10. CONCLUSIONS ON HISTORICAL MORIORI CLAIMS

Our conclusions follow on the three main Moriori claims: those on enslavement, land rights, and land tenure. We must be satisfied that in each case there was an act or omission of the Crown; that the act or omission was contrary to Treaty principles; and that it was prejudicial to the claimants.

10.1 Enslavement

10.1.1 The Crown

As regards the enslavement claim, the question to be answered is whether the Crown omitted to take such steps as it was obliged to take to relieve Moriori from enslavement. We must first inquire of the steps required, if any, in terms of Treaty principles.

10.1.2 Principles

Article 3 of the Treaty of Waitangi provides that 'Her Majesty the Queen of England extends to the Natives of New Zealand . . . all the Rights and Privileges of British Subjects'.

No British subject could be enslaved in British territories, and, once a slave from anywhere set foot on English soil, that slave was immediately free.[1] In terms of the Treaty, Moriori had all the rights and privileges of British subjects from the moment of annexation and a right to be free. As we see it, any Crown acquiescence in their enslavement, express or implied, could only be contrary to the principles of the Treaty.

But what of the Maori right to maintain their own customs, and indeed possessions, in article 2? Enslavement was customary and slaves were possessed.

As with 'rights laws' generally, a balancing is required – in this case, a balancing of cultural rights on the one hand and, on the other, of rights of freedom. In striking that balance, regard must be had to what the Treaty set out to do. Article 1 states the objective; it was to transfer governance to the Queen. The 'Queen's law', to use a common Maori expression, was

1. See 'Somersett's case', *Byrne's Law Dictionary*, p 825

thereby introduced. The preamble explains why. It was necessary to secure peace and good order. That was agreed upon at the execution of the Treaty. Putting all together, it is clear where the balance falls. Customary Maori enslavement was a direct result of warfare; it was fully understood and accepted by Maori that, under the Queen's law, warfare would cease; and thus it would follow that, with the cessation of hostilities, slavery must end too. Further, inhumane treatment, whether by slavery or other means, was not conducive to peace and good order and could not be tolerated under the Queen's law, whether it was the result of custom or arose from any other cause.

It adds flavour to observe that Lord Russell saw it that way at the time, when he instructed Governor Hobson on what to do:

> Among native customs, there will be some which it is the duty of the government not to tolerate. Of these the chief are cannibalism, human sacrifice, and infanticide. With such violations of the external and universal laws of morality no compromise can be made, under whatever pretext of religious or superstitious opinion they may have grown up.[2]

Slavery was not mentioned but was clearly amongst the customs to be targeted. Russell's examples did not purport to be exhaustive, and slavery was seen as contrary to human rights by this time.

Sufficient numbers of Maori saw it that way too, in our view, for the principle to have inured even before the Treaty was signed. Missionaries had convinced them, by moral force alone, that the customs Russell mentioned should be abandoned, and abandoned they were, and by 1840. But most slaves had been released by then as well. Some Maori were not prepared to let go of those slaves who had become part of their families, and many slaves did not want to leave. None the less, the principle had been established. We think it was sufficiently understood what the Queen's law would entail, at least on this subject. Moreover, slavery on Rekohu continued to have a measure of brutality that had long ceased to exist elsewhere, and, as we have seen, aspects of slavery on Rekohu were not customary – the prohibition on marriage and the fact that they were enslaved on their own lands.

However, whether an end to slavery was clearly understood by Maori is not really the point in this instance. The question is whether the obligation to secure to Maori the rights and privileges of British subjects was

2. Lord Russell to Governor Hobson, 9 December 1840, BPP, vol 3, p 28 (doc F4(d), vol 7, p 1257)

clear to the Crown. Obviously, that was so. We have only to consider the extent to which the Crown was obliged to take positive steps.

Lord Russell recognised that a gradual approach to changing custom would sometimes be required.[3] How gradual could that be? We think it is established as a Treaty principle that the Crown has a positive obligation to take active steps to perform its Treaty duties to the most reasonable extent. For the reasons given in chapter 5, we consider that that duty was not met after the Crown had notice of Moriori enslavement at the hands of other Maori. Having regard to all the circumstances, including the difficulties of distance involved, we are satisfied that the requirement to take reasonable steps to end slavery on Rekohu was not met and that the practice was primarily to ignore. In fact, Moriori were maintained in pitiable conditions that put their survival seriously at risk, and, in failing to take action when action was entirely feasible, for the reasons earlier explained, the Crown committed a most serious breach of its Treaty obligations.

