

Te Whanganui-a-Orotu Report 1995

12 Conclusions and Recommendations

12.1 The role of the Tribunal

Before setting out our findings and recommendations, we remind ourselves that our role is to determine whether or not the principles of the Treaty have been breached and, if they have, what, if any, recommendations we should make.

Our jurisdiction is clearly set out in section 6 of the Treaty of Waitangi Act 1975. Under subsection (1), Maori may submit a claim to the Tribunal if they are prejudicially affected by legislation or a policy, practice, act, or omission of the Crown that is inconsistent with the principles of the Treaty. The Tribunal then inquires into the claim (subs (2)) and, if it finds that the claim is well founded, may recommend remedial action to be taken by the Crown (subs (3)). That recommendation may be in either general or specific terms (subs (4)). Accordingly, before we make any recommendations, we must be satisfied that the present claim is well founded.

Waitangi Tribunal, Department of Justice, Wellington.

Te Whanganui-a-Orotu Report 1995

12 Conclusions and Recommendations

12.2 The principles of the Treaty

12.2.1 A general overarching principle

In its earlier reports, the Tribunal formulated particular principles of the Treaty of Waitangi that are applicable to particular claims. In recent reports, it has enunciated the view that 'some matters earlier characterised as principles might more appropriately be seen as inherent in or encompassed by a wider and more general principle', that is:

*The cession by Maori of sovereignty to the Crown . . . in exchange for the protection by the Crown of Maori rangatiratanga. [Emphasis in original.]*¹

In the *Ngai Tahu Sea Fisheries Report 1992*, the Tribunal saw this principle as 'fundamental to the compact or accord embodied in the Treaty' and as 'of paramount importance'.² Derived as it was directly from the provisions of articles 1 and 2 of the Treaty, this principle was 'overarching and far-reaching'. Intrinsic to it were several concepts, elsewhere characterised as principles. Specifically, these were 'the Crown obligation actively to protect Maori Treaty rights; the tribal right of self-regulation, the right of redress of past breaches, and the duty to consult'.³

Implicit in the overarching general principle was:

the notion of reciprocity - the exchange of the right to govern for the right of Maori to retain their full tribal authority and control over their lands, forests, fisheries and other valuable possessions for so long as they wished to retain them. It is clear that cession of sovereignty to the Crown by Maori is conditional. It was qualified by the retention of tino rangatiratanga . . . that . . . embraced protection not only of Maori land but much more, including fisheries.

Rangatiratanga was confirmed and guaranteed by the Queen in article 2. This necessarily qualifies or limits the authority of the Crown to govern. In exercising sovereignty it must respect, indeed guarantee, Maori rangatiratanga - mana Maori - in terms of article 2.

The Crown in obtaining the cession of sovereignty under the Treaty therefore obtained it subject to important limitations upon its exercise. The right to govern it acquired was a qualified right.⁴

In the *Ngawha Geothermal Resource Report 1993*, the Tribunal again enunciated the overarching principle of the Treaty. It then went on to discuss the nature of the Crown

duties inherent in that principle, namely, the duty of active protection, the duty to redress past breaches, and the duty to consult. It referred to the need to ensure that:

the Crown cannot avoid its Treaty duty of active protection by delegation to local authorities or other bodies . . . of responsibility for the control of natural resources in terms which do not require such authorities or bodies to afford the same degree of protection as is required by the Treaty to be afforded by the Crown. If the Crown chooses so to delegate it must do so in terms which ensure that its Treaty duty of protection is fulfilled.⁵

12.2.2 The principle of partnership

The principle of partnership, long acknowledged as having been authoritatively established by the Court of Appeal, states that 'the Treaty signifies a partnership, requiring the Pakeha and Maori partners to act towards each other reasonably and with the utmost good faith'.

As stated in the Muriwhenua Fishing Report 1988, and cited in the Ngawha Geothermal Resource Report 1993:

It was a basic object of the Treaty that two people would live in one country. That in our view is also a principle, fundamental to our perception of the Treaty's terms. The Treaty . . . [was indeed] a charter, or a covenant in Maori eyes, for a continuing relationship between Crown and Maori, based upon their pledges to one another. It is this that lays the foundation of the concept of partnership.⁶

We have restated the two foregoing principles as a reminder of the simple but basic promises of the Treaty and of the broad intentions that underlie the mutual obligations of the parties to it. In our view, these provide the general backdrop against which all claims stand to be measured.

