

13. HERITAGE CONTROL

13.1 BACKGROUND

13.1.1 The Department of Conservation's legislative responsibilities

The Crown has assumed responsibility for preserving the country's natural and historical heritage, and the Department of Conservation is an important mechanism for achieving this. The department was established by the Conservation Act 1987, and its obligation to give effect to the Treaty of Waitangi is the strongest legislative recognition of the Treaty.¹ 'Conservation' is defined as:

the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations.²

The Conservation Law Reform Act 1990 established the New Zealand Conservation Authority. The main purpose of the authority is to consult with local peoples and create conservation management strategies that reflect local as well as national concerns. These strategies cover all national and historic resources.³ The Crown also has responsibility for fisheries conservation. The Crown can recognise the relationship between Maori and important places for customary food gathering through the creation of taiapure or mataitai reserves.⁴ Already 15 non-commercial fishing areas established by the local community have been recognised.

13.1.2 The Department of Conservation on the Chathams

Only 4.6 per cent of Rekohu is conservation estate. This is contrasted with the smaller Rangiuarua (Pitt Island) where 43 per cent of the island is owned by the Crown. In total, 8.2 per cent of the total land mass of the islands is owned or administered by the Department of Conservation. This includes Rangatira and Mangere Islands, which were purchased in the 1950s for conservation purposes. Many of the sites brought under the department's administration in the last decade have been via the mechanism of covenants willingly entered into by the landowners. On the

1. Section 4 of the Conservation Act 1987

2. Section 2 of the Conservation Act 1987

3. Section 17D of the Conservation Act 1987. This definition includes national and historic resources under the Wildlife Act 1953, the Marine Reserves Act 1971, the Reserves Act 1977, the Wild Animals Control Act 1977, the Marine Mammals Protection Act 1978, the National Parks Act 1980, and the New Zealand Walkways Act 1990. For further elaboration, see the Waitangi Tribunal's *Whanganui River Report*, Wellington, GP Publications, 1999, pp 309–312.

4. Part IX of the Fisheries Act 1996

mainland, the department controls 38 per cent of the land area, although, of course, much of that is mountainous.⁵

The Department of Conservation's greatest concern on Rekohu is deforestation, particularly on the main island. Only 7500 hectares of indigenous forest remain – approximately 10 per cent of the original cover. The department is acutely aware of the appalling extinction rates of Chatham Island flora and fauna. Sixteen bird species have disappeared from Rekohu, seven are now extinct. A further six are now endangered or found only on outer islands. The huge colonies of nesting seabirds originally found on Rekohu have largely disappeared and are much scarcer on neighbouring islands. Land ecosystems and indigenous vegetation types are not well represented in protected areas, and those areas that do exist are vulnerable and fragmented.⁶

Not only do the Chathams have a rich flora and fauna, but they are also rich in cultural history. There are more than 700 recorded archaeological sites, while many more lie unrecorded. Moriori occupation on Rekohu is unique, and evidence of this ancient association includes middens, burial sites, limestone caves, petroglyphs (rock art), and dendroglyphs (tree carvings). With the exception of the cave figures, these sites are on land administered by the department, such as the JMBarker (Hapupu) national reserve, Taia Bush, the Lake Kairae historic reserves, and the Henga and Cannon–Pierce scenic reserves, as well as the Wharekauri conservation area. There are also a considerable number of historical sites on private land, and while they are protected by the New Zealand Historic Places Act 1996, landowner cooperation is very important for their successful management.⁷

At the time of our hearings, the Crown was engaged in public dialogue on a proposed conservation management strategy for the Islands. This process proved controversial and brought to the fore concerns about the Department of Conservation's management of its relationships with the peoples of Rekohu and their heritage sites.

We note, however, that this contemporaneous debate masked a considerable amount of agreement. It was apparent that the Crown, Ngati Mutunga, and Moriori all sought to preserve the natural and historical heritage, and subsequent progress in heritage planning has been positive. Many of the issues raised in the course of our hearings are now redundant. The Crown through its agent, the Department of Conservation, has

5. Document F6, paras 5–6; doc L5, para 15

6. Department of Conservation, *Draft Chatham Islands Conservation Management Strategy*, Wellington, Department of Conservation, 1996, p 9

7. Department of Conservation, *Chatham Islands Conservation Management Strategy*, Wellington, Department of Conservation, August 1999, pp 9, 34–36

worked at establishing, maintaining, and developing positive relationships with the key groups on the islands and at reinforcing the relationships of those groups with their taonga. While there were many complaints of past compromise of significant sites, the lesson now appears to have been learnt that disrespect for cultural heritage, of whatever peoples, is a major impediment to ethnic cooperation. Cooperation represents an ongoing challenge, but it appeared to us that a good foundation has now been laid.

Broadly, the current issues express three concerns about conservation management:

- ▶ *Relationships*: What quality of relationship is required with the Crown?
- ▶ *Control*: When customary interests are affected, who decides and what principles should apply?
- ▶ *Balance*: How are preservation and development to be balanced?

These concerns are considered in the context of the more particular issues raised. Most of them related to the draft conservation management strategy, but, since the hearings, that plan has been finalised.⁸

Local resource management planning was not an issue for the simple reason that there was none. At the time of the hearings, the islands' local government was undergoing reform. This has since been completed, and the Tribunal recognises the need to bed down the new system.⁹ We therefore will not comment on it.

13.2 ISSUE 1: WITH WHOM SHOULD THE CROWN BUILD RELATIONSHIPS?

13.2.1 The problem

Under established Treaty principles, the Crown (and those whom the Crown empowers) must consult with Maori on matters affecting Maori. Planning statutes now so specify. These include the Conservation Act 1987, the Resource Management Act 1991, and the Reserves Act 1997.

Mori and Ngati Mutunga do not agree on who should be consulted or who has the primary interest in local conservation and environmental management. They have also both divided into two camps, each with respectable followings.¹⁰

8. Ibid

9. See esp sections 26–28 of the Chatham Islands Council Act 1995

10. This lack of agreement was evident from the two Mori and two Ngati Mutunga groups who appeared before us. See also doc F7, paras 36–37.

That is the problem that we now address. To consult with each camp is not an answer, for each challenges the other's right. So far, the Department of Conservation has borne the burden of the problem; but the new Chathams council will also inherit it when it comes to resource management planning.

13.2.2 Background

The following are influential factors:

- ▶ *Land awards:* The 1870 Native Land Court awards continue to exacerbate confusion over customary association with land and taonga. Who now speaks for the ancestors in considering birds, fish, plants, and sacred sites – Moriori or those who were awarded the associated land? The problems are made worse by the intense feelings of some claimants that Maori are occupying Moriori ancestral land.

Of course, there are groups of conquerors and conquered elsewhere – from Wanganui to Wellington, for example – but the factual matrix does not compare, especially with regard to the history of enslavement.

