that the airport can be corporatised.¹⁶ Crown counsel further notified the Tribunal that the two councils had been advised that, should a company be formed to operate the airport, the Crown did not wish to grant to them pre-emptive rights over the Crown's shareholding.

In principle, we find the concept of the claimants being able to enter into a partnership with the two councils to own the Hawke's Bay Airport to be a most satisfying one. Such an arrangement could well reflect the spirit of the Treaty of Waitangi in a more meaningful way than the award of monetary compensation. However, we do not wish to make any final recommendation at this stage. Exactly what options exist for the possible place of the Crown shareholding in any settlement is a matter still to be determined. We do recommend, however, that the Crown's interest in the Hawke's Bay Airport form part of the negotiations between the claimants and the Crown.

If negotiations do not eventuate or fail, the claimants have leave to request that we make more detailed recommendations about the Hawke's Bay Airport.

PTII.3 MONETARY COMPENSATION

In our 1995 report, one of the possible recommendations suggested was that:

A substantial fund should be set up as compensation for the past loss of Te Whanganui-a-Orotu as a taonga, of both tangible and intangible value, and as a hapu/

13. *Te Whanganui-a-Orotu Report 1995*, sec 8.3.1; see also the 1865 map at p 128 (fig 15) and discussion at secs 7.7.7-7.8, the 1965 map at p 129 (fig 15), and the 1868 plan at p 93 (fig 13).

14. Paper 2.167 (memorandum of Crown counsel concerning the Hawke's Bay Airport Authority, 20 September 1996), p 1. The claimants questioned the current arrangement of the airport venture. They suggested that it might now be incorporated as a local authority trading enterprise or a partnership: see paper 2.178 (memorandum of claimant counsel in reply to paper 2.167, 5 November 1996).

15. Paper 2.163 (Tribunal memorandum concerning the Hawke's Bay Airport Authority, 4 September 1996)

16. Paper 2.256(a) (memorandum of Crown counsel concerning negotiations with the Napier City Council and the Hastings District Council, 8 December 1997)

iwi economic base, to which the claimants and their tipuna had Treaty rights of resource development.¹⁷

We find no reason to change the substance of this tentative recommendation. We therefore recommend that the claimants receive a substantial fund of money in order to be compensated in part for, principally, the loss and despoliation of Te Whanganui-a-Orotu as a resource and taonga. More particularly, there should be compensation for the islands Te Pakake and Te Ihu o Te Rei, which, like Roro o Kuri and Tapu Te Ranga, have special significance as wahi tapu and as urupa. Te Ihu o Te Rei is now owned by the Napier City Council, and the claimants remain concerned at the ongoing desecration that we observed on our site visit in 1993.¹⁸ In his closing address, Mr Hirschfeld submitted that we recommend:

that the Crown should take steps to obtain a long-term lease over the property; and that this was not precluded by the 1993 Amendment. The property could then be leased to the claimants.¹⁹

We do not agree; the plain words of the amendment preclude any such recommendation.

Te Pakake and Te Ihu o Te Rei are just two examples of the severe losses suffered by the claimants through the Crown's appropriation of the islands of Te Whanganui-a-Orotu and reclaimed lands. Yet, because they are now private property or have been vested by the Crown in local authorities, we cannot recommend their return to the claimants. For what in effect are double losses, not even 'a substantial fund of money' can compensate.

As we have already seen, the claimants attempted to assess the appropriate compensation to which they are entitled by obtaining expert evidence from Mr Compton. The total arrived at for land and economic losses – excluding loss of an intangible value – was \$23,065,000 (see sec PTI.3.4(3)). The Crown took no position on appropriate levels of quantum.²⁰

In our view, the appropriate means by which an amount of monetary compensation should be arrived at is by negotiation, following negotiations over the return of land to the claimants. Obviously, any final compensation figure will be affected by the value of such land returned to the claimants. We believe that a substantial sum of money is required to reflect the loss of a taonga of both tangible and intangible value and to establish a hapu economic base to which the claimants and their descendants will have access.

If negotiations fail and the claimants and the Crown are unable to agree on the amount of compensation that should be paid, the Tribunal would give favourable consideration to a request for more detailed recommendations.