12.2.3 The principle of active protection

We turn now to consider the nature of the principles of the Treaty recently discussed by the Privy Council in *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, the Te Reo Maori (Maori language) case, which is of particular relevance to this report. The Privy Council, which in this case included our chief justice, Sir Thomas Eichelbaum, had this to say at page 517:

In Their Lordships' opinion the 'principles' are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty . . . With the passage of time, the 'principles' which underlie the Treaty have become much more important than its precise terms. Foremost among those 'principles' are the obligations which the Crown undertook of protecting and preserving Maori property, including the Maori language as part of taonga, in return for being recognised as the

legitimate government of the whole nation by Maori. The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown. This emphasises the solemn nature of the Crown's obligation. It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Maori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.

It appears to us that the Privy Council's statement that the Crown's undertaking to protect and to preserve Maori taonga (property) is foremost among the Treaty principles and is entirely consistent with the observations of the judges of our Court of Appeal in the landmark 1987 *New Zealand Maori Council (Lands)* decision.

We think, therefore, that there can be no doubt that an important Treaty principle is the Crown's duty actively to protect Maori tino rangatiratanga over their taonga (Maori text), that is, the full, exclusive control and undisturbed possession of their properties so long as they wished to retain them (English text). But other important concepts or principles have been enunciated by the Tribunal and the courts as well. Among these are reciprocity and partnership, consultation and tribal self-regulation, and redress for past Treaty breaches. A further principle of tribal resource development has been referred to by claimant counsel in the present claim and by the Hawkes's Bay Regional Council in its proposed policy statement. All these Treaty principles are apposite to the present claim. Indeed, they are, as it were, the whariki (mat) on which the claim is laid.

Waitangi Tribunal, Department of Justice, Wellington.

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12.3 The application of Treaty principles to the present claim

12.3.1 Introduction

Before we apply the principles of the Treaty to the present claim, we should recall that on three previous occasions Treaty claims to Te Whanganui-a-Orotu have been raised and discussed.

In 1874 H K Taiaroa asked in Parliament whether reclamations were not in contravention of Treaty rights. In response, McLean denied that there had been any breach of the Treaty and declared that every government had carefully preserved Maori rights (see [paras 6.1.1-4](#)).

At the 1934 hearing of Hori Tupaea's petition, Raniera Ellison argued on behalf of the claimants that no law, whether common or other, can override any of the privileges that the Treaty solemnly granted to Maori (see [para 10.11.1](#)). If British law were to supersede the conditions of the Treaty, he claimed, it would follow that the Treaty was of no value. Te Whanganui-a-Orotu came within the scope of article 2 of the Treaty, which guaranteed the claimants their fisheries and other properties. Therefore, what remained since the earthquake was theirs by right under the Treaty. The claimants, he submitted, should at least participate in the area that they had always maintained was theirs (A6(m):89). Judge Harvey did not respond to this Treaty claim.

Again, in 1965 the claim of Ihakara Rapana and others that the Treaty guaranteed rights to Maori and had the power to override common law was ignored.

In the present claim, the claimants contend that they never knowingly or willingly relinquished their tino rangatiratanga over their taonga (Te Whanganui-a-Orotu) and that the Crown was in breach of Treaty principles in asserting ownership over Te Whanganui-a-Orotu by vesting it in the Napier Harbour Board by statute (see [paras 6.1.1, 6.1.3-4](#)).

The Crown contends that Te Whanganui-a-Orotu was included in the 1851 purchase or, alternatively, that it vested in the Crown through the 'arm of the sea' legal rule, whereby areas of water that form part of the sea are the property of the Crown.

If the Crown is unsuccessful in both of these alternative arguments, it must follow that Te Whanganui-a-Orotu was never acquired by the Crown. In this case it would seem to us to be self-evident that the subsequent vesting of Te Whanganui-a-Orotu in the Napier Harbour Board as a harbour endowment and the reclamation and disposal of and serious environmental damage to Te Whanganui-a-Orotu was in breach of the Treaty principle that the Crown must actively protect Maori taonga.