10.1.3 Prejudice

As a result of the Crown's failure to take action, Moriori were prejudiced in the respects given in chapter 5. Broadly, the failure to intervene cost Moriori lives, prejudiced them in their subsequent land claim, and threatened their continued survival as a people. The effects still seriously impact on the survival of Moriori as a people today.

10.1.4 Finding

This claim is well founded. The Treaty was breached, the breach was serious, the impact continues, and compensation should be provided to assist Moriori rehabilitation.

10.2 Land Rights

10.2.1 The Crown

Moriori claimed that they lost their proper rights to land through a decision of the Native Land Court. The act of the Crown complained of was the appointment of the court to determine native land rights when there

3. Ibid

were far better options. It is clear that the constitution and empowerment of the Native Land Court and the appointment of the court to determine Rekohu land rights were both acts of the Crown. It was a matter of positive Government policy and was given effect to by statute.

10.2.2 Principles

The next question is whether the Crown's appointment of the Native Land Court to determine the Rekohu land question was consistent with Treaty principles.

Article 2 of the Treaty in Maori guaranteed to Maori their rangatiratanga. We hold that the appointment of the Native Land Court, as reconstituted in 1865, was contrary to the consequential principle of autonomy: that, to the extent practicable and reasonable, Maori themselves should decide such questions as those relating to their land tenure and their land rights. In this case, it was feasible to promote a considered Maori decision on the Rekohu questions by appointing a Maori panel either to decide or, at the very least, to recommend to the Government. The 1862 Act had facilitated the appointment of such a panel, but that Act was replaced, on the initiative of Chief Judge Fenton, to vest control in Pakeha judges.

Likewise, it was feasible to extend the runanga system. This system, established before a Native Land Court was constituted, had provided for runanga to make their own decisions about their own lands (amongst other matters). We are satisfied that the appointment of the Native Land Court in this instance was conceptually wrong and contrary to the Treaty principle of rangatiratanga as described. Our reasons have been more particularly set out in chapter 8.

We add that the appointment of Pakeha judges to determine the nature of Maori custom had the predictable effect of distorting customary values. Again, for the reasons given in chapter 8, we consider that the judges' understanding of custom was simply wrong. Might was not right, but, as Chief Justice Martin observed at the time, Maori had no difficulty in distinguishing between cases in which land passed according to custom and those in which it was taken by mere force. The judges made no similar distinction, for they saw custom in simplistic terms and not as reflecting a society's understanding of right and wrong, good and bad, and proper and improper conduct. They also saw custom in static terms, when in fact it is hugely dynamic.

Once again, it was for Maori to determine the matter, according to values and principles both passed to them by their forebears and more recently adopted from missionary teachings; for custom is no more than that which people generally accept as proper at different points in time. We consider, for the reasons given in chapter 8, that were a Maori panel to have been appointed, and were it to have taken a Maori approach to customary law, a far better result would have followed. We would have expected an effort to secure to Moriori at least half the land, to the extent that that was practicable.

Further, through the Native Land Court, the custom was wrongly overlaid with judge-made rules, some of which lacked a proper, principled foundation. We can understand the need for a rule that violence after 1840 would not be countenanced as a source of land rights, but not the rule, sometimes applied and applied in this case, that all rights were finally settled at 1840. The reality was that rights by conquest were legitimated only by time, as Te Rangi Hiroa later pointed out, and accordingly it was necessary to look at subsequent developments after 1840 to consider how rights had matured. There were significant changes in this case that were not brought into account.

Given that the court was in fact appointed to the task, we are of the opinion, and again for the reasons given in chapter 8, that the restriction of that court to questions of custom was likewise contrary to an objective of the Treaty to secure substantive justice for all. Again, while respect for Maori custom and law was promised in the course of the Treaty debate, at Waitangi and other places, all was subservient to the need to adapt custom where required in the interests of securing peace and good order and fair and just results.[4]

The issues on Rekohu were such that the court could not limit itself to custom alone but had to take into account the whole of the circumstances of the case. It could not and did not do that. In the result, justice was not done. We conclude that the appointment of the court to assess matters on custom alone, according to how it construed custom, was contrary to the Treaty objective of establishing a government that would ensure substantive justice for all. As a corollary, we note that the court was neither obliged nor empowered to give effect to the principles of the Treaty of Waitangi.