17. *Te Whanganui-a-Orotu Report 1995*, sec 12.4.4

18. Document K14 (closing address of senior claimant counsel Charl Hirschfeld, 13 August 1996), pp 24–25

19. *Ibid*, p 25

20. Document K13 (synopsis of submissions of Crown counsel on remedies, 13 August 1996), p 33

PTII.4 THE CONTROL AND MANAGEMENT OF SETTLEMENT ASSETS

Having recommended that the claimants receive monetary and other forms of compensation, we need to consider briefly the means by which the claimants will control and manage these assets. The claimants held a hui on 11 August 1996 at Waiohiki Marae, where they decided that their own statutory entity would be the best vehicle by which to receive, control, and manage settlement assets. Accordingly, at the remedies hearing, Mr Hirschfeld amended the statement of claim to request the following recommendation:

Should any remedies in terms of recommendation be made in favour of the claimants, such as for the return of land or interest in land or money or both or for anything otherwise then the Tribunal should further recommend that the legal entity to receive any such remedy be established by an Act of Parliament which constitutes the seven hapu claimants as an hapu authority.²¹

Mr Hirschfeld told us that a statute:

would enshrine, more concretely, the identity of the hapu and property over which they would have control . . . the relationship between the hapu and the Crown would be better enhanced and preserved in Treaty terms particularly.²²

When discussing representation and mandate issues, Mr Brown raised a number of points that the Crown believed were relevant to the question of what claimant vehicle should receive settlement assets.²³ He observed that a statutory entity might not be a ‘panacea for internal wrangling’, which was one of the problems the claimants sought to overcome. In this connection, Mr Brown recalled that in cross-examination Mr Hiha had conceded that other claimant groups may also want to have their own statutory entity. Counsel asked the Tribunal to give careful consideration to the fact that the precedents for a statutory entity involved large tribal authorities, rather than smaller groups of hapu. In summary, Mr Brown submitted that there were worthy features in favour of establishing a statutory entity but that they should be assessed against all the advantages that are sought to be derived from such a process.

In our view, it is the claimants’ responsibility to decide on the most appropriate vehicle for the receipt and management of settlement assets and the way in which those assets are to be managed. Accordingly, we recommend that a legal entity to receive remedies be established by an Act of Parliament and that the statute constitute the seven claimant hapu as a hapu authority.

We do not at this stage wish to make any more detailed recommendations about the composition of a statutory entity. This should be a matter for negotiation between the parties. Leave is granted to the claimants to return to us for more detailed recommendations on this matter if negotiations do not eventuate or fail to result in an agreement.

21. Claim 1.2(h) (fourth amendment to the second amended statement of claim, 12 August 1996), p 2 (see app 1)

22. Document K14, p 23

23. Document K13, p 27

PTII.5 PREVENTING FUTURE PREJUDICE**PTII.5.1 Introduction**

Part of section 6(3) of the Treaty of Waitangi Act 1975 states that the Tribunal can ‘recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future’. So far we have made recommendations designed to compensate for the prejudice suffered by the claimants. In addition to compensatory recommendations, we also have the power to make recommendations designed to prevent future prejudice to the claimants and others. In this section, therefore, we will recount, by reference to our 1995 report and the submissions of counsel, the ways in which the Crown continues to breach the principles of the Treaty in order that we may recommend legislative amendment so that future prejudice can be prevented.

PTII.5.2 The management of conservation land (the Ahuriri Estuary)**(1) Introduction**

In our 1995 report, we found that the Crown had breached the principles of the Treaty by:

- depriving Maori of access to Te Whanganui-a-Orotu for fishing, shellfish gathering, transportation, and other uses, including kaitiakitanga of wahi tapu;
- permitting serious environmental damage and destruction to occur to Te Whanganui-a-Orotu; and
- failing to ensure, by legislation or other means, that Maori had an effective role in the conservation and resource management of Te Whanganui-a-Orotu in accordance with their status as tangata whenua and Treaty partners (see app III).

Based on the identification of these breaches, one possible recommendation we suggested was that a new management regime be developed for the conservation land within Te Whanganui-a-Orotu to ensure that the claimants have effective representation. In developing a proposed model, we added that the claimants should not feel bound by conditions that the Resource Management Act 1991 imposes upon the handing over of any part of the conservation estate.²⁴ All the conservation land in Te Whanganui-a-Orotu is contained within the Ahuriri Estuary. We have already recommended that the estuary be returned to the claimants (see sec PTII.1.2(4)). This action would in part compensate the claimants for the loss of their taonga, Te Whanganui-a-Orotu. To prevent future prejudice from occurring, however, what is required is the development of a new management regime for the estuary. Below, we summarise the submissions we received on this topic and make some concluding remarks.