- ▶ *Previous attitudes to tribal governance and dispersal:* Tenure reform prevented tribal governance from maturing naturally to modern corporate structures, as described earlier. Further, the Government largely declined to treat with tribal runanga from 1860 to the 1980s. As a result, current tribal structures have been built without the benefit of natural growth over time. With the dispersal of the hapu, there are also fewer common community norms. Differences are only to be expected.
- ▶ *Facilitating agencies:* Crown support for runanga development in the 1980s was premised upon the judicial determination of representation and constituency disputes. This was considered in chapter 12. However, the statute that provided for this, the Runanga Iwi Act 1990, was repealed following dissatisfaction over the criteria it set out, and nothing was put in its place. Current Maori wisdom appears to be that the problem should be decided by gradually rebuilding the hapu from the ground up and allowing representation to emerge. No doubt this is commendable, but it takes time.
- ▶ *Money:* The Department of Conservation has borne the brunt of representation problems so far, but representation issues extend far

beyond conservation concerns. Representation issues arise also when considering contracts for services under devolution policies, the benefits of Treaty settlements, and the prospective allocation of benefits from the Treaty of Waitangi Fisheries Commission.

- ▶ *National policy development:* Governments do not now appear to work with national Maori organisations on policy development, and this applies even to the development of policy on representation issues.
- ▶ *Land-use legislation:* We have left for last the most important variable affecting representation issues in environmental management: the inadequate framework provided for representation in land use legislation. The thrust of conservation and resource management law is that consultation is to be with ‘tangata whenua’. Literally, this means ‘the people of the land’; but in the statute it means the ‘iwi’ (the people) or ‘hapu’ (tribe) that holds ‘mana whenua’, that being said to mean ‘customary authority’.¹¹ In essence, the Crown or local authority must consult the people with customary authority.¹²

If matters were simply put that way, there would not be such a problem. To deal with the people with customary authority, one would simply go to each of the marae, for it is there that customary authority resides. But that creates another problem. To illustrate this, in Rotorua there are 25 substantial marae around one lake alone, and there are at least eight important lakes; while on Rekohu the marae almost ceased to exist.

The main problem is the statutory language. What sort of ‘customary authority’ does ‘mana whenua’ entail? Amongst Maori, there is a large dispute on that and, indeed, on whether the term has value at all. We think that in this case the infusion of Maori words has muddied the statutory intent. If it was meant to say that consultation should be had with runanga or other bodies generally accepted as representing the people traditionally associated with an area, then it would have been better had the legislation said that.

The last factor had more impact than any other on the arguments that we heard. It was compounded by the fact that, in customary diplomacy, the self-proclamation of ‘mana anything’ is the language of boast and war.

11. Sections 2, 6–8 of the Resource Management Act 1991

12. Document c1

13.2.3 The arguments

To illustrate the environment in which the arguments were made, the debate was preceded by a legal opinion, commissioned by a Ngati Mutunga group and flaunted before Moriori as determinative, that Moriori had permanently lost tangata whenua status through conquest and subjugation. (This was not from any counsel involved in the hearings, counsel at the hearings being helpfully constrained.) Then, following some conciliatory words in the course of the hearings, the embers were stoked towards the end by a further letter conveyed on behalf of the Ngati Mutunga to te Iwi Moriori Trust Board. This advised that Moriori had no status as an iwi in terms of the Act as they had lost all the rights of an iwi in 1835.¹³

Accordingly, we first report, with regret, that there was no mediated solution. Equally, we are pleased to report that there was no physical violence. On this occasion, Nunuku's law prevailed.

Many different views were expressed, even from within the separate camps. The main points for those Moriori at one end of the spectrum were as follows:

- ▶ The Treaty obliges the Crown to recognise the rangatiratanga (independent autonomy) of the tribal groups according to their proper status. The Crown must recognise Moriori as the original people or tangata whenua of Rekohu, who, though once enslaved, are now free. As a free people, they retain today the main ancestral association with the natural resources of Rekohu, and accordingly the Crown should treat with them, exclusively or at least primarily, on conservation and management issues.¹⁴
- ▶ In terms of the land use legislation, Moriori are the tangata whenua and hold customary mana whenua over the area. Mana whenua comes from the original ancestors and not from those of Ngati Mutunga.¹⁵
- ▶ In so far as the Crown proposes to consult equally with Moriori and Maori, the Crown is in breach of the Treaty. Not only should the Crown consult with Moriori, but it should give them priority.
- ▶ Representation on the Chatham Island Conservation Board of four European, four Maori, and two Moriori is wrong. Moriori should have four representatives, and Maori two or none at all.¹⁶
- ▶ Proposals that one runanga should represent both Moriori and Maori are really to keep Moriori down and Maori to the fore. The history of the runanga concerned was evidence of this intent. For

13. NDDavidson, Bell Gully Weir, to CPreece, chairman, Te Iwi Moriori Trust Board, 10 August 1993 (doc c1, para 1.4, attachment)

14. Document G14, paras 6–15

15. Document c1, para 1.8

16. Document G14, para 94

example, Moriori were allegedly denied speaking rights on the marae. The intent is also to stop Moriori from receiving independent recognition.¹⁷

Opinions for those of Ngati Mutunga at the other end of the spectrum can be summarised by reversing most of what Moriori said and adding the following:

- ▶ Under the Treaty, the Crown must recognise the rangatiratanga of Ngati Mutunga. Ngati Mutunga must also be acknowledged as the tangata whenua of Rekohu (they referred to Wharekauri) and as the only holders of mana whenua. Moriori lost tangata whenua status, and mana whenua, when Moriori were conquered and subjugated. The Crown is in breach of the Treaty in dealing with Moriori.¹⁸

There were shades of opinion in between, amongst both Moriori and Maori, but most notably from a second group of Ngati Mutunga, which basically sought reconciliation.¹⁹

The Department of Conservation resiled from its earlier position that priority must go to Ngati Mutunga in view of the 1870 Native Land Court decision, though Moriori remained bitter about the initial stance.²⁰ At the hearings, the department's position was that it was willing and wanting to consult openly and equally with all. Not surprisingly, it had no idea who it was obliged to consult with and awaited the Tribunal's findings. In the meantime, notwithstanding the statutes, the department wisely proposed to delete all references to tangata whenua and mana whenua in the Chatham Islands conservation management strategy. Those words made life too hard.²¹

Crown counsel made very helpful submissions, with considerable sensitivity and awareness of cultural norms, generally supporting recognition for both Moriori and Maori on the basis of Treaty principles. The Crown argued that each had interests in the natural environment, though the interests were not precisely the same, and each now had ancestral associations.²²

13.2.4 Conclusions

On this issue, we agree with the Crown. Crown policy in not dealing equally with Moriori in the past was contrary to the principles of the Treaty of Waitangi and prejudicial to Moriori, but the position has now changed and past policy should now be left in the past.

17. *Ibid*, paras 95–96

18. *Ibid*, para 32

19. Document N5, paras 15–16

20. Document G14, paras 87–98; see also doc F9

21. See doc L5, paras 18–19; *Chatham Islands Conservation Management Strategy*

22. Document 01, para 22

However, we think that the statutory reference to mana whenua is contrary to the principles of the Treaty, being out of kilter with cultural ethics, and is prejudicial to all claimants as a result. The term is not essential to give effect to what the Legislature may have intended, and we recommend that it be removed.

Because of the importance of ethnic relations to the whole of the claims, we introduced this issue in chapter 2. We need only summarise our earlier findings with small additions where required.

- ▶ Moriori are entitled to independent recognition as a distinct section of the Maori people. Whether they wish to be represented through a single runanga for Moriori and Maori is for them to decide. Where one body is necessary for a particular purpose, then there should be equal representation, unless some special reason for providing otherwise is plain.
- ▶ Moriori are tangata whenua of Rekohu. We think that is absolutely clear. To keep that status, it is sufficient that they are still represented on Rekohu today, but they could qualify for some generations even if they were entirely absent. Tangata whenua status derives from ancestral association. Ancestral association in turn is a fact of history that cannot be changed by conquest, enslavement, colonisation, or anything else. In this case, the 1835 invasion is totally irrelevant. It has nothing to do with the matter.