Further, were it appropriate for the court to maintain its fundamental and restricted understanding of custom, then the conquest in this case

4. The promise to respect Maori custom was made orally at several places. See Waitangi Tribunal, *Muriwhenua Land Report*, Wellington, GP Publications, 1997, for an example in the Muriwhenua district. At Waitangi, the provision was incorporated into a written statement, which is sometimes referred to as the fourth article.

could not be seen as customary. It would not have happened but for the use of a British sailing vessel and the availability of guns.

Given that the Crown in fact arranged for the court to determine the matter, the next question is whether the Crown should have intervened once the result was known. The fact of the matter is that, although today the Legislature only occasionally intervenes to overturn court decisions, at the time, especially with regard to the Native Land Court, such interventions were common. The Treaty promised that Maori land interests would be justly protected, and it envisaged justice for all. In this case, the land had been Moriori land for hundreds of years. On a commonsense view, the Maori had taken possession and control of the land. But it was not their ancestral land. It was really Moriori land, and Moriori people, that the Maori controlled and possessed. The invasion itself was recent, and a result of European influences that, according to the preamble of the Treaty, the Crown was anxious to suppress. The Treaty had envisaged just outcomes for the future. Moreover, Moriori had remained upon the land, most Maori had been absent for the last 20 or so years, and many had no intention of returning at all.

In the light of all these factors, it ought to have been obvious that an award of a mere 3 per cent of the land to Moriori was indefensible and was insufficient for their future survival and development. The Treaty obliged the Crown actively to protect the interests of the Moriori people. Indeed, in article 3 the Queen extended the 'Natives of New Zealand' her royal protection. We are of the opinion that, to give that protection in this case, the Treaty obliged the Crown to intervene on behalf of the Moriori people; and that, in breach of that obligation, the Crown failed to do so.

The approach we have taken is not new. It is substantially the approach proposed by Hirawanu Tapu, a visionary Moriori leader, though still young at the time in question. He put the matter simply and profoundly to the government of the day. He sought that Rekohu land question should be decided, not upon any narrow construction of law, be it Maori or other law, but according to the higher principles of justice. Assuming that that might be found in the new regime that the Treaty ushered in, he made his appeal to the Queen's law. He then asked that the land be shared.

Does the Treaty assist in that approach? Indeed it does, in our view, for we think that that is what the Treaty was mainly about.

The preamble to the Treaty is often underrated, but in our view is a most significant part of the Treaty in establishing the Treaty's purpose

and the framework for Treaty jurisprudence. The preamble sets out what Maori could expect from the Treaty – 'just Rights', 'the enjoyment of Peace and Good Order', and those steps required 'to avert the evil consequences which must result from the absence of the necessary Laws and Institutions'. Given those words, how could Tapu have been wrong in appealing to the Queen's law for the resolution of the Rekohu issues? How could he have been denied consideration of the full justice of the Rekohu case having regard to what the Treaty of Waitangi said? The Treaty was much more than a mere guarantee of land rights. It was a commitment to substantive justice for all.

The preamble gives vent to the ill-effects of prior contact without the law, and here it is important to be reminded of the context. Foremost amongst the bad aspects of contact must surely have been the introduction of the musket. Maori society experienced population shifts at a level unlike anything that is known to have occurred before. Rekohu came at the tail-end of all this, and Moriori, unaware of what had been happening on the mainland, caught the worst of the spin-offs from the musket wars that there could ever have been. The effects of the wars were still being felt throughout the country when the Treaty was signed. We are not aware of any part of the country that was unaffected. To say that the Treaty makers were unconscious of these events when framing the preamble would be remarkably pretentious. The Crown was well informed. We think it is the preamble that most underlines the Crown's responsibility to have intervened in the Rekohu situation as best it could. It is also the preamble, along with article 3, that defines the nature of the intervention required, not to decide upon a narrow question of custom, but to look to the full justice of the case.