12.3.2 Was Te Whanganui-a-Orotu included in the sale?

In considering whether or not Te Whanganui-a-Orotu was included in the sale, it is helpful to recall the conclusions that we reached in chapter 3.

- (a) The principal Ahuriri chiefs agreed to sell McLean the inland Ahuriri block lying to the north and west of Te Whanganui-a-Orotu. As Tareha said on 20 December 1850, 'The water is ours. The land you see before you is yours.'
- (b) On 2 May 1851, the sellers, under pressure from McLean and with considerable reluctance, agreed to sell Mataruahou and Te Taha. The May agreement secured for the Crown the control of the entrance to the harbour, which McLean considered 'essentially necessary' for the growth of European settlement.
- (c) There is no evidence that the purchase of Te Whanganui-a-Orotu was negotiated or that the chiefs agreed to sell it. We can only conclude, therefore, that McLean thought that the harbour was an arm of the sea and belonged to the Queen under English common law, but he did not explain this to Maori.

It is also helpful to recall our conclusion in chapter 4 that there is no firm evidence that the sellers ever saw, let alone understood, the red line on the deed plan that McLean exhibited before they signed. Nor is it critical whether they did or did not. The red line on the deed plan is an incorrect delineation of the external boundary of the Ahuriri purchase in that it includes the strip of land north of Ruahoro and continues on from where the Puremu and Tutaekuri Rivers discharged into Te Whanganui-a-Orotu to Mataruahou (see [para 4.7.1](#)). Furthermore, it excluded that portion of Te Whanganui-a-Orotu that was embraced in the later Tutaekuri and Te Whare o Maraenui block purchases (see paras [5.3.3](#), [5.5.2](#)).

Having regard to these conclusions and the other matters discussed in chapters 2, 3, and 4, we think that the correct analysis must be that the sellers had no reason to believe that Te Whanganui-a-Orotu was included in the purchase.

In contrast, the Crown, through its agents, regarded Te Whanganui-a-Orotu as being included in the sale. This was illustrated by the reference to 'moana' in the all appertaining (tangi) clause, the reservation of a fishing right and canoe access, and the red line on the plan attached to the deed.

The case for the Crown, cogently argued by Mr Brown, cannot overcome the key point that there was no 'meeting of minds' between Maori and the Crown over the position of Te Whanganui-a-Orotu; at best the Crown's arguments, even on a strict legal analysis, can do no more than establish that there were two different understandings of the all appertaining clause and the reservation of fishing and access rights. We cannot accept the Crown's view that the red line on the deed plan accurately represents the external boundary of the 1851 purchase.

12.3.3 Was Te Whanganui-a-Orotu an 'arm of the sea'?

But what of the Crown's alternative contention that Te Whanganui-a-Orotu was an 'arm of the sea' and thus the bed had vested in the Crown (presumably upon the signing of the Treaty in 1840) even if the lake had not been included in the purchase?

In this instance, it is, we think, helpful to bring together the relevant historical evidence, which is scattered through a number of chapters.