24. *Tē Whanganui-a-Orotu Report 1995*, sec 12.4.4

(2) Submissions of claimant counsel

By way of introduction, claimant counsel Ms Wickliffe emphasised the history of the ‘central exchange’ or ‘general overarching’ principle of the Treaty.²⁵ On the basis of the relevant case law and Tribunal reports, she argued that the Treaty guarantees to the seven claimant hapu rangatiratanga over their taonga, Te Whanganui-a-Orotu. Ms Wickliffe went on to explain the interrelationship between the overarching Treaty principle and the principle of self-regulation or full tribal authority (derived as it is from rangatiratanga).²⁶ She summarised and quoted from the Privy Council judgment *New Zealand Maori Council v Attorney General* [1994] 1 NZLR 513 and the Tribunal’s *Ngawha Geothermal Resource Report 1993* to explain the principle of active protection.²⁷ Counsel submitted that the Crown had a duty actively to protect the rangatiratanga of the claimant hapu over Te Whanganui-a-Orotu.

Ms Wickliffe went on to review the claimants’ relationship with DOC and the case law that had clarified the meaning of section 4 of the Conservation Act 1987.²⁸ Drawing on Court of Appeal decisions, she submitted that the Crown was obliged to ensure that the claimant hapu had effective representation in the management of Te Whanganui-a-Orotu.²⁹

In her concluding remarks on Treaty principles and conservation land, Ms Wickliffe submitted that the exercise of the claimants’ rangatiratanga over Te Whanganui-a-Orotu should be consistent with the principle of partnership implicit in the Treaty. In practical terms, this meant that the management of the Ahuriri Estuary should be implemented in conjunction with DOC. The issues, objectives, and policies of importance to claimants would be identified in a hapu management plan.³⁰

(3) Crown questions and submissions

Mr Brown explored some of the issues relating to the management of conservation land with Mr Hiha in cross-examination, and he later submitted, with considerable justification, that ‘the interface between . . . proposed regimes was left in a very uncertain state’.³¹ Mr Brown told us that the Crown is currently developing policies on natural resources and that these policies will influence its position on this claim.³²

(4) The Tribunal’s conclusion

We recommend that a new joint management regime be developed for the Ahuriri Estuary that will enable the proposed hapu authority and DOC to work together in accordance with the Treaty principles of central exchange and partnership.

25. See *Te Whanganui-a-Orotu Report 1995*, sec 12.2.1, for our explanation of this principle; see doc K4, pp 1–2, for Ms Wickliffe’s explanation.

26. Document K4, pp 3–4

27. *Ibid*, pp 5–6

28. *Ibid*, pp 9–10

29. *Ibid*, p 14

30. *Ibid*, p 15

31. Document K13, p 32

32. *Ibid*, p 33

We realise that the Hawke's Bay Regional Council, the Napier City Council, and the Hastings District Council also have statutory responsibilities in the management of the Ahuriri Estuary and that the Napier City Council owns part of it. We deal with their responsibilities in the following sections. Suffice to say, any local authority that has responsibilities to fulfil in the management of the estuary should work together with the claimants in accordance with the Treaty principles of central exchange and partnership.

The composition of the new joint management regime and its terms of reference are matters to be negotiated.

PTII.5.3 Effective representation and Maori advisory standing committees

(1) Introduction

In our 1995 report, one of our suggestions for possible recommendations was that:

The local authorities responsible for the sustained resource management of natural and physical resources in the claim area should be required, by legislation if necessary, to match their words with action and develop the present Maori advisory standing committee structure and process to give the seven claimant hapu a more effective representative and responsible role, in accordance with their status as tangata whenua.³³

(2) Claimant counsel's suggested amendment

Ms Wickliffe asked that the Tribunal amend this suggested recommendation.³⁴ Her main concern with the suggested recommendation was that the present Maori advisory standing committee did not adequately represent tangata whenua. Instead, she submitted, standing committees were responsible for a broad and diverse range of Maori groups. Counsel noted that this constituency goes far wider than the seven hapu that are tangata whenua of Te Whanganui-a-Orotu. While this was appropriate for general territorial and regional issues, it was not acceptable in terms of the relationship between tangata whenua and their ancestral lands, water, and other taonga.³⁵ It was only through their tangata whenua status or hapu relationship with Te Whanganui-a-Orotu that customary and Treaty rights existed.