Moriori may be described as tangata whenua tuturu ake, or the true tangata whenua of Rekohu.

To the extent that the statute associates tangata whenua with temporal power, the statute should be promptly changed.

- ▶ Ngati Mutunga are also tangata whenua of Rekohu. The tests include:
 - Do they have many generations of ancestors buried there?
 - Do they continue to bury their dead there and to respect the sacred sites?
 - Do they place the whenua (placenta) of their newborn with the whenua (placenta or land) of Papatuanuku (the earth mother)?
 - Do they talk to the land?
 - Do they respect the land?
 - Is their heart with Rekohu or is it still mainly in Taranaki?
 - Are they at peace with the Rekohu gods for the forests, birds, land, seas, and fish? We note the early Maori concern to

establish that peace, using Moriori to intercede, when birding, for example.

Makarini Temara looked for the relevant signs in the Ngati Mutunga welcome, their conduct during site visits, and their testimony, and he was satisfied that Ngati Mutunga have become tangata whenua of Rekohu as well. He was particularly assured of the Moriori status and so spoke to the land when replying to their welcome, for, as he saw it, they are the land.

Ngati Mutunga may be described as tangata whenua iho, or those of the tangata whenua who came after.

- ▶ Moriori and Maori each have customary authority in their own spheres, for the simple reason that they both exist on Rekohu and manage their own affairs. The authority is in respect of themselves. The authority over land and seas is with the gods. Moriori and Maori have customary use rights and ancestral associations with the lands and seas.
- ▶ Whether Moriori and Maori have mana is not for them to assert. Mana depends on how others see them. Do they feed their visitors well? Do they conduct themselves with dignity? Are they strong in debate but cautious about taking to arms? Do they care for those of the tribe who need help? Do they work for themselves or the people as a whole? Do they address each other with respect, even when they disagree? And so on. Despite the arguments described, Mr Temara was satisfied that they both had mana. But, of course, mana comes and goes and is always a matter of degree.

A major difficulty over the use of 'mana whenua' in the statutes is that it requires people to proclaim that they have mana, when in Maori ethic that is not done, except as a boastful challenge or in contemplation of war. More regularly, it is thought that those who find it necessary to proclaim that they have mana will almost certainly not have it.

- ▶ For the reasons indicated above, we consider that the term 'mana whenua' should not be used in the statutes. It cuts across customary concepts and protocols. We add that the term appears to be relatively new, having been coined for the authority of Maori as against that of Governor Grey. It was also used in the context of pending war. There is nothing wrong in coining new words. However, it does

not sit comfortably with customary concepts when it is used, as here, to describe relationships between Maori groups.

- ▶ We especially bring to attention the fact that the word ‘mana’ was kept out of the Treaty of Waitangi. The drafter of the Maori text was fully acquainted with the term, but it was assiduously avoided and, with hindsight, rightly so. We think that the Treaty provided a good precedent that the Legislature should follow. ‘Rangatiratanga’ is now used to describe the authority of people in respect of people.
- ▶ The association of mana with temporal authority and with whenua offends other concepts. For Maori, mana is primarily a spiritual or personal quality. As for temporal authority, it is seen to exist within the people, and not within the land, as Sir Monita Delamere said. There are many ways in which ‘mana’ can be used, and no doubt there are times when it would fit in describing a peoples’ rights but it is not a good equivalent for state-like organisations.

For those reasons, we consider that the Department of Conservation should treat with both Moriori and Maori groups according to their interests. But we cannot say with which camp within each group it should treat. It is within the mana (rights) of peoples to settle their own form of representation. If that creates a continuing problem (as we think it does) it is open to the Crown and Maori nationally to consult on what might be done, for the problem exists everywhere. It is not a problem that we need to resolve to discharge our functions in this instance.

13.2.5 Recommendation

We recommend that the term ‘mana whenua’ be taken from out of the statutes and that other words be found to express whatever is the statutory intent. Further thought is also needed on how ‘tangata whenua’ is defined.

13.3 ISSUE 2: CULTURAL SITES

We believe that, if the Department of Conservation builds a strong relationship with Ngati Mutunga and Moriori, there will be little need for comment from us on individual sites. We note that some of the more significant sites on Rekohu include burial grounds, burial dunes,

historical meeting sites, pa sites, petroglyphs (rock art), dendrologlyphs, mahinga kai, and distinctive land features with significant histories.

- ▶ Officials have been instructed to protect such sites and to involve local Maori since 1988.²³ Joint management is proposed for select sites, but some Maori are sceptical that they will have much say. Sites may also be managed with Maori through committees of conservation boards. In both cases, we think that time is needed to see how relationships work.
- ▶ The return of cultural sites held by the Crown has been accepted in principle since at least 1993. This conflicts with environmental ideology that conservation lands be publicly owned, but, equally, retention conflicts with Maori ideology that sacred sites should be held by the ancestral right-holders. However, the growing view appears to be that environmental management requires respect not just for the environment but for people, and that local goodwill is needed for environmental policies to work. This calls for a measure of pragmatism. The only clear cases where it seemed to us that a site might not be returnable were cases where lands had been entrusted to the Department of Conservation by private landowners.
- ▶ Where cultural sites are on private land, the Historic Places Trust may give notice for a heritage order to be noted on plans under the Resource Management Act 1991, and the trust may also negotiate heritage covenants with owners. However, the best protection may be the 'Chathams way'. Some owners have gifted sites. As for others, we heard no complaints that access was denied. In one case, the Forest and Bird Protection Society provided for the fencing of a burial site on private land.²⁴
- ▶ Where sites are to be returned but both Moriori and Ngati Mutunga claim an interest, it appears to us that the Maori Land Court should appoint trustees representative of each and define rights and obligations in a trust order.

13.4 ISSUE 3: CULTURAL HARVEST

The purpose of Moriori and Maori sealing, birding, fishing, foraging, and hunting was not only to feed the family but also to obtain clothing, shelter, implements, ornaments, musical instruments, and medicines.

23. Document F6, para 13

24. Document F13, para 15

Customary hunting practices are cognisable as rights in law. They are also cognisable under Treaty principles. The Maori Treaty text acknowledged that Maori had authority over all their prized possessions, unless that authority was freely relinquished. Moreover, the Treaty does not restrict users to traditional implements and craft. As with all people, there is a developmental right.

However, this Tribunal has long considered that the Crown's right of governance allows it to impose reasonable constraints to protect the resource. Moriori and Maori had their own conservation ethic which kept them in tune with nature's moods, but the bulk of today's society has no such ingrained ethic, with its profound spiritual base, and with modern exploitation the Crown must now set the rules.

A series of statutes and associated regulations now apply:

- ▶ *Non-commercial freshwater fish*: section 26ZH of the Conservation Act 1987.
- ▶ *Plants*: section 30(2) of the Conservation Act 1987.
- ▶ *Animals*: section 38 of the Conservation Act 1987.
- ▶ *Flora and fauna*: section 50 of the Reserves Act 1977.
- ▶ *Birds*: section 53(1) of the Wildlife Act 1953.
- ▶ *Seals and whales*: section 4(1) of the Marine Mammal Protection Act 1978.