Tapu knew this instinctively. He did not refer to the Treaty and perhaps did not know of its terms. But he already knew its spirit and that, we consider, was the most important part of all. He also knew that the questions of prior enslavement and of land rights were inextricably intertwined and that emancipation could not be real unless Moriori had a fair share of the land.

In adopting this broad approach, we are affirming the approach taken by the Tribunal in its first major reports, the *Report on the Motunui–Waitara Claim* of 1983 and the *Report on the Manakau Claim* of 1985.

10.2.3 Prejudice

Moriori were prejudiced by the loss of that to which they were entitled: a half-share in the land at the very least. A half share is all that they claimed. This sharing applies to the main island and to all the outer islands, except in the case of the 'Fourty Fours', as they are known in the Chathams. We think that the greater evidence by far is that Moriori were entitled to the whole. We referred to that island in chapter 9.

The loss still seriously impacts on the survival of Moriori as a people today.

10.2.4 Finding

This claim is also well founded. The Treaty was breached, the breach was serious, the impact continues, and compensation should be provided to assist Moriori re-establishment.

10.3 Tenure Reform

As explained in chapter 9, the claim on tenure reform was the main plank of the Ngati Mutunga case. Treaty principles and compliance with the requirements of the Treaty of Waitangi Act 1975 are therefore considered in conjunction with that claim in chapter 11. It is concluded in that chapter that the reform of land tenure was an act or policy of the Crown that was contrary to the principles of the Treaty of Waitangi.

10.3.1 Prejudice

The prejudice to Moriori was described in chapter 9. The management of that land under the Crown's laws for native land administration was a major contributor to Moriori dispersal, which in turn seriously compromised the chances of Moriori survival.

10.3.2 Finding

This claim is proven. The Treaty was breached, the breach was serious, the impact continues, and compensation should be provided to assist Moriori re-establishment.

In addition, Maori land law continues to impact on the current administration of the island, and a particular recommendation for the review of that law, for the purposes of the Chathams, is made in chapter 12.

10.4 Recommendation

It seems right in principle that the Crown and Moriori should have the mana of settling matters between them. This principle seems now to be generally accepted.

We recommend that the Crown negotiate with Moriori, through such representative bodies as may be agreed, for a settlement of the claims that we have now held to be well founded.

Leave is reserved for the Crown or Moriori to apply for more specific recommendations if required.

10.5 Endnote

Moriori claims arising from the more recent management of Rekohu are dealt with in later chapters.

There are also comments on the above recommendation, and on others, in chapter 14.

14. CONCLUSIONS

In this chapter, we draw together the threads.

14.1 Moriori

Our conclusions in regard to Moriori are as follows:

- The main relief by far is due to the Moriori people.
- Compensation for failing to intervene on their enslavement was recommended at chapters 5 and 10. Our reasons were also set out in those chapters. Important findings were that the Crown was aware of the situation and was in a position to have effectively intervened to provide a remedy and should have so intervened. The long-term consequence is that Moriori as a people, and their culture and integrity, are now seriously at risk, to the detriment of both the country and the descendants of the few survivors.
- Compensation was also recommended for the failure to set aside the clearly unjust allocation of land by the Native Land Court. This was recommended in chapter 10. The reasons are given in that chapter and in chapters 6 to 9. Broadly, the court adopted criteria set by the Crown that were inadequate in Treaty terms. Further, the Crown did not intervene, though it knew of the position, could have intervened as it had done in other cases, and should have intervened when, in terms of Treaty principles, the awards were patently wrong. Moriori received 3 per cent of the main island and nothing of the outer islands. They were entitled to 50 per cent of all, at least. There were also far better ways of resolving the issues, which were substantive issues of justice, than using the Native Land Court to rule on a narrow question of custom.

  The prejudice for today is that Moriori now lack the land base that they should have had and their people are dispersed. That land base is now necessary for the social, cultural, and economic development of Moriori.
- Compensation is due also for the impact on Moriori of the Crown's policy on tenure reform. This was dealt with in chapters 9 and 10.

The same topic was examined more thoroughly, in relation to Ngati Mutunga, in chapter 11.