Building on this argument, Ms Wickliffe submitted that the only way local authorities could appropriately fulfil their duties to Maori under the relevant parts and sections of the Resource Management Act 1991 was through the transfer to tangata whenua of powers over their lands, waters, and taonga. The best form for this transfer of powers to take, she contended, is by the development of a hapu management plan, to be administered by a hapu authority.³⁶ Counsel added that the claimants wanted representation on the Maori standing committee in addition to a hapu authority; that a two-layered process was envisaged.

33. *Te Whanganui-a-Orotu Report 1995*, sec 12.4.4

34. Document K15 (amended submissions of junior claimant counsel Caren Wickliffe on recommendations 12.4.4(e)-(g), 12-13 August 1996), p 31

35. *Ibid*, p 32

36. *Ibid*

Ms Wickliffe then went on to summarise some of the recent decisions of Judge Kenderdine in the Planning Tribunal, which tended to support an interpretation of the Resource Management Act that enabled tangata whenua to exercise autonomous decision-making power over customary land, water, and taonga. However, Ms Wickliffe pointed out that not all Planning Tribunal decisions followed this line of interpretation, and that consequently local and regional authorities had difficulty in coming to terms with their obligations under the Act.³⁷ She concluded that it was important that the Resource Management Act be amended as suggested by the Tribunal (with her suggested modification) because there was no guarantee that an approach similar to that of Judge Kenderdine would always prevail.³⁸

(3) The Tribunal's conclusion and recommendation

We agree with Ms Wickliffe's approach and suggested amendment. Accordingly, we recommend that, in order that tangata whenua may have a representative and responsible role reflecting their status, two distinct bodies be created. The first would be a hapu authority comprised of tangata whenua and endowed with powers of policy determination and planning over their taonga. The second body would be a strengthened Maori standing committee, to enable the seven hapu to have continued representation on wider regional issues.

PTII.5.4 Hapu authorities, hapu management plans, and transfers of power

(1) Introduction

As already noted, the claimants have submitted that there is a need for the seven hapu to establish themselves as a hapu authority. Once this authority is established, and the claimants have made clear their preference that this be effected by special legislation, a hapu management plan would be drafted and implemented. It is through this management plan, Ms Wickliffe has argued, that the claimants would be able to participate in joint management of the Ahuriri Estuary (see sec PTII.1.2(2)). Below, we discuss further submissions on hapu authorities and hapu management plans and the transfer of powers to hapu authorities under section 33 of the Resource Management Act 1991.

(2) Claimant counsel submissions

Ms Wickliffe provided us with submissions on the sections of the Resource Management Act relating to the transfer of powers to a hapu authority.³⁹ She explained how it might be possible for local authorities to transfer not only the powers of policy and plan formation but also the power of consent over areas of taonga.⁴⁰ She noted that such a transfer of powers would properly acknowledge the partnership created from

37. Document K15, p 34; Ms Wickliffe referred to the Ministry for the Environment's 1994 working paper *Case Law on Consultation* (doc K11), p 9.

38. Document K15, pp 35–39

39. *Ibid*, p 41

40. *Ibid*, p 41

the overarching Treaty principle of ‘central exchange’. The Treaty of Waitangi, counsel argued, provided for a distribution of power in which the Crown would control activities of government, while hapu would retain autonomous control over their resources.⁴¹ She linked this general description to the relevant parts of the Hawke’s Bay Regional Council’s *Regional Policy Statement*,⁴² and concluded that the regional council and the local authority could transfer powers to the claimants but that the claimants wanted the security of knowing that this would in fact happen.⁴³

Ms Wickliffe then discussed to whom the transfer of powers could be made. She noted that there was uncertainty about the definition of an iwi authority in section 2 of the Resource Management Act.⁴⁴ Ms Wickliffe noted that, although iwi authorities do not refer to hapu, they could conceivably be limited to only some of the hapu of an iwi for the purposes of exercising authority over ancestral land. Having noted this, however, counsel acknowledged that confusion exists and that an appropriate amendment to the Act would settle the matter.