Ministers of the Crown have discretion to approve cultural harvest in particular cases. None the less, such heavy constraints apply that cultural harvest rights have been all but taken away. The question is: Should something more be allowed? The main concern was with toroa (albatross – hopo tchar to Moriori, modified to toroa by Maori) and akoako or titi (mutton bird).

13.4.1 Issues

The questions are:

- ▶ Is the Crown's constraint on Moriori and Maori rights of cultural harvest reasonable in all the circumstances?
- ▶ Is adequate recognition given to Moriori and Maori interests in harvesting particular flora and fauna?

In now referring to 'Maori', we include Moriori, unless the context otherwise requires.

13.4.2 The Maori position

Maori say the Crown's restrictions are unreasonable in that they are not sufficiently cognisant of the extent of Maori interest and the promises of the Treaty. Nor does the Crown give sufficient weight to the Rekohu circumstance. The islands are of limited land size and, traditionally, the chief food supply was fish and pelagic birds. The following points were made:

- ▶ *The level of dependence:* The level of dependence on seafood and birds is evidenced by midden remains, the specialised technology (Moriator had their own forms of nets, traps, hand-lines, spears, and sea craft), and oral tradition.²⁵ Especially unique were the unsinkable, wash-through korari that were able to withstand heavy swells and to sit beside precipitous cliffs in restless seas. An eight-person korari carried some 40 albatross.²⁶

Albatross included tara, tatataki, and ruru. The modern classifications are Northern Royal, Chatham Island Mollymawk, and Northern Buller's Mollymawk. In tradition, the albatross was seen to exemplify Moriator mana, featuring in rock art and ritualistic incantations, and providing the main personal adornment.²⁷

Midden remains testify to the large variety of birds in fact taken, but pigeon, titi, and toroa appear to have been especially esteemed. Fish have already been mentioned. Numerous witnesses spoke of harvesting fish, shellfish, and eels today in and around Te Whaanga and the coastal foreshore.²⁸

Seals were the mainstay of the Moriator diet, but not so with Maori. Commercial operations from 1805 extirpated the onshore Southern Fur Seal colonies before Maori arrived.²⁹

Whale stranding sites are known. In Moriator beliefs, the spirits of their departed ancestors herded the pods of 'blackfish' to beach themselves in order to feed their descendants.³⁰

The extent of dependence on fish and seabirds is further evidenced by the comparative lack of a large terrestrial resource. Though pigeon, rails, and eels were significant, the archaeological record is that marine foods were overwhelmingly important in the diet. The regular edible flora were karaka (kopu) berries and fernroot. Kumera, the main crop on the mainland, did not grow on Rekohu.

25. Document M4, paras 8–9

26. Document C42, p 6, apps D, E

27. See references to HD Skinner and William Baucke, *The Moriatoris*, Hawaii, 1928, and to Baucke's articles in the 2, 9, 23 September 1922 supplements to the *New Zealand Herald* (doc C42).

28. For archaeological evidence, see doc G3, ch 4, 5.

29. *Ibid*, p 38

30. Michael King, *Moriator: A People Rediscovered*, Auckland, Viking, 1989 (doc C13), pp 17–38

- ▶ *The cultural weighting:* On the mainland, major hapu groupings boast of particular foods for which they are famous and which serve to boost their mana in trade and tribal hosting. These foods are referred to as mana kai – food that raises status. Despite their removal from the mainland, Moriori applied the same concept to titi and, especially, toroa.

The taking and preparation of toroa was also accompanied by elaborate rituals to make good the harvest, protect the harvesters, and appease the deities who jealously guarded the resource. The harvesting was dangerous, and, if a person was injured, it was seen as self-evident that someone on that or a preceding expedition had broken the rules.

While Maori may have conquered the Moriori, they may not have presumed to have conquered the Moriori gods. There is evidence that Maori took Moriori priests on titi- and toroa-harvesting expeditions to perform the incantations necessary for the survival of both the species and the gatherers. But, equally, Maori incorporated toroa into their culture. Large numbers of titi and toroa were preserved in their own fat and sent to Taranaki, to feed those in the war and to support Parihaka. Te Whiti in turn adopted the toroa feather as the emblem of the Taranaki people and the symbol of unity.³¹ Toroa also became the symbol of their survival and autonomy, both during and after the wars between 1860 and 1881. The supply continued through the twentieth century, and the raukura, as the three-feather arrangement is known, continues to be worn when Taranaki meets or travels to this day.

Crown restrictions on taking toroa are thus symbolic in another respect that is not always appreciated, and it is not now easy to control unauthorised harvesting.

- ▶ *The spiritual weighting:* As indicated above, the gathering of toroa has infused the political and spiritual dimension of Moriori and Maori life.
- ▶ *The extent of grievance:* In assessing what is fair and reasonable, regard must also be had to the evidence of grievance. While the dissatisfaction with restrictions was made abundantly plain, the history of petitions and applications to the Minister for permissions to take

31. Ibid, pp 17–38, 133–134

show that the concern is nothing new. We were referred to petitions and applications from 1933, 1946, and 1961, and several from the 1970s. A regular contention was that Moriori and Maori were careful stewards of the resource and that the refusal to allow an annual cull of fledglings was causing overcrowding in the breeding grounds and the needless death of young birds.³²

The 1970s complaints concern mainly illegal but commercial gatherings by mainland fishermen, who used helicopters to plunder the nesting grounds during the crayfish boom. Fledglings blown from precarious ledges were washed to the northern beaches of the main island and were collected there by locals. These were not birds that could enter the breeding cycle.³³

In 1989, Moriori Tchakat Henu sought permission to take a prescribed number of hopo tchar each year for significant customary and ceremonial occasions. This was not granted, and in 1991 a petition was prepared and filed. At the same time, another group sought to have themselves established as a management committee to supervise the collection and allocation of hopo tchar.³⁴

- *The empowerment of officials:* Between 1898 and the passing of the Social Security Act in 1938, Maori had greatly restricted access to benefits on account of their traditional food resources.³⁵ An irony was that the Government had already passed, and continued to pass, legislation to restrict Maori access to these foods. There was also little thought at that time that the Government was taking away a common law and Treaty right.

We consider, however, that there is no lack of official concern today. Department of Conservation officials pointed to a great deal of documentation in support. The international debate and the various arrangements for cultural harvests in other countries has also been considered.

In response, it was argued that there still remains the substantial difficulty that, to seek some special use, Maori must go cap in hand to an official for a decision. No matter how fair and reasonable that decision may be, it will always be seen to be wrong, as it must be when what the ancestors had authority to decide is decided by a bureaucrat. In turn, the bureaucrat may or may not be fully attuned to the Maori point of view.