- (a) McLean always spoke of the harbour, not of fresh water or salt water or of the harbour proper, as distinct from the lagoon. Moreover, he was convinced that the harbour was required for successful settlement (see paras [3.4.5](#), [3.4.9](#)). There is no evidence that he negotiated its purchase; he must have assumed that the Crown acquired it after the signing of the Treaty in 1840.
- (b) In 1859 (before reclamation commenced), the provincial government of Hawke's Bay obtained an opinion from C D Ward to the effect that the bed of the harbour below the high-water mark was prima facie the Crown's property (see [para 5.6.3](#)).
- (c) In Parliament in 1874, McLean himself said in reply to a question from Tairaroa that authority for reclamation below the high-water mark was not a breach of the Treaty and that native rights had been preserved. All rivers and streams, both on and below the surface, were ceded to the Crown in the all appertaining clause in most deeds of sale (see [para 6.1.2](#)).
- (d) Ormond and the provincial government's solicitors, in promoting a local Bill to authorise reclamation by the Napier Harbour Board in 1874-76, were presumably relying on Ward's legal opinion that the Crown owned the bed of the harbour below the high-water mark (see paras [6.1.1](#), [6.1.3](#), [6.1.4](#)).
- (e) There is no evidence that until Tareha made his claim to Cooper in 1861 Maori were ever told that the Crown 'owned' harbours from 1840. And at that time Tareha had no idea that harbour works and reclamations would ever extend very far beyond Te Pakake and Te Koau, and that large areas would be reclaimed and drained for urban and industrial land (see paras [5.7](#), [5.10](#)).
- (f) In 1916 John Salmond, the Solicitor General and one of this country's greatest jurists, opined that the inner harbour was tidal water and the high-water mark was the limit of native customary title (see [para 10.6.3](#)).
- (g) In 1920 the Native Land Claims Commission interpreted the reservation of a fishing and access right in the deed of sale as merely reiterating 'the ordinary common law that all the King's subjects . . . have a right of passage over the sea, a common right of fishing and a common (though perhaps restricted) right of landing on the foreshore' (see [para 10.7.2](#)).
- (h) In 1948 Judge Harvey thought that there was 'some fairly strong evidence and material' to support the claim that in 1840 Te Whanganui-a-Orotu was 'a fresh or brackish water lagoon and as such was "land" within the meaning of the various Native Ordinances and Acts' (see [para 10.11.8](#)).
- (i) Claimant witnesses gave evidence of the presence of freshwater fish in various parts of the lagoon at least until after the reclamation of Napier South. An expert witness gave us evidence on the presence of large and varying quantities of fresh water in the lagoon (see paras [1.2.1](#), [2.5.7](#), [6.6.3](#), [8.7](#)). This suggests that Te Whanganui-a-Orotu was more a part of the river system than an arm of the sea.

We conclude that, as at 1851, and indeed at all material times, Te Whanganui-a-Orotu included elements of fresh water and elements of sea water, with the relative amounts of each varying from one part to another and from one time to another, in accordance

with freshwater inflows that were far more substantial than tidal saltwater inflows. The presence within Te Whanganui-a-Orotu of large quantities of fresh water and a very restricted link to the sea distinguished it from harbours like Manukau. We therefore cannot accept the Crown's presumption that Te Whanganui-a-Orotu was a part of the sea. It follows that the bed of Te Whanganui-a-Orotu did not as a matter of common law (traditional English judge-made law) vest in the Crown.

Even if we are wrong in this conclusion, we think that for the Crown to rely on a principle of English common law to deprive Maori of their taonga, Te Whanganui-a-Orotu, would be a breach of the Treaty principle to actively protect the property of Maori.

As the petitioners said at the 1934 hearing, common law rights cannot override Treaty rights (see [para 10.11.4](#)), and in this case the exercise of British sovereignty is qualified by the article 2 guarantee of tino rangatiratanga.

12.3.4 Parallels with the Lake Omapere decision

It is interesting to note, as Mr Hirschfeld did very effectively in his closing submissions (I18(e):103-116), the parallels between the present claim and the *Lake Omapere* decision.⁷ That 1929 decision of Judge F O V Acheson of the Native Land Court was in our view one of the most perceptive judgments in the legal history of our country. We think that the following passages demonstrate this quality and show parallels with the present claim. Page 7:

Did the ancient custom and usage of the Maoris recognise ownership of the beds of lakes?

. . . Yes! And this answer necessarily follows from the more important fact that Maori custom and usage recognised full ownership of lakes themselves.

The bed of any lake is merely a part of that lake, and no juggling with words or ideas will ever make it other than part of that lake. The Maori was and still is a direct thinker, and he would see no more reason for separating a lake from its bed (as to the ownership thereof) than he would see for separating the rocks and the soil that comprise a mountain. In fact, in olden days he would have regarded it as rather a grim joke had any strangers asserted that he did not possess the beds of his own lakes.

A lake is land covered by water, and it is part of the surface of the country in which it is situated, and in essentials it is as much part of that surface and as capable of being occupied as is land covered by forest or land covered by a running stream. [Emphasis in original.]