Ms Wickliffe also made submissions on the extent to which hapu management plans should be taken into account by local authorities when preparing regional policy statements and plans. Noting that local authorities need only ‘have regard to’ a hapu management plan, she submitted that this meant that a plan’s provisions might not be considered to outweigh any contrary considerations. It would depend on how local authorities chose to interpret their obligations to recognise and provide for the relationship of Maori with their ancestral lands, to have particular regard to kaitiakitanga, and to take into account the principles of the Treaty. This was ‘highly unsatisfactory’, she argued, and provided a further reason why the Resource Management Act should be amended.⁴⁵

(3) The Tribunal’s conclusions and recommendations

We have already agreed that the claimants should be established as a hapu authority. It follows that a hapu management plan should be drafted and implemented. For this to occur without unnecessary confusion, we recommend that section 2 of the Resource Management Act 1991 be amended so that ‘iwi authorities’ include authorities representing hapu that are tangata whenua.

We also recommend that the Resource Management Act be amended to ensure that hapu management plans are accorded an appropriate weight by local authorities, given that the plans represent the view of a Treaty partner and not just one sector of the community.

41. Ibid, p 42

42. See *Tē Whanganui-a-Orotu Report 1995*, app v, for our previous comment on the Hawke’s Bay Regional Council’s *Regional Policy Statement*.

43. Document K15, p 45

44. Ibid, p 45. We note that the Ministry for the Environment, in its *Case Law on Consultation* (doc K11) at pp 20–21, referred to the Runanga Iwi Act 1990 (repealed in 1991) to help define ‘iwi’.

45. Document K15, pp 48–50

PTII.5.5 Further changes to the Resource Management Act 1991

In our 1995 report, we found that what has been and is occurring in the claim area in respect of environmental management and planning processes clearly indicates that the structure established under the Resource Management Act 1991 is inappropriate.⁴⁶ One of our suggested recommendations, therefore, was that appropriate amendments to the Act be made as recommended in the *Ngawha Geothermal Resource Report 1993*. The Ngawha Tribunal recommended that:

an appropriate amendment be made to the Resource Management Act 1991 providing that in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall act in a manner that is consistent with the principles of the Treaty of Waitangi.

As Part II of the Resource Management Act is presently worded, those exercising powers and functions which may impact on Maori natural resource taonga are not required to ensure that Maori Treaty rights are accorded their appropriate standing. Accordingly, such rights are at risk of being depreciated or outweighed by other considerations and as a consequence Maori Treaty rights are not given the protection which article 2 requires. We see no alternative to the amendment we have recommended if Treaty breaches are to be avoided in the implementation of the Resource Management Act.⁴⁷

Ms Wickliffe advised us that the claimants supported the suggested recommendation, because they felt it called for a statutory requirement that definitively acknowledged the Crown's responsibility to fulfil its duties under article 2 of the Treaty. The amendment would add potency to our recommendation that the seven claimant hapu be given a more effective representative and responsible role to reflect their status as tangata whenua (see sec PTII.5.3(3)).⁴⁸

We confirm our tentative recommendation.

PTII.5.6 The Conservation Law Reform Act 1990

In our 1995 report, we found that there was a lack of tangata whenua representation on the Conservation Authority and conservation boards.⁴⁹ We therefore included as one of our suggested recommendations that appropriate amendments be made to the Conservation Law Reform Act 1990 to give effect to Treaty principles as provided for in section 4 of the Conservation Act 1987.⁵⁰ We confirm this recommendation.

Ms Wickliffe submitted that any amendment to the Act should include:

- recognition that tangata whenua participate in conservation management because of their special status, rather than as one of many interest groups;

46. *Te Whanganui-a-Orotu Report 1995*, sec 9.13.5

47. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, Wellington, Brooker and Friend Ltd, 1993, sec 8.5.2

48. Document K15, p 68

49. *Te Whanganui-a-Orotu Report 1995*, sec 9.13.4

50. *Ibid*, sec 12.4.4

- a higher ratio of tangata whenua membership of the authority and boards; and
- a framework for joint management that provides for the equal participation of both Treaty partners.⁵¹