32. Document C42, pp 10–12

33. Ibid

34. Ibid, pp 50–53

35. Michael King, 'Between Two Worlds', in *The Oxford History of New Zealand*, Geoffrey W Rice (ed), 2nd ed, Auckland, Oxford University Press, 1992, p 293

13.4.3 The Department of Conservation's position

The Department of Conservation's position was that the heritage was seriously threatened and that, at this stage, no chink in the protective armour can be allowed. The nature and extent of Maori interests had been carefully examined, and there was sympathy for them, but harvesting was currently unsustainable and was likely to remain so for some time. The department accepts a duty to liaise with Maori on cultural harvest, but the species must first reach sustainable levels. The following points were made:

- ▶ *Maintenance of biological diversity:* The biological diversity of Rekohu is nationally and internationally renowned. Rekohu has birds that are endangered on the mainland, as well as 18 species of birds found only there. The latter include the Chatham Island pigeon, the magenta petrel, the oyster-catcher, the tui, and the black robin. All have the highest priority endangered-status classification. More than 40 species of flora are likewise found only there.
- ▶ *Threat to biological diversity:* Introduced cats, dogs, rats, weka, and possums, and, later, land clearance and stock played havoc in the past, and many species that are known to have lived on Rekohu are now extinct. These include all the native ground birds except the Chatham Island snipe (which survives on Rangatira Island).³⁶
- ▶ *Steps taken to control:* Special measures have been taken to control predators; fence bush, dunes, and wetlands; and restore habitats. In the 1960s, Mangere and Rangatira Islands were purchased, stock was removed, and predators were attacked to create safe breeding grounds. This was done with the assistance of the Royal Forest and Bird Protection Society. There are now encouraging reports of population increases and the appearance of species thought to have been extinct.³⁷
- ▶ *Monitoring of toroa:* Toroa have coped with storms, natural hazards, and climatic change. They have coped less successfully with the introduction of predators, man-made habitat change, and harvesting by humans. However, a major cause of loss of toroa today, and the reason for a recent decline in their populations, appears to be long-line fishing. The birds take the bait from the extensive lines of hooks that move close to the surface and are caught. The albatross loss by this means is substantial, but little can be done about it. Boats must have sirens to warn off flocks, but it is impossible to police the boats at sea.

36. Document F7, paras 3–9

37. *Ibid.*, paras 11–14

Moreover, albatross also fish in international waters where there is much foreign long-line fishing for tuna. An international ban on long-line fishing in southern waters would be required to stop toroa loss, but, unless that could be achieved – which would be difficult – toroa are likely to remain a seriously threatened species.

Maori prefer the Northern Royal Albatross, but this is a particularly rare species. It breeds only at Rekohu and at Tairaroa Head in Dunedin. A 10-year monitoring programme was begun after the raids of the crayfishing years, and a 1991 report told of a decline in the population that approximately coincided with the increase in tuna fishing. The appearance of crowded nesting grounds is deceptive. Popular beliefs that ‘taking only a few won’t matter’ are not valid, according to scientific evidence, and would have marked effects on the future population. Even limited and controlled cultural harvest would further jeopardise the species’ survival.³⁸

- ▶ *The involvement of Maori and local farmers:* The human predator is increasingly recognised as a threat that cannot be controlled as effectively as on the mainland. In fact, Rekohu is almost impossible to police. It is now seen as essential that local people should own the conservation ethic themselves. Early conservation efforts were imposed from outside, earning resentment from local islanders, but special efforts are now being made to win local support. The establishment of a local conservation board, with Maori representatives on it, gives expression to this (though as we see it equal representation for Moriori and Maori is required). There is now much closer cooperation between the Department of Conservation and Maori in monitoring and in gathering and sharing information.

Concern for Moriori and Maori interests has been demonstrated by the Department of Conservation. In 1991, Moriori Tchakat Henu gained approval to take 20 birds for the 1991 bicentennial celebrations. These had been blown from nests and washed to the main island. Immature and unable to fly, they were doomed to die anyway, but at least the cultural interest was recognised.³⁹

The Department of Conservation is content to make skins, bones, and feathers available for local crafts. The main problem has been Maori and Moriori divisions.⁴⁰

- ▶ *Consideration of options:* There is international debate on whether controlled and supervised harvesting of select species (like titi) at

38. Document C42; John Bartel, ‘Seabirds in Strife’, *Forest and Bird*, November 1990 (doc F13(a), app 10)

39. Document F7, paras 19–21

40. *Ibid.*, paras 36–37

select sites with increased populations will increase or diminish illegal taking. Will it satisfy the urge or add to it? Will it deter the human predators from more sensitive sites or encourage them to explore more widely? Will they introduce other predators like rats? Have they become more interested in themselves than in preserving the heritage of their ancestors? These are all questions to be brought into account.

13.4.4 Findings

We are concerned with Treaty rights, not indigenous peoples' rights as such. Under the Treaty, it is clear that both Moriori and Maori have interests in the wild flora and fauna. These were not conquered. They remained owned by the Moriori conception of Tangaroa (god of seas) and Tane (god of forests and birds), and use rights belonged to those who respected them. In this instance, 1835, and all that, is irrelevant. The Treaty preserved the right of those whom the gods had allowed to use.

We now consider the following:

- ▶ *Overview:* On the evidence, the Department of Conservation is more than a protector of the environment; it is equally a protector of the Moriori and Maori identity and way of life. The constraints on Moriori and Maori are for their benefit as well. That which Moriori and Maori received from their ancestors and which, in accordance with the traditional law, they must pass to succeeding generations is now under threat from outside forces requiring new methodologies to control. It is the transmission of that sacred heritage that the department seeks to assure. In this, the department, Moriori, and Maori are on common ground.
- ▶ *Ultimate goal:* In terms of the Treaty, and its promise of authority to custom-holders, an ultimate goal is Moriori and Maori control of customarily used flora and fauna, with the Department of Conservation providing servicing and support. This would require the commitment of all to the best management and advice that science can provide, and rigorous local policing with community support to that end. It would also require cooperation between Moriori and Maori. The Forest and Bird Protection Society stressed the dangers of a fragmented approach to environmental management and local interests

subsuming necessary environmental standards.⁴¹ We think that local responsibility is more important on a remote island than on the mainland, provided those responsible have the mind and the wherewithal for the task.

- ▶ *Present position:* For now, however, the threats of loss are real, the dangers are many, and the risk is too great to allow for any major departure from the current state of control. None the less, control from mainland New Zealand will not work. For one thing, there is not the policing capacity. But, despite all that has been said, there is a well-knit community. Best hopes appear to lie with the traditional ‘policeman within’ – the moral sanction that comes from a shared cultural ethic whereby a community enforces its own rules by deprecating offenders, both local and the many from over the seas. We are satisfied that the Department of Conservation is aware of this and seeks a partnership with the community. In this case, a partnership is not only desirable but required in order to do the job.
- ▶ *Toroa:* There is clearly no perfect knowledge of toroa numbers, and in time more studies will be required, but, on the evidence as it stands, toroa should not be harvested at present. The risk is too great, but Moriori and Maori must be kept informed of any policy change. We have the Department of Conservation’s undertaking that they will be. The department accepts a duty to liaise with Maori on population movements and to advise when species have reached a sustainable level.
- ▶ *Titi:* Rakiura Maori can take Titi from the Titi Islands, but Rekohu Moriori and Maori are constrained, though the birds are closer to their homes and their harvest of titi was no less. Naturally, this seems inequitable. However, numerous colonies that were originally distributed throughout the islands have virtually disappeared. This appears to have been due mainly to imported rodents. Further, over the years the human gatherers were no longer confined to Moriori and local Maori. The evidence was also that mainlanders had started to take them. Restrictions on landing on certain islands appear to be reasonable because of the protected wildlife there, and we understand that Maori sold two islands to the Department of Conservation to secure that protection.