- We have recommended that the quantum be negotiated between Moriori and the Crown, but with leave for either party to seek further findings or recommendations if desired.
- Compensation should be directed to Moriori cultural re-establishment and the social, economic, and cultural development of the people. Also, a significant Moriori land base on Rekohu appears to be a necessary long-term goal.
- The common thought is that the tribes have the right to determine for themselves what they will do with the proceeds of any settlement. It is their money. The principle seems sound, but a balance is required, and we do not agree that the Crown should have no say on either the purposes for which proceeds may be applied or the necessary protective mechanisms. In this case, the people are scattered and the interests of all must be considered.
- The Crown has a right to govern and a duty to ensure fairness for all. Part of the Treaty understanding was that Maori would have laws to protect them as much from each other as from anyone else. The Crown should ensure that any proceeds pass to a properly constituted body with appropriate charitable purposes and accountability.

We appreciate that it will be necessary for Moriori to settle representational differences, at least for the purpose of negotiations, before this matter can progress.

14.2 Ngati Mutunga

Compensation is also due to Ngati Mutunga for the lasting impact of the Crown's policy on tenure reform. Chapter 11 contains the precise recommendation and reasons. Tenure reform probably affected all Maori, so the matter must be cautiously managed. Some tribes were affected more than others. Chapter 11 sets out the particular effects on Ngati Mutunga and notes the extent of land loss and social dislocation. The latter was marked by internal disputes, a loss of control, and the dispersal of the people. That dispersal was not to a nearby town, as most often happened on the mainland, but to distant and scattered places beyond the seas.

An unworkable title system, shareholder control from abroad, and court, not tribal, control were other consequences. We will refer to that further below.

In terms of lasting prejudice, the main loss was to the social and economic consequences for the tribe as a corporate entity. Individual Ngati Mutunga did receive land, more than their entitlement in some cases, but the tribe as a tribe received nothing. The tribe's corporate social and economic capacity was dissipated. Compensation should be for general tribal purposes, in order to rebuild the tribe and the cultural base on the island, and in return for the land that the people, as a tribe, were denied.

Again, negotiations were recommended, but with leave to apply for more specific recommendations.

The return of a particular block, Kekerione 1, subdivision 62, is recommended at the end of chapter 11. This is to two persons on particular terms of trust. It is subject to payment but on concessionary terms.

14.3 Moriori and Ngati Mutunga

A new indigenous land law is proposed for Rekohu in chapter 12. This is a radical suggestion, but one that seems necessary, not just to overcome the tenure problems inherited from past reforms but for the progress of the Chathams as a whole. The title system as it now exists is unsatisfactory and seriously prejudices those who live on the island. It also affects the island economy. That economy has enough difficulties without the addition of this.

A particular respect in which the island is affected more than anywhere else is that, comparatively small though the amount of Maori land may be, proportionately there is more Maori land here than elsewhere in the country.

There is also a respect in which the Maori land on Rekohu is affected differently from elsewhere. Most owners are scattered beyond the wide seas. Rents that could best be spent in rebuilding the cultural base at home, for everyone's benefit, are also scattered abroad, sometimes in cheques worth little more than the postage stamp. And when it comes to voting on what is best for the land, those who decide may never have set a foot on it.

In custom, this is the wrong way round. The produce of the land stays with the land; the primary right is with those on the land; the primary concern is to secure the home base as the cultural font. And all benefit whenever they go home.

The Crown is responsible here, for the current title problem is the direct result of its tenure reform. Chapter 12 recommends that the Crown fund a body to promote a new Maori land law specific to Rekohu. Of course, Moriori and Ngati Mutunga would have to agree that the matter be explored. There is much that we would like to suggest on what might be done, but the matter was not debated before us and we should make no further comment.

All islanders, Maori included, are affected by the mainland exploitation of the Chathams seas. The islanders are vitally dependent on the seas for their livelihoods and the Chathams seas are rightly seen as their natural heritage. Chapter 12 reviews these matters. We urge the further consideration of marine reserves to protect the islanders' use of such foods as paua, not for cultural treats but to feed local families, and to limiting exploitation by mainlander commercial interests. To restore the islanders' natural heritage, and for fundamental reasons of island economics, we especially urge that all feasible steps be taken to increase quota allocations to the Chatham Islands Enterprise Trust.