PTII.5.7 Compulsory acquisitions of Maori land under the Public Works Act 1981

Following our finding that the Crown had breached the principles of the Treaty by compulsorily acquiring islands by use of the Public Works Act 1928 and not paying any compensation, we assessed whether the Public Works Act 1981 had rectified some of the faults of the previous Act. It had not. Accordingly, one of the possible recommendations suggested in our 1995 report was that appropriate amendments be made to the Public Works Act 1981 as outlined by the *Te Maunga Railways Land Report*.⁵² Since the publication of our report, the Turangi township Tribunal, building on the recommendations of the Te Maunga railways land Tribunal and the Ngai Tahu Tribunal (in their *Ngai Tahu Ancillary Claims Report 1995*⁵³), has proposed three comprehensive recommendations to amend the Public Works Act 1981, on which Mr Hirschfeld relied in his submissions at the remedies hearing.⁵⁴

Clearly, a review of this Act is long overdue, and we therefore lend our support to the Turangi township Tribunal's recommendations. Not all them, however, are applicable to the circumstances concerning the compulsory acquisition of the former islands in Te Whanganui-a-Orotu, where no compensation was paid. We therefore recommend that the Crown promote the following amendments to Part 11 of the Act:

- (a) The Crown or a local authority should not seek to acquire Maori land without first ensuring that no other suitable land is available as an alternative.
- (b) If the Crown or a local authority wishes to acquire Maori land for a public work or purpose, it should first give the owners adequate notice and by full consultation seek to obtain their informed consent at an agreed price.
- (c) If the owners are unwilling to agree, the power of compulsory acquisition for a public work or purpose should be exercised only in exceptional circumstances and as a last resort in the national interest.
- (d) If the Crown or a local authority does seek to acquire the use of Maori land for a public work, it should do so by acquiring a lease, licence, or easement, as appropriate, on terms agreed upon with the Maori owners or, failing agreement, by appropriate arbitration. Should there be exceptional circumstances where the acquisition of the freehold by the Crown or a local authority is considered to be essential, Maori should have the right to have that question determined by an appropriate person or body independent of the Crown or local authority, as the case may be.

The Act should also be amended to provide that it is to be interpreted and administered so as to give effect to the principles of the Treaty of Waitangi.

51. Document K15, p 63

52. Waitangi Tribunal, *Te Maunga Railways Land Report*, 1st ed, Wellington, Brooker's Ltd, 1994, pp 82–83

53. Waitangi Tribunal, *The Ngai Tahu Ancillary Claims Report 1995*, Wellington, Brooker's Ltd, 1995, sec 9.4.6

54. Waitangi Tribunal, *The Turangi Township Report 1995*, Wellington, Brooker's Ltd, 1995, secs 22.4.1–22.4.3; doc K4, pp 66–84

PTII.6 SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

We have reached several conclusions and made a number of recommendations in this report, most of which confirmed the conclusions and tentative recommendations made in our 1995 report (see apps III, IV). In the following sections, we restate and summarise our conclusions and recommendations.

PTII.6.1 Why should recommendations be made?

We first determined whether or not it was appropriate to make recommendations. The Crown submitted that we should not. We disagree, and have concluded that it is entirely appropriate to make some recommendations at this stage, for the following reasons:

- the claim is well founded (sec PTI.2.6);
- we have had regard to all the circumstances of the case (sec PTI.2.6);
- the seven claimant hapu are the tangata whenua of Te Whanganui-a-Orotu (sec PTI.2.5);
- the claimants have asked us to address questions of remedies (sec PTI.2.2);
- no other claims to Te Whanganui-a-Orotu exist (sec PTI.2.4(5));
- redress is long overdue for this claim (sec PTI.2.2); and
- it would be unfair and unnecessary to delay relief (sec PTI.2.2).

PTII.6.2 General conclusion and recommendation

We have already concluded that the Crown breached the overarching basic Treaty principle of central exchange and partnership by failing actively to protect the claimants' rangatiratanga over their taonga, Te Whanganui-a-Orotu (sec PTI.2.6). We conclude that the Crown has a fiduciary duty to ensure that the rangatiratanga of the claimants over their taonga is restored. How this is achieved should be negotiated between the parties, for the benefit not only of the claimants themselves but, generally, of the whole district.

We recommend that the claimants and the Crown negotiate. These negotiations should commence immediately and not be unduly or unreasonably delayed. We sincerely hope that the negotiations will result in a comprehensive agreement for settlement of all aspects of this claim (sec PTI.2.6).

Most of our recommendations are made in general terms. We therefore grant the claimants leave to return to us to seek more detailed recommendations if negotiations with the Crown are unsuccessful (sec PTI.2.6).