Page 8:

. . . To the spiritually-minded and mentally-gifted Maori of every rangatira tribe, a lake was something that stirred the hidden forces in

him. It was (and, it is hoped, always will be) something much more grand and noble than a mere sheet of water covering a muddy bed. To him, it was a striking landscape feature possessed of a 'mauri' or 'indwelling life principle' which bound it closely to the fortunes and the destiny of his tribe. Gazed upon from childhood days, it grew into his affections and his whole life until he felt it to be a vital part of himself and his people.

Page 9:

. . . To the Maori, also, a lake was something that added rank, and dignity, and an intangible mana or prestige to his tribe and to himself. On that account alone it would be highly prized, and defended.

. . . Finally, to all these things there was added the value of a lake as a permanent source of food supply.

. . . Lake Omapere . . . has been to the Ngapuhis for hundreds of years a well-filled and constantly-available reservoir of food in the form of the shell-fish and the eels that live in the bed of the lake. With their wonderful engineering skill and unlimited supply of man-power, the Maoris could themselves have drained Omapere at any time without great difficulty. But Omapere was of much more value to them as a lake than as dry land.

Pages 10 and 11:

. . . Was Lake Omapere, at the time of the Treaty of Waitangi (1840), effectively occupied and owned by the Ngapuhi Tribe in accordance with the requirements of ancient Maori custom and usage?

. . . Yes! The occupation of Omapere was as effective, continuous, unrestricted, and exclusive as it was possible for any lake-occupation to be.

It is not contested that for many hundreds of years the Ngapuhis have been in undisputed possession of this lake, and have lived around or close to its shores. . . Great numbers of the Ngapuhi, must have grown up within sight of Omapere's waters, and have regarded the lake as one of the treasured tribal possessions. By no [process] of reasoning known to the Native Land Court would it be possible to convince the Ngapuhis that they and their forefathers owned merely the fishing rights and not the whole lake itself.

According to ancient Maori custom and usage, the supreme test of ownership was possession, occupation, the right to perform such acts of ownership as were usual and necessary in respect of each particular portion of the territory possessed.

In the case of a lake the usual signs of ownership would be the unrestricted exercise of fishing rights over it, the setting up of eel-weirs at its outlets, the gathering of raupo or flax along its borders, and the occupation of villages or fighting-pas on or close to its shores.

. In short, the Ngapuhis used and occupied Lake Omapere for all purposes for which a lake could reasonably be used and occupied by them, and the Native Land Court says that much less use and occupation would be ample, according to ancient custom and usage, to prove actual and effective ownership of the lake, bed and all. [Emphasis in original.]

Pages 13 and 14:

. . . It was contended (but not seriously pressed) on behalf of the Crown that sales by Natives to the Crown, of areas adjoining Lake Omapere, gave to the Crown rights in those portions of the bed of the lake fronting on to the portions sold.

This contention had no merit whatever. The sales to the Crown were of particular areas of land well defined as to area and boundaries, and could not possibly have been intended to include portions of the lake-bed adjoining. See also Judgment of Court of Appeal in *Re Mueller v Taupiri Coal Mines Co* (1900) 3 GLR 154.

Also the mere fact that Lake Omapere was 'customary land' was an absolute bar to sales of any portions of it to the Crown. Section 89 of 'The Native Land Act, 1909', forbids sales of 'customary land' to the Crown, and earlier statutory provisions were to the same effect.

Moreover, Lake Omapere was tribal territory, and therefore, according to established Maori custom and usage, no individual or group of individuals had the right to alienate any portion of its bed. To hold otherwise would be to give support to that lamentable doctrine which led, in the celebrated Waitara Case, to tragic and unnecessary wars between Pakeha and Maori.

There can thus be no presumption either in law or in fact that the sales of some lands to the Crown adjoining Lake Omapere carried with them rights to portions of the lake or of its bed.

Page 19:

. . . Are the words 'Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess', contained in Article Two of the Treaty of Waitangi, ample in their scope to include Lake Omapere?

. . . Yes!

According to both English Common Law and ancient Maori Custom, the term 'Lands and Estates' would be ample to include by description a lake or a lake-bed. But even if that were not so, the further term 'other properties collectively possessed' would be more than ample to include a lake occupied and possessed as was Omapere. [Emphasis in original.]

Page 20:

... Did the parties to the Treaty of Waitangi contemplate, at the time of the signing, that the Natives would be entitled to the bed of Lake Omapere?

