

CHAPTER 2

THE CLAIM

*Na roto i te purapura, te maramatanga i tipu mai i Mokai.
The knowledge of the light was born from enlightenment here in Mokai.¹*

2.1 INTRODUCTION

The claimants alleged that, by closing Mokai Primary School, the Crown failed to protect taonga of the seven hapu of Mokai and so did not meet its Treaty responsibilities. The school, it was said, was a significant vehicle for the retention and transmission of ‘local identity and autonomy – Mokaitanga’.

One aim of the claimants’ evidence was to demonstrate how the school fostered Mokai tino rangatiratanga. Claimant witnesses approached this by:

- ▶ explaining the standing of the school in the Mokai community (see sec 2.2);
- ▶ describing the kaupapa of the school – how it aimed to meet the requirements of the national primary school curriculum while simultaneously imparting te reo and matauranga Maori specific to Mokai (see sec 2.3); and
- ▶ emphasising the significance of the school’s kaupapa to the Mokai community and the potential consequences of closing the school (see sec 2.4).

The claimants’ challenge to the sufficiency of the Crown’s consideration of options other than closure of the school was another important part of the claim. They contended that the school’s unique value to Mokai children and the wider community, and the progress made by the school since late 1996, should have caused the Crown to consider options that would preserve and strengthen the delivery of education in Mokai.

Connected with that was the claimants’ challenge to the quality of the consultation undertaken by the Ministry of Education during the process that culminated in the Minister’s decision to close the school. The consultation, it was said, did not afford the school community sufficient opportunity to convey its views on the importance of the school and did not generate any discussion of alternatives to closure.

The claimants’ evidence of those matters was directed at elaborating:

- ▶ the socio-economic, staffing, and resourcing problems faced by the school and how they were being addressed (see sec 2.5);
- ▶ the wider educational context for understanding those problems (see sec 2.6);

1. Koti Te Hiko, first hearing, tape 3B

- ▶ the progress made during the last three years in meeting the Crown’s requirements for quality education delivery (see sec 2.7);
- ▶ the availability of alternatives to closing the school that the Crown could have invoked, or the school community could have initiated had it known about them (see sec 2.8); and
- ▶ the inadequacies of the consultation that was undertaken with the school community during the closure process (see sec 2.9).

Finally, this chapter contains a summary of two matters raised in the claimants’ statement of claim that were modified during the course of the hearing. They relate to:

- ▶ a recommendation concerning the land on which the school is situated (see sec 2.10); and
- ▶ a claim based on the fact that the Education Act 1989 does not contain a ‘Treaty clause’ requiring the Act to be implemented consistently with the principles of the Treaty of Waitangi (see sec 2.11).

2.2 THE SCHOOL’S PLACE IN THE PAST, PRESENT, AND FUTURE OF MOKAI

Claimant counsel summarised the evidence of the important place of the school in the identity and autonomy of Mokai under the following heads:

- ▶ the land on which the school is situated is ancestral Maori land;
- ▶ the community is predominantly Maori;
- ▶ the children who were attending the school had whakapapa links to the seven hapu of the Mokai area;
- ▶ there are close links between the school and the matua marae of the area, Pakaketaiari;
- ▶ local tikanga was a component of the school’s teaching; and
- ▶ the school had a bilingual focus and was teaching te reo Maori.²

In elaborating those matters, claimant witnesses spoke of the ‘Mokai triangle’ – a concept that captures their understanding of the interdependent relationship of the Mokai marae, village, and school. Their evidence touched on the historical significance of the school in the life of the once much larger community, of Maori and Pakeha, that was resident in the area. Mainly, however, claimant witnesses focused on the school’s unique capacity to educate Mokai children in their own community, in close contact with the marae and their families, and thereby strengthen all three parts of the triangle and, with that, the identity of Mokai.