PTII.6.3 The claim area

We conclude that the Wai 55 claim area for remedies purposes is represented on maps presented to us by the claimants and the Crown (sec PTI.3.2). The claim boundary is shown on the location map (see p 7). Pukemokimoki is excluded from the claim area (sec PTI.2.3).

PTII.6.4 The land to be returned

To restore the mana and rangatiratanga of the claimants over Te Whanganui-a-Orotu, it is necessary for the Crown to return land as part of any settlement.

(1) *The Landcorp farm*

We propose that the Landcorp farm and the islands of Roro o Kuri and Tapu Te Ranga should be returned to the claimants for the following reasons (sec PTII.1.1):

- the farm is the largest single property of those that were formerly under the waters of Te Whanganui-a-Orotu;
- the farm includes islands of inestimable value to the claimants; and
- the claimants should be physically reunited with at least part of Te Whanganui-a-Orotu.

We emphasise, however, that at this stage we do not make our proposal a binding order pursuant to section 8A(2)(a) of the Treaty of Waitangi Act 1975. We would prefer the Landcorp farm to be returned as part of a negotiated settlement.

(2) *The Ahuriri Estuary*

We recommend that the Ahuriri Estuary be returned to the claimants (sec PTII.1.2(4)). How and under what conditions it should be returned are principally matters to be negotiated between the Crown and the claimants. Its return must occur in conjunction with the development of a new regime for the joint management of the estuary (secs PTII.5.2, PTII.6.9).

(3) *Other Crown-owned properties*

We recommend that the claimants negotiate with the Crown for the return of other specific Crown-owned properties within the claim area (sec PTII.1.3).

PTII.6.5 The Hawke's Bay Airport

We support in principle the concept of the claimants entering into a partnership with the Napier City Council and the Hastings District Council to own the Hawke's Bay Airport (sec PTII.2). We recommend that the Crown's interest in the airport form part of the negotiations between the Crown and the claimants.

PTII.6.6 Monetary compensation

We recommend that the claimants receive a substantial fund of money (sec PTII.3). The fund will compensate the claimants to some degree for:

- the expropriation of Te Whanganui-a-Orotu;
- the past loss and despoliation of Te Whanganui-a-Orotu as a taonga of both tangible and intangible value;
- the past loss and despoliation of Te Whanganui-a-Orotu as a resource and hapu economic base, to which the claimants and their tipuna had rights of resource development;

- the parts of Te Whanganui-a-Orotu that were destroyed for the development of the city of Napier and the port;
- the loss of significant islands Te Pakake and Te Ihu o Te Rei; and
- the parts of Te Whanganui-a-Orotu which are now in private or local authority ownership.

We recommend that the amount of monetary compensation be arrived at by negotiation. The final compensation figure will be affected by the value of any land returned to the claimants.

PTII.6.7 The control and management of settlement assets

We consider that it is the claimants' responsibility to decide on the most appropriate vehicle for the receipt and management of settlement assets (sec PTII.4). Having regard to claimant submissions, we recommend that a legal entity be established by an Act of Parliament and that the statute constitute the seven claimant hapu as a hapu authority.

PTII.6.8 The management of the Ahuriri Estuary

We recommend that a new joint management regime be developed for the Ahuriri Estuary. The claimants, DOC, and other authorities with management responsibilities should work together in accordance with the Treaty principles of central exchange and partnership (sec PTII.5.2(4)). The composition of the new joint management regime and its terms of reference are matters to be negotiated.

PTII.6.9 The Resource Management Act 1991

To prevent future prejudice occurring to the claimants, several amendments to the Resource Management Act 1991 are necessary. The amendments affect the new joint management regime we recommend be developed for the Ahuriri Estuary. They also affect the management of physical and natural resources in the wider claim area.

We recommend that, in order that tangata whenua may have a representative and responsible role in accordance with their status as Treaty partner, two distinct bodies be created. The first would be a hapu authority comprised of tangata whenua and endowed with powers of policy determination and planning over their taonga. The second body would be a strengthened Maori standing committee, to enable the seven hapu to have continued representation on wider regional issues (sec PTII.5.3(3)).

We recommend that the hapu authority be sufficiently resourced to draft a hapu management plan. For the plan's implementation to occur without unnecessary confusion, we recommend that section 2 of the Resource Management Act be amended so that 'iwi authorities' include authorities representing hapu that are tangata whenua.

We recommend that the Resource Management Act be amended to ensure that hapu management plans are accorded an appropriate weight by local authorities,