... The parties to the Treaty certainly intended it to protect the rights of the Ngapuhis to their whole tribal territory. The Court has already shown that such territory necessarily included Lake Omapere, and that ownership of the lake necessarily included ownership of the lake-bed. [Emphasis in original.]

Page 21:

... Did the parties to the Treaty of Waitangi contemplate, at the time of the signing, that the Crown would claim the bed of Lake Omapere?

... No!

There was no Common Law Right of the Crown to lakes or to the beds of lakes in England, so it is impossible to suppose that the Crown's representatives who were negotiating with the Maoris took it for granted that New Zealand lakes would belong to the Crown as a matter of right. [Emphasis in original.]

Page 24:

... In these later days, 1929, it is not sufficiently realised how dependent the early settlers were on the Treaty of Waitangi, and what great benefits the white people derived from it for several decades.

... In view of the considerations set out above, the Native Land Court holds that it is unreasonable to suppose that the Natives at the time of the Treaty intended to give up Lake Omapere or its bed to the Crown, and that it is equally unreasonable to suppose that the Crown at the time of the Treaty intended to claim the lake or its bed in opposition to the Natives.

We think that the words of Judge Acheson could be applied to Te Whanganui-a-Orotu with only minor modifications. More particularly, we do not see why the presence of substantial quantities of salt water within Te Whanganui-a-Orotu and the influence of the tide should alter the position in Treaty terms. Indeed, the word 'moana' denotes a lake as well as the sea. To the claimants and other petitioners, it was (like Lake

Omapere) Maori customary land. The sale of land adjacent to it did not include rights to its bed and drainage operations were unauthorised (cf I18(e):113-115).

We therefore conclude that, if the Crown did not purchase Te Whanganui-a-Orotu, its appropriation by the Crown and the consequent affront to the rangatiratanga of the claimants was a clear breach of the principles of the Treaty. If, however, the Crown did acquire Te Whanganui-a-Orotu, either by contract or by the common law, it did so on a basis that was also clearly in breach of the Crown's Treaty guarantee of rangatiratanga and its obligation to actively protect taonga.

12.3.5 Legislation

Beginning with the statutory vesting of Te Whanganui-a-Orotu in the Napier Harbour Board, it appears to us that over the years there were a series of breaches of the principles of the Treaty. On each occasion that the reclamation and sale or lease of lagoon lands was authorised by legislation or took place, it was done without consultation with or the approval of Maori and was therefore in breach of the principles of the Treaty. Similarly, acts, policies, and omissions that resulted in the pollution of Te Whanganui-a-Orotu (see paras [2.5.8](#), [6.6.1-5](#), [8.7](#), [9.6](#)) were further breaches of the principles of the Treaty as was the loss of shellfish beds and fishing grounds and the access to them. Further breaches occurred through the loss of the island reserves of Te Pakake and Pukemokimoki (see paras [5.7](#), [6.3](#)) and through losses at the southern and northern ends of the lagoon and more particularly of Roro o Kuri, Te Ihu o Te Rei, and Parapara (see paras [5.3.1-3](#), [5.5.1-5](#)).

The Crown's compulsory taking of the six islands that clearly did not form part of the sale (see paras [7.7.1-7](#)) was a further and blatant breach, as was the inclusion of Tapu Te Ranga in the Lands and Survey farm (see [para 7.8](#)).

Even if Te Whanganui-a-Orotu was acquired by the Crown in 1851 as a matter of general law, it is, we think, beyond argument that it was implicit in the acquisition that Maori would continue to have access to Te Whanganui-a-Orotu for what were to them the vitally important activities of fishing, shellfish gathering, and transportation, as well as for the protection of and access to wahi tapu. Following the earthquake, Te Whanganui-a-Orotu in its natural state would have continued to be a source of fish, shellfish, and other traditional resources, and, at least to some extent, a means of transport. By extensively draining and then developing land uplifted by the earthquake without any regard whatever for Maori rights and interests (see paras [7.4](#), [7.5](#), and [7.6](#)), the Crown committed further breaches of the principles of the Treaty, more particularly those of active protection and partnership, depriving local Maori of their traditional hapu/iwi resource and prospects for resource development.