One kaumatua, Tuhuriwai Rangikataua, portrayed the three components of the triangle as a unity, observing that in the community nothing happened at the marae without happening at the school and vice versa.³ Mohi Osborne also considered the village, marae, and school to be a single entity.⁴ Jocelyn Waimata Kingi described the school and the marae at Mokai as an ‘extension for us as Maori people’.⁵

2. Document A29, para 3.13

3. Document A9; tape 2A; doc A9, para 15

4. Document A15; tape 2A

5. Document A13, para 8

Ruth Forshaw, a retired teacher who assisted with the school's teaching of te reo and waiata, expanded on the nature of the triangle in a manner that is similar to Mr Te Hiko's explanation (see sec 1.4.3(1)):

*He whakamutunga korero maku, kahore e taea te whakawehe te marae me te kura.
Ko nga tamariki inaianei nga kaumatua mo apopo
Me ako ratou ki nga mahi o te marae
Nga mahi e mahingia ana i o ratou matua me nga mahi e mahingia ana e nga kuia,
koroua
Ma te noho i runga i te marae, ma te whakarongo
Ka taea te honohono i enei korero*

*To end my story I say you cannot separate the marae from the school
The children of today will be the elders of tomorrow.
They must learn the things of the marae
The work done by their parents – the work done by their grandparents
By living on the marae by listening these things will be achieved.⁶*

Mrs Forshaw also explained some of the practical aspects of the interactions that give meaning to the concept of the Mokai triangle:

Because the school is so close to the marae we are able to participate in all the powhiri. The tamariki sit with the kaumatua and kuia listening to the whaikorero and the karanga, on occasion they stand with us when we waiata. Whenever there are hui or tangihanga the tamariki participate in the powhiri . . . so the tamariki are exposed to the kawa of the marae at every level.⁷

The close association between the marae and the school – which are almost directly across the road from one another – is also reflected in the Mokai Primary School charter. It refers to the marae as being of 'great importance in providing the community with a focal point for its needs' and to the school as 'a major part' of that focal point.⁸

Crown counsel asked several claimant witnesses for their view of the relative importance of the marae and the school in fostering Mokai identity. Tuhuriwai Rangikataua agreed that the marae is the 'core' of Mokai and that if 'Mokaitanga' is strong, it will be protected by the marae and the community that belongs to it. In response to claimant counsel, he agreed that the closure of the school contributes to a loss of 'Mokaitanga'.⁹ Mr Te Hiko explained that the children need a 'stable, positive Maori education' and that the school is needed to support the children. He said it is difficult to maintain the 'spiritual wealth' of Mokai when there are few leaders.¹⁰ In response to questions from the Tribunal, Mr Te Hiko added that the community wants its children 'to maintain what is correctly kept at home' but also to build on it.¹¹

6. Document A12, para 28

7. Ibid, para 26

8. Document A25(18), p 3

9. First hearing, tape 2A

10. First hearing, tape 3B

11. Ibid

2.3 THE KAUPAPA OF MOKAI SCHOOL

The claimants did not provide detailed evidence about the school's governance and management before late 1996. The Crown supplied copies of annual reports prepared by the school's board and principal for the years 1991 to 1994.¹² No such reports were prepared in 1996 nor, it seems, in 1995.

From the reports supplied, it is clear that the decision to introduce bilingual teaching at the school was made late in 1993 in response to very low enrolments.¹³ The board chairperson's report for 1994 records a rise in the roll that year (from two pupils at the end of 1993 to 10 at the end of 1994) and attributes it to the change 'from mainstream to bi-lingual' teaching and the appointment of a new principal.¹⁴ The principal's 1994 report records difficulties with maintaining te reo teaching at 50 percent or more and cites as contributing factors 'a number of transient children, fatigue and Maori not being spoken at home'. The report adds that the time-frame for the school becoming a kura kaupapa Maori 'looks like it needs to be reviewed', that 'more whanau development' is needed and that 'an increase in the amount of Maori spoken in the homes and community will [make] and has made a difference'.¹⁵