Chapter 13 considers that Moriori and Maori should be dealt with equally for the purposes of Crown administration on the island. Each group is entitled to its own institutions. Each may be described as tangata whenua of the islands. Each has an interest in the natural resource for the purposes of land use planning and heritage control. To the extent that it is necessary that they combine, they should be equally represented on the common body, unless it is plain that in a particular case one group should have priority. There is no reason why they should not form a single body if they wish, but that must be up to them.

Planning legislation that defines tangata whenua in terms of mana whenua is culturally wrong and has prejudiced relationships between the two groups, just as it prejudices others. Statutory change to remove reference to mana whenua in the planning legislation is recommended in chapter 13.

Cultural harvest was a major item of contention in this case. We accept that Moriori and Maori have cultural harvest rights, but we also accept

that the Crown has the right to impose constraints to protect the resource and that, at this stage, prohibitions are still required. The matter is discussed in chapter 13. We have made no recommendations at this time but have left the position open so that it can be kept under review.

However, in the course of reviewing titi harvesting on the outer islands, our attention was drawn to the ownership of certain of these islands. The islands are only ever used for birding. They are owned by the descendants of a few persons who were haphazardly put on the titles by the Native Land Court. Clearly, those persons could only have been trustees for all, but no trust was provided for. Clearly, also, Moriori were equally entitled as a group. Because of restrictions on the Tribunal in regard to the making of recommendations in respect of private land, no recommendations are made. But justice calls for rectification. There is adequate scope for the Crown to see where the balance of justice lies and to consider the appropriate steps. Again, this matter is addressed in chapter 13.

An impediment to progress on the island has been the quality of relationships between Moriori and Maori. Disputes between the two over interests in customary resources seem likely to continue. We have recommended that work should be undertaken for the reform of current Maori land law on the island. Part of that could involve a search for an informal body on the island for the mediation of land disputes. We see no reason why that should not extend to disputes in all areas.

Te Whaanga was the subject of a specific claim. Special legislation to vest Te Whaanga in a body representative of Moriori and Ngati Mutunga, but with Moriori predominance, was recommended in chapter 13.

14.4 In Summary

Our formal recommendations relate to:

- compensation for Moriori (the main recommendation);
- compensation for Ngati Mutunga;
- the vesting of Te Whaanga Moana;
- the amending of planning legislation;
- the reviewing of Chathams Maori land law; and
- the conditional return of the hospital block (Kekerione 1, subdivison 62).

In addition, we urge the further consideration of marine reserves and the allocation of fish quota for the benefit of the islanders. The Crown may also wish to consider the ownership of certain outer islands used for birding.

The following karakii is recited at the tohinga or baptism of a Moriori child. It invokes a blessing on the child, that he might grow and prosper to tread the land in the future.

Ka One

Te one no Uru, no Ngana, no Iorangi e-ra ia.
Kei tongia te one, tongia te one e, tareae-i-ae,
Whati te rangi, whati te rangi, tu tatau tareae-i-ae, tu tatau tarea.

No Tu, no Tane, no Rongo, no Tangaroa, e-ra ia.
Kei tongia te one, tongia te one e, tareae-i-ae,
Whati te rangi, whati te rangi, tu tatau tareae-i-ae, tu tatau tarea.

No Tahu, no Moko, no Maroro, no Wakehau, e-ra ia.
Kei tongia te one, tongia te one e, tareae-i-ae,
Whati te rangi, whati te rangi, tu tatau tareae-i-ae, tu tatau tarea.

No Ruanuku, no Taputapu, no Rakeiora, e-ra ia.
Kei tongia te one, tongia te one e, tareae-i-ae,
Whati te rangi, whati te rangi, tu tatau tareae-i-ae, tu tatau tarea.

E puke, e puta wai, ta ihi, ta mana, ta ha, ta whakaariki.
Kei tongia te one, tongia te one e, tareae-i-ae,
Whati te rangi, whati te rangi, tu tatau tareae-i-ae, tu tatau tarea.

No Rongomai-whiti, no Rongomai-rau, no Rongomai-ta-uiho-o-te-rangi.
No te whakaariki, ko ro Tauira te one,
Whati te rangi tu tatau tareae-i-ae, tu tatau tarea.

E puke wai, e puta wai, ta ihi, ta mana, te ha, te whakaariki ra-i.
Kei tongia te one tareae-i-ae, whati te rangi tu tatau tareae-i-ae.
Whati te rangi tu tatau tarea – no.