In cross-examination, it was admitted that no research had been undertaken on sustainable titi populations.⁴² The need for research

41. Document F13, paras 47–57

42. Document L5, para 49

was acknowledged, but it must surely be unwise to permit harvesting in the interim. It was thought that there might be some scope to relax the absolute prohibition in the near future, and we again look to the Department of Conservation to keep Moriori and Maori informed.

It is clear that colonies on the main island are under too great a threat for there to be any prospect of harvesting there in the foreseeable future. However, when giving evidence for the Department of Conservation, Alan Munn, a field centre manager, had the interesting thought of allowing Moriori or Maori to manage select sites on their own lands.⁴³ We think that this has considerable merit, re-establishing as it does the relationship between the people and their customary heritage, making them responsible for environmental management, and putting them to the proof of their claimed capacity for environmental control. There is a problem in that the land awards were so haphazard in the past that the accident of current ownership bears no relationship to customary birding rights, and Moriori would presumably be more limited in proposing sites. However, while owners control access, two things could allow such a scheme to get off the ground. The first is that the owners of the land do not own the birds. As a matter of law, the birds are insufficiently domesticated for that. The second is that it is possible for significant sites to be set aside as Maori reservations for the common benefit of a class of persons, with the trustees and terms of trust being settled by a court. We think that this should be explored further.

We understood that the remaining colonies are on Maori-owned islands. Harvesting there would have to be with the owners' agreement. Once more, the award of the islands last century was extremely casual, as we have described. They were awarded to a few individuals only, and properly a trust for all the people, while not provided for, was implied. Further, Moriori should not have been kept out.

We make no recommendations on this point because of the statutory restrictions on making recommendations in respect of private land. But it cannot be beyond the wit of the Crown to see that justice has not been done. We are not talking of land that has been used for other than the birds, and there is adequate scope for the Crown to see where the balance of justice lies and to look to some rectification.

43. *Ibid.*, para 48

For the reasons given earlier in the chapter on the original award of titles, the Treaty requires no less.

- ▶ *Seals*: On the evidence, there is a dearth of information about seal numbers, but the best available evidence is that populations have not reached a point where the restrictions provided for in the Marine Mammals Protection Act 1978 can be relaxed, even on a selective basis.⁴⁴ Section 4 of the Conservation Act 1987 requires the Marine Mammals Protection Act and regulations to be interpreted and administered to give effect to the principles of the Treaty. The Department of Conservation acknowledges its responsibility under that section to take into account the traditional harvest exercised by Moriori and protected by the Treaty.
- ▶ *Whales*: It was not clear to us why whale bones cannot be severed from dead whales, having regard to the primacy that Maori gave to whalebone, even ahead of greenstone. We understood that international obligations had some relevance. We think that the position should be further explored, internationally if need be. As is common with rights-centric law, a balance must be struck with other rights: in this case, those contained in our international obligations to respect cultural interests.
- ▶ *Arts and crafts*: When we speak here of arts and crafts, we refer to toroa feathers, whalebone, sharks' teeth, skins, and pingao and other plant materials (pingao is an indigenous plant used to weave fine mats). It appears that an informal arrangement for their distribution broke down through disputes about the membership of an advisory committee. We understood that policy guidelines were to be addressed in the management strategy, although this may be an area where national policy must be examined to ensure maximum access to these taonga consistent with conservation objectives.

13.4.5 Conclusion

It is not established on the evidence that the Department of Conservation is acting inconsistently with the principles of the Treaty of Waitangi. This finding does not restrict a further claim on proof of changed circumstances, new policies and practices, or the failure of partnership and consultation practices.

44. Ibid, paras 42–44

13.5 ISSUE 4: ENVIRONMENT MANAGEMENT GENERALLY

The quality of the relationship between Maori and the Crown was explored in the context of the draft Chatham Island management strategy. The Crown admitted that the relationship had not been good before 1990 but contended that this had since changed. A new partnership was evident in the gifting of land to the Department of Conservation, the covenancing of private land, and cooperation in fencing bush against stock invasion and for predator control. In the future, rather than acquiring more land, the department anticipated working more with landowners.⁴⁵

To summarise a host of details, we considered that the primary Maori concern was the balance of power. It seems to us that, for remote places, environmental management must depend more on local empowerment than elsewhere, with central management focusing on quality controls, but it was also evident that, whatever the right balance is, the relationship was new and needs time to mature.

An impediment to progress has also been the quality of the relationships between Moriori and Maori. Disputes between the two over interests in customary resources seem likely to continue. In an earlier chapter on Crown administration, we recommended that work should be undertaken to reform the current Maori land law as it applied to the Chathams. We envisaged that part of that process would involve the search for an informal judicial body for the mediation of disputes. We see no reason why that should not extend to cover disputes in this area and, indeed, in any others.

13.6 ISSUE 5: TE WHAANGA**13.6.1 What is it?**

Te Whaanga, a large expanse of water over 46,000 acres, is the one of the most distinctive features of the main island. It is fed in the south by two large streams, Te Awa Inanga and Makara, which rise eight miles to the south-east. Many small streams abut the west. Te Whaanga is bounded by land all round, but on the east the land is mainly sand dunes. The dunes stand between the inland waters and the open sea and extend as far as the eye can see. They have existed for a very long time, and Moriori buried many of their dead there.

45. Document F6, paras 14–31

From time to time, the inland water breaks out into the sea (or the sea breaks into the inland water, depending on one's point of view). The breach, through the lowest part of the sandhills, is to the south, where the sand meets solid ground. It takes the form of a narrow gap called Te Awa Patiki (the pathway of the flounders). When we saw it, it was a little wider than a stone's throw. Certainly, it is very narrow for the water mass behind.

In the natural history of this large inland expanse, there have been cycles in which, for some four to seven years, the inland water was completely shut off. Equally, there were times when the breach applied, and, for some four to seven years, the water ran out and the sea got in. On one view, nature intended a completely enclosed lake, or lagoon, by building sandcastles, but had not quite finished the job.⁴⁶

Today, the breach is kept open by machines for about 75 per cent of the time on a four-year cycle. More land is available for grazing if the water is allowed to drain out, and a ford by the mouth of a stream is not so liable to flood. This makes it hard to assess what Te Whaanga was once like, and written and oral accounts must be accessed.⁴⁷

On those accounts, the water tended to be brackish, more in select parts rather than generally, but just how brackish depended on who visited and when. Presumably, it was more brackish during a breach.

Was it tidal? Some say it was because the water level went up and down, but again, was that during a breach? Others say there was no tidal movement, even during a breach. They say that the opening was too small for the size of the 'lake' and that water levels were changed by the sun, wind, and rain. On our visit, there was no shortage of the last two, but we were assured that the first also appears. Each was said to have more influence on the shallow waters of Te Whaanga than they might have on a deeper water expanse.⁴⁸

Did Te Whaanga support sea fish? The answer is 'Yes', but was that during a breach? Eels are not much help. They are bountiful but move between fresh and salt water, and to do so they are known to cross country and to burrow through sand. The shellfish could also be more helpful than they are. They are not completely sedentary and are known to exist in salt water, brackish water, and even fresh water.