The final and most recent group of breaches was the depriving of the claimants, by legislation or otherwise, of an effective role in the management of the Ahuriri Estuary, which forms part of the conservation estate (see [paras 9.12.1-8](#)).

12.3.6 Summary of breaches of Treaty principles

In summary, we find that there have been a series of breaches by the Crown of the principles of the Treaty in respect of Te Whanganui-a-Orotu. These breaches may be grouped as follows.

The Crown has been in breach by:

- (a) not making it clear that it believed that Te Whanganui-a-Orotu was included in the original purchase and then relying on what were, at most, legally ambiguous provisions in documents prepared by the Crown as a basis for claiming Te Whanganui-a-Orotu;
- (b) purporting to rely on the common law principle of 'arm of the sea' to acquire Te Whanganui-a-Orotu without the consent of Maori;
- (c) enacting legislation to vest Te Whanganui-a-Orotu in the Napier Harbour Board and to authorise a series of reclamations and sales and leases of it, more particularly to the Napier Borough (City) Council for urban development;
- (d) compulsorily acquiring islands, without paying any compensation, that were clearly outside the purchase and recognised by statute as customary Maori land;
- (e) depriving Maori of access to Te Whanganui-a-Orotu for fishing, shellfish gathering, transport, and other uses, including kaitiakitanga of wahi tapu.
- (f) permitting serious environmental damage and destruction to occur to Te Whanganui-a-Orotu; and
- (g) failing to ensure, by legislation or otherwise, 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.

We note that in some of these matters, in addition to breaching the general overarching principle of active protection of rangatiratanga over a taonga, were breaches of other principles of the Treaty that were formulated by the Tribunal and the courts and relied on by the claimants. These were the principles of partnership, involving the duty of the Crown to act responsibly and in good faith and to consult, and the duty to provide effective redress for past breaches of the Treaty, which the Crown failed to do (see ch 10).

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12.4 Recommendations

12.4.1 Two legal issues

Having found that the Wai 55 claim is well founded and that there have been a number of breaches of the principles of the Treaty that have prejudiced the claimants, the Tribunal has jurisdiction to recommend to the Crown that action be taken to compensate for or remove that prejudice. Before considering what, if any, recommendations we should make, we refer to two legal issues.

The first of these issues is the effect of the Treaty of Waitangi Amendment Act 1993, which amended section 6 of the Treaty of Waitangi Act 1975 by providing that the Tribunal:

shall not recommend--

- (a) The return to Maori ownership of any private land; or
- (b) The acquisition by the Crown of any private land.

'Private land' is defined as:

any land, or interest in land, held by a person other than--

- (a) The Crown; or
- (b) A Crown entity within the meaning of the Public Finance Act 1989.

Mr Hirschfeld presented an elaborate argument to the effect that the 1993 amendment had no application to the present claim because it was enacted on 20 August 1993 - after the hearings had commenced - or, alternatively, that the amendment was itself in breach of the principles of the Treaty (I18(e):117-124). Mr Brown, supported by counsel for the Port of Napier Ltd (I16), responded by submissions to the effect that the plain words of the amendment reflected the intention of Parliament as disclosed by *Hansard* and left no doubt that it did apply to the present claim. We agree. As Mr Brown submitted, the amendment is not retrospective in its nature because it prohibits the Tribunal from making recommendations in respect of private land only from the date of its enactment. By its words, the amendment also squarely applies to local authorities such as the Port of Napier Ltd and the other local authorities to which parts of Te Whanganui-a-Orotu have passed. None of these local authorities are agencies of the Crown as defined in the Public Finance Act 1989.

We cannot accept Mr Hirschfeld's submission that the amendment is in breach of the principles of the Treaty. Again as Mr Brown submitted, it is open to the Government to consider the possible effect of a Tribunal recommendation on a private landowner who has acquired rights to that land in good faith, and Parliament does have the ultimate right to change the law. It is not as if the Tribunal is being deprived of the power to make recommendations in respect of Crown land, whether within the area of the claim or not, or to recommend to the Crown that it should make monetary compensation consequent upon the disposition by the Crown of land that could otherwise have been the subject of a recommendation. If the Crown elected to transfer to local bodies for no or inadequate consideration land that to its knowledge was the subject of a claim, it must accept the consequence of a potential liability for monetary compensation to the claimants.

The second legal issue that arises is the possible significance of the inclusion within the area of the claim of a substantial area of land that is owned by Landcorp, a State-owned enterprise. We are mindful that any recommendation for the return of that land could potentially be subject to sections 8A and 8B of the Treaty of Waitangi Act 1975, with the consequence that, if the procedures specified in those sections were followed, the Crown could be required to give effect to the recommendation. We are, however, conscious that the scope and the application of these sections have not as yet been the subject of detailed consideration by the Tribunal or the courts.

12.4.2 Final recommendations not appropriate at this stage

We must now decide what, if any, recommendations to make in respect of our finding that a series of breaches by the Crown of the principles of the Treaty have occurred.

At this stage, we consider that it is not appropriate to make any final recommendations for three main reasons:

- (a) The question of remedies was not extensively argued at the hearing.
- (b) The Tribunal is considering a recommendation that the Landcorp farm be returned to the claimants and is conscious that such a recommendation is potentially binding.
- (c) The claimants should have the opportunity of reformulating the recommendations that they seek in the light of the contents of this report.

We do not, however, want to see the question of relief delayed unnecessarily, and, to avoid that happening, we propose to fix the week starting 30 October as the date for a further hearing in Napier. Should the claimants or the Crown so wish, they may apply to us for an adjournment to a later date, provided they give six weeks' notice.

12.4.3 Interim steps to be taken

In the interim, the following steps should be taken:

- (a) The Crown should identify and advise the Tribunal and the claimants of 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, when it comprised 9500 acres (3840 hectares).

- (b) The Crown should also identify and advise the Tribunal and the claimants of the present day land utilisation of the Landcorp farm. What we seek is an up-dating of the Ahuriri farm settlement utilisation study of September 1982, which was prepared by staff of the Napier district office of the Department of Lands and Survey (see [para 8.4.8](#)) (D6(a):1023-1110).
- (c) There should be no further alienation of any Crown land or State-owned enterprise land lying within the pre-1851 boundaries of Te Whanganui-a-Orotu.
- (d) The claimants should file with the Tribunal a schedule of the recommendations that they seek and they should serve it on the Crown at least one month prior to the further hearing.
- (e) If the claimants lack sufficient resources to prepare the recommendations that they seek, they should approach the Crown for financial and/or expert assistance. In that event, we would expect a sympathetic and helpful response.

12.4.4 Suggestions on possible recommendations

To assist the parties in preparing for the further hearing, we make the following suggestions on possible recommendations (we emphasise that we make these on a tentative basis and on the information at present available to the Tribunal):

- (a) The area of Crown land to be considered for possible return should include the Landcorp farm, Roro o Kuri, and the Ahuriri Estuary.
- (b) 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/iwi economic base, to which the claimants and their tipuna had Treaty rights of resource development.
- (c) More particularly, compensation should be paid for the taking of island reserves and wahi tapu, Te Pakake and Pukemokimoki, for the six former lagoon islands (Maori customary land) that were compulsorily acquired under the Public Works Act 1928 without any compensation being paid, and for the Crown's failure to compensate tangata whenua for the losses that they incurred, including a fishing and access right, by the drainage and development that followed the 1931 earthquake, even though half of this partially developed land was revested in Crown ownership in 1950.
- (d) A new regime should be developed for the management of conservation land within Te Whanganui-a-Orotu that will ensure that the claimants have effective representation. In developing a proposed model, the claimants should not feel bound by the conditions that the Resource Management Act 1991 at present requires to be imposed upon the handing over of any part of the conservation estate.
- (e) 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.

- (f) Appropriate amendments should 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 (see [para 9.13.4](#)).
- (g) Appropriate amendments should be made to the Resource Management Act 1991, as recommended by the *Ngawha Geothermal Resource Report 1993* (Wai 304:155; [para 9.13.5](#)).
- (h) Appropriate amendments should be made to the Public Works Act 1981, as outlined in recommendations 3(a), 3(b), 3©, and 3(d) of the *Te Maunga Railways Land Report 1994.8*
- (i) The Crown should pay to the claimants reasonable costs and disbursements.

Waitangi Tribunal, Department of Justice, Wellington.