In the absence of board and principal reports for 1995 and 1996, and the claimants' preference not to dwell on that period, evidence about the school during those two years is more patchy. Both Crown and claimant witnesses referred, however, to the very high turnover of acting principals during the period, and to the board's difficulties in finding a permanent principal. Crown evidence of the enrolments at the school during 1995 and 1996 reveals that the roll peaked at 20 pupils but was most often in the range of 12 to 18 pupils.¹⁶

The claimants' evidence of the school's provision of bilingual education focused on the period from late 1996 through to the school's closure – the period when Haromi Koopu was the permanent principal. Mrs Koopu, of Tuwharetoa and Ngati Whakaterere descent, had been asked by the school board to apply for the principal's position.¹⁷ The Tribunal understood that her connections to Mokai were an important part of the reason for that request.

Claimant counsel described the parents' aspirations as being to see their children grow up educated in the basics of the curriculum and 'learning te reo Maori, matauranga Maori, tikanga and kawa' and 'how that applies in the Mokai context'.¹⁸ Mrs Koopu described the school's programme in this way:

Apart from the standard curriculum subjects of mathematics, technology and science, health and safety and physical well-being, social studies, arts and crafts, language and visual language, there was also a strong focus on what I call Mokaitanga. This involved teaching the children about who they were and where they came from

12. Document A25(4A)-(4D)

13. Document A25(4D)

14. Ibid

15. Ibid

16. Document A25(1), p 6

17. Document A8, para 2

18. Document A18, para 4.13

through whakapapa (genealogical links), iwi and hapu connections, whanaungatanga (family), pakiwaitara (stories), whakatauki (proverbs) and whakamoemiti (prayer). Further to this the children were taught raranga harakeke (flax weaving), traditional cooking, nga tikanga, performing arts, kapa haka, tukutuku and carving. Te reo was spoken continuously during the first half of the day.

The afternoon continued in both te reo and English. Underpinning all these activities was the spiritual dimension embracing whakamoemiti (prayer), manaakitanga (hospitality), whanaungatanga (family) and arohatanga (love). Because the school is situated next to the marae the children were often exposed to the realities of marae kawa, tikanga and te reo. To further enhance whakawhanaungatanga and Mokaitanga the children spent a great deal of time at the marae. They would actively participate in powhiri and would stand to support kaumatua and kuia with waiata. This also included school trips to other marae around Lake Taupo seeing and meeting first hand their chief, Tumu Te Heu Heu on their Tuwharetoa side . . . The tamariki saw for themselves the relevance of whanaungatanga and they will carry these experiences with them forever.¹⁹

It was apparent that claimant witnesses consider the national curriculum to be a suitable framework for the delivery of the kind of education desired by the Mokai community for its children. Mrs Koopu voiced her understanding that the school's emphasis upon matauranga and te reo Maori was wholly compatible with the national curriculum, in this way:

Don't anybody tell me that traditional Maori is not learning about the curriculum delivery, because it is the way that our tamariki have been able to cope with some of the curriculum delivery . . . Everything is one, how we deal with our Maori, how we deal with being in a Pakeha world. It's no different, it's just the way that we do it. It's the attitude that we have on how we should do things. It's just normal and natural to have a karakia. We just do that naturally.²⁰

Mrs Koopu also emphasised that the time devoted to the teaching of traditional Maori knowledge could not be distinguished from the time spent teaching the national curriculum:

It wasn't just something that you came in and said come on I want all you guys for three days, one week, mahi nga mahi o te Maori [to concentrate on 'Maori' work] – [then] that's it. It went right through.²¹

Illustrations were provided of the school's use of traditional knowledge to develop the children's skills in the essential learning areas of the national curriculum. Claimant counsel summarised this evidence as covering the following matters:

- (a) Bush studies as they pertain to this area.
- (b) Children being taught waiata that pertain to this area.
- (c) Children being prepared for kapa haka in this area.

19. Document A8, paras 13–14

20. First hearing, tape 10B

21. Ibid

- (d) Children participating in marae activities.
- (e) Whanau members being free to come and go at the school and participate in activities.
- (f) Children being taught the tikanga, kawa and matauranga of Mokai.
- (g) Children being taught those aspects of Maori life which will allow them to retain the ahi ka of Mokai.²²

During the site visit to the school, the Tribunal saw examples of student art depicting scenes from both the pre-contact and post-contact history of Mokai. Mrs Koopu said that the children were taught the korero accompanying a particular scene or event and so learned about the history of their community. She also showed how the children's mathematics skills were developed through the use in their artwork of grids for proportions and of enlarging and scaling techniques.²³

Mrs Forshaw explained how the children were exposed to their environment:

As part of our curriculum we taught the tamariki about the things that grow in the bush. They know the sounds of the manu (birds). In the bush we would often hear the flapping wings of the kereru (wood pigeon), although we couldn't see it, the tamariki knew which bird it was. Kereru can fly very high. When the tamariki see the orange berries on the ground we know the kereru have been feeding. The tamariki already know those bush areas and that they feel comfortable in the bush.²⁴

Mr Te Hiko, who participated in some of those lessons, said an important aspect of them was to teach the children how to survive on the land. An example he gave was of the children being taught to bake a rewana bread in a camp oven so they could survive if they did not have electricity. Such lessons, he said, were one way of teaching the children about their ahi ka.²⁵ Mr Rangikataua described familiarity with the environment and the ability to survive in the bush as characteristics of his 'Mokaitanga'.²⁶

Mr Te Hiko also explained how the raranga harakeke (flax weaving) that he and his wife taught at the school in 1997 and 1998 developed the pupils' skills in aspects of Maori and other knowledge. On the Maori side, the use of flax taught the children about rongoa (medicine), whakatauki (proverbs), whaikorero (oration), and waiata (song). As well, Mr Te Hiko explained, the weaving was used to teach mathematics: 'halving, quartering, subtraction and adding – it's all done with the harakeke'.²⁷

The interconnectedness of Maori and other knowledge, and the centrality to all learning of the skills learned through raranga, were explained by Mrs Koopu in this way:

So the raranga harakeke is not only our traditional values that we value so much, it is also how we brought in the curriculum. And I really want you to understand that

22. Document A18, para 4.10

23. First hearing, tape 10B

24. Document A12, para 25

25. First hearing, tape 3B

26. First hearing, tape 2A

27. First hearing, tape 3A; doc A10, para 4

because there is no separation. The traditional values of Maori and Pakeha go together. Why do they go together? You have to whakarongo [listen] to learn, and that is the key skill . . . Whether you're pakeha, Maori, Chinese, Japanese you have to whakarongo to get any skill . . . [After you] whakarongo, you have to titiro. You have to watch. You have to take it in. Then after the whakarongo, the titiro, you had to . . . mahi. You had to korero it.²⁸

Some of Crown counsel's questions to claimant witnesses suggested the Crown regarded the school's emphasis on 'Mokaitanga' as jeopardising its ability to deliver the national curriculum. For example, when Mrs Koopu said that 'Mokaitanga was an integral part of everything we did' at the school, Crown counsel asked what proportion of the school teaching day was involved with 'Mokaitanga'. Mrs Koopu replied that the question was impossible to answer because what she meant was that the children were looked at in an holistic manner. Soon afterwards, Crown counsel highlighted an ERO report's comment that 'the wider school community is deeply parochial about the school' and asked Mrs Koopu if it pointed to a problem with curriculum delivery which, counsel later suggested, might be related to the school's focus on 'Mokaitanga'. Mrs Koopu replied that what ERO described as 'deeply parochial' was, in her view, the people's understanding of 'how their children learn' and that the school's focus on 'Mokaitanga' was 'about understanding us and the values we place on who we are'.²⁹