Nor do names assist. 'Te Whaanga' means any stretch of water other than the fully open sea. It could include a lake or a bay. 'Lagoon', in context, means a body of water cut off from the open sea by coral reefs or

46. Assistant Surveyor-General to Under-Secretary for Lands and Survey, Lands and Survey file 22/132, p 238 (doc K10, attachment, paras 72-80)

47. Document K10, p 71; doc L5, para 75

48. For a discussion of historical views, see document K10.

sandbars, but how ‘cut off’ does it have to be and was there a breach when the term was first applied here? ‘Roto’ (lake) has been used to describe Te Whaanga, and a lake can have a sea outlet; but, as with the previous term, ‘lake’ describes only the perception of the person who so named it. ‘Moana’, also used in the past, is decidedly neutral. It means any large expanse of water, be it an inland body or the sea.

13.6.2 Ownership

The problem is that Moriori and Maori each claim to own Te Whaanga, but the Crown has assumed to own it instead. The Crown has said, or at least has implied, that Te Whaanga is an arm of the sea, and that, by law, arms of the sea belong to the Crown. Moriori and Maori say that it is not an arm of the sea but a lake, and that, as a matter of law (although this in itself is debatable), lakes belong to them until freely and willingly relinquished.⁴⁹

In 1936, Maori petitioned the House of Representatives for a title to Te Whaanga. The matter was investigated, but it appears that Maori never had a reply. In 1938, they applied to the Native Land Court for a title, but it appears that they never had a hearing.

13.6.3 The issues

Ownership at law is not the issue before us. The first question for us concerns what the Treaty might provide. Also, Moriori and Maori compete for the ownership, as between themselves.

We define the issues in this way:

- ▶ Do Moriori or Maori have interests in Te Whaanga that are provided for under the principles of the Treaty of Waitangi? If the answer to that is ‘Yes’, then:
 - What is the nature of those interests?
 - Who has interests: Moriori, Maori, or both?
 - Who should represent those interests today?
 - Have those interests been prejudicially affected by Crown policies, acts, or omissions?
- ▶ If there are interests that have been prejudicially affected, then what steps are needed to protect or to provide for those interests today or

⁴⁹ This process is described up to 1938 in document k2.

what other steps are necessary to compensate for or to remove the prejudice?

13.6.4 Treaty Principles

The applicable Treaty principles have already been considered in the Tribunal's *Te Whanganui-a-Orotu Report* and *Whanganui River Report*.⁵⁰ We see no need to depart from the position as seen there. In summary, the Treaty promised to protect Maori in the full, exclusive, and undisturbed enjoyment of all those possessions that they prized; and lakes, rivers, and lagoons were no exception. Here, the Maori text is especially instructive. It elaborates upon, but is not inconsistent with, the text in English.

The next question – whether Te Whaanga was one such prized possession – is clearly to be answered in the affirmative. It was around its shores that Moriori gathered, and it was thus substantially the mainstay of the traditional Moriori economy. An abundant supply of fish, shellfish, eels, and birds could be taken in almost total safety. The birds included several forms of native duck. In the moulting season, flocks were surrounded by Moriori craft and driven ashore. Patiki (flounder) abounded there, presumably during the breaches, and the breach, Te Awa Patiki, was named for them. There were also kahawai, garfish, cockles, pupu, and the like.⁵¹

Later, Maori also prized Te Whaanga. Thousands of eels were caught there, it is said, smoked or preserved in fat, and included in the supplies sent to Parihaka. We presume, and think it highly likely, that Maori both used and controlled Te Whaanga from soon after they arrived. However, Maori depended less on Te Whaanga than Moriori, since meat and vegetables had been introduced by Europeans before they went there.

Accordingly, do Moriori or Maori have interests in Te Whaanga that are provided for under the principles of the Treaty of Waitangi? The answer for both is 'Yes'.

13.6.5 What is the nature of those interests?

Moriori and Maori had no concept of 'owning' in the English sense. They rather 'possessed' and 'used' for so long as the gods, and any enemies, allowed. By possession, we mean that they saw themselves as having rights to use and as having an authority or right of control as against others.

50. Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, Wellington, Brooker's Ltd, 1995, pp 210–211; *The Whanganui River Report*, pp 261–269, 288–294, 338–339
51. Document K2, p 11

Furthermore, that which was possessed was a water regime, consisting of bed, water, and contents, not merely dry land. The fact that the law that grew up in England distinguished between the ownership of land and the ownership of water in any water regime is not good ground for making that distinction here. The Treaty guaranteed whatever it was that Maori possessed, in the sense of using and enjoying, and what was possessed was a water resource. In the same way, fisheries were preserved, and of course, Te Whaanga was a fishery too. There is no point in the guarantee if it is seen to apply only to the bed.

As was explored in the *Whanganui River Report*, coupling ‘possession’ with the Crown’s guarantee of ‘ownership’ at English law is an appropriate cultural equivalent.⁵²

Mori and Maori also had a complex system of individual or family use rights, subject to social obligations to the tribe. The ultimate authority was the tribe. The reasons were given in the chapter on tenure reform. The appropriate title-holder would be some entity representing the tribe.

13.6.6 Who has an interest?

Mori claimed the exclusive right and title through immemorial use. Most Maori were willing to share with Mori, but, if push came to shove, then they claimed the exclusive right by virtue of de facto possession and control when the Treaty was signed. Both envisaged continued use and enjoyment by all islanders in ‘the Chathams way’. After all, Mori and Maori are not denied access to sacred sites now on private European-owned land. But a question of right is involved.⁵³

We consider that the ownership issue must be seen in terms of Treaty principles. As discussed in earlier chapters on the nineteenth-century land question, the Treaty envisaged a larger justice than custom alone can provide. And for the reasons given in those chapters, we think the justice of the case requires that the interests of both Mori and Maori should be respected, and that both should be represented in the title.

13.6.7 Who should represent those interests?

We consider that a body representing Mori and Maori should hold the title, but that it should have a predominant Mori membership. Mori

52. *The Whanganui River Report*, pp 291–294

53. Document 12, paras 33–34; doc 14, paras 133–136; doc 15, paras 66–72

depended on Te Whaanga much longer and much more than Maori. From the time of their arrival, and before, Maori had access to European foods.

13.6.8 Have there been prejudicial effects?

We consider that the Treaty interests of Moriori and Maori have been prejudicially affected by Crown acts and omissions. It is prejudice enough that the Moriori and Maori entitlement has never been acknowledged. The Crown may have honestly thought that neither Moriori nor Maori had a right equivalent to ownership. But the Crown's belief is irrelevant to whether a right was denied. It was, and that is prejudice enough.

However, the prejudice was also in acts of presumptive control, allowing uses without asking whether Moriori and Maori agreed. Following the sinking of the *Holmwood* by a German mine in 1940, the Government used the northern basin of Te Whaanga for military flying boats, putting in a wharf and a telephone line to the landing site. Later, the landing site would be used for civil flights.⁵⁴ Later still, the draining of the northern basin was investigated, again without reference to Moriori or Maori. In 1967, the Crown agreed to private owners erecting stopbanks at the northern end to reclaim and take title to some 1150 acres. Approval to reclaim a further 1000 acres was given to another farmer in 1968. In 1984, a regional water board allowed the Minerals Exploration Company to discharge 570 litres of water per day into Te Whaanga.

Through the failure to identify and declare Moriori and Maori interests, the general population also effected changes, directly or indirectly, without reference to Moriori or Maori. In the 1880s, swans were introduced, via Lake Huro. There were good and bad aspects to this, but no one inquired as to Moriori or Maori opinion. From 1882, adjoining European landowners began to open the channel artificially, so as to lower the water levels to provide more grazing land. Because of the very shallow edges, a large flow out was not required. This is said to have provided grazing for 2000 sheep. Moriori and Maori may have been happy with this; there is no record of any objections. But that is not the point. Unless aboriginal rights are acknowledged, any inroad is the thin edge of the wedge.

Other islanders used Te Whaanga for fording, boating, fishing, and gathering swans' eggs.⁵⁵

54. Document c3, vol 2, sub-doc 2.4; doc k10

55. Document c3, vol 2, sub-doc 2.4; see doc k10, apps

One respect in which Maori were advantaged is that, for so long as the land was customary land (ie, Crown land subject to Maori customary usage), Moriori and Maori did not have to pay rates. This was no advantage before 1982. The Crown also submitted that its control of the title prevented riparian accretion claims. But that did not stop reclamation. Whether accretions can cut into privately owned lakes is not certain in any event. But this matters little. Whatever the advantages, the disadvantage, if only from a failure positively to provide for the Treaty right, could only have been more.

13.6.9 What protective measures are needed?

(1) What principle applies?

It is now well established in law, and was considered in Tribunal reports from 1982, that the Crown has a duty actively to protect. We think that requires taking all such steps as might reasonably be required to ensure, to the extent practicable, that Moriori and Maori interests are acknowledged and defined. Leaving things as they are does not provide the sort of acknowledgement required to match the Treaty's guarantee.

(2) What constraints apply?

Tribunal reports have also long considered that, in righting one wrong, another should not be created. The Act now gives extra force to this. The titles to reclaimed lands cannot now be resumed.

The public interest in using is important but is not determinative. On a narrow point, no prescriptive use right can be claimed against Crown land, be it ordinary Crown land or Crown land burdened by customary interests. On a broader rights view, the larger public interest lies in ensuring an adequate remedy where property rights have been wrongly denied. The position might be different if the public use was larger than it has been, but we need not decide that on this case.

Moriori and Maori have both said that public access would not be denied, but that has not been determinative in the conclusions that we have reached.

The question of compensation for land lost by reclamation was not raised, though the return of land was sought. There is no reason why compensation cannot be raised in good faith negotiations.

(3) Should ownership be determined by the courts?

In giving effect to the Treaty, we see no fairness in referring the question of ownership to the courts. The tests are not the same. The position would be different if the Treaty were part of the applicable law, but it is insufficiently clear that that is so.

For one thing, the onus of proof is not the same. The law starts with a presumption: that, if Te Whaanga is an arm of the sea, it is vested in the Crown and the burden of customary interest must be shown to exist. Under the Treaty, it is pertinent to ask how the Crown came by it, and, if only by operation of law, whether it can be shown that that was understood and agreed. How might Maori have reacted had it been put to them, when the Treaty was signed, that such bodies of water would no longer be theirs to control but would pass to the Crown?

As to whether or not it is an arm of the sea or a lake, the law looks to geomorphology. The Treaty looks to the historical use by people, and the reasonable expectations of both sides.

(4) Should the Crown issue a Crown grant?

The best protection may not be a Crown grant alone. Rates would accrue, which seems inappropriate save to the extent of actual commercial user, as with eel farming. Nor should there be civil liability for flooding, unless it was due to unnatural causes. On the other hand, holding the land as Crown land subject to Maori customary practices does not give sufficient expression to the ownership to which Moriori and Maori are entitled, including developmental or alienation rights.

(5) Control by planning

The Crown submitted that ownership was not important now. Planning legislation provides a framework for future management, offering a variety of mechanisms including consultation, the exercise of kaitiakitanga, and provisions for taiapure management. The Resource Management Act 1991 enables councils to transfer functions to iwi authorities, and, in so far as the Conservation Act 1987 applies, the Department of Conservation must administer responsibilities so as to give effect to Treaty principles.⁵⁶

As we see it, there is no reason to delay the transfer of ownership if ownership is no longer an issue. However, we are unconvinced that ownership is no longer important. Surely, resource management legislation cannot have gone so far as to make ownership meaningless. At the very least, it

56. Document 15, paras 80–88

must have a bearing on any obligation to consult over use or the exercise of any discretion to transfer management functions.

We incline to support a special Act to recognise the ownership of Te Whaanga by a body of the kind described, unless the claimants themselves have an alternative proposition. We see no reason why management laws should not otherwise apply. Despite their strength, the words ‘guarantee’ and ‘full exclusive and undisturbed possession’ do not defeat laws that are reasonably necessary for resource protection and environmental management under the Crown’s right of governance.

13.6.10 Conclusion

The Crown assumption of an unburdened title represents a Treaty breach. Maori have suffered prejudice as a result.

We recommend special legislation to vest Te Whaanga in a body representative of Moriori and Ngati Mutunga, but with Moriori predominance. The further terms should be negotiated, but the claimants have leave to apply for more particular recommendations.

13.7 ISSUE 6: CONSERVATION TENURE

Is there a proper balance on the islands between conservation and development? Some Ngati Mutunga claimants argued that the Department of Conservation had acquired too much land that was needed for farming. They argued that on the islands a critical mass of farm product was needed for marketability and to protect the fragile island economy.

13.7.1 Argument

These claimants argued that the Crown’s land acquisitions, particularly on Rangiauria, were prejudicial to Maori in that they affected their livelihoods (and those of all islanders). For the same reason, it was contrary to the Treaty, and Crown purchases should be constrained. A perceived policy to make the islands a protectorate for wildlife once more made the islanders’ survival, and the island’s future, secondary to mainland views.⁵⁷

Claimants added that the Department of Conservation’s argument that its share of the island was much less than its share of the mainland cut no

57. Document M4, para 8

ice.⁵⁸ More of the mainland was in mountain, and islanders need every inch of the land on a small island to survive. The islanders should not be factored out by mainland statistics. Were a proper analysis made of topography and island economics, it was argued, the conservation estate would be excessive. The department's contention that most of its land was un fit for agriculture unless the indigenous vegetation was cleared encouraged the response that it should be cleared.

13.7.2 The relief sought

The claimants sought the transfer of all Department of Conservation land to private ownership, with conservation issues to be jointly managed. That, it was claimed, was more appropriate for the Rekohu situation. Consultation was not enough, because it provided for a response but denied the initiative and control, and those seeking to consult came with mainland perspectives firmly embedded in their minds.

The Department of Conservation responded that islanders would have preference in any future sale of department land.⁵⁹

13.7.3 Conclusions

The proposal represents a major policy change, and this requires a larger debate outside this Tribunal. If the Crown's Treaty right to govern is not to be unreasonably constrained, this Tribunal can recommend only to the extent necessary to ameliorate any offending policy. For example, we might consider whether the Crown's retention of any particular block represented an unreasonable constraint on island survival. But the matter was not put to us in that particularised way. For the purposes of the larger debate, we add that there was insufficient evidence of the economic effect on the islands of land retirement or preservation for a final conclusion to be drawn.

In considering the prospect of land transfer, priority must go to those who lost land as a result of Crown action inconsistent with the Treaty. Here, Moriori have the prior call. While, in the now usual way we have left the terms of any settlement with Moriori for negotiation, Moriori have a very special case, which obliges the Crown to do all that is reasonably possible to secure them with an adequate island land base, if that is what they want. We will not recommend so as to prejudice that prospect.

58. Document I5, paras 15–16

59. Document O1, paras 32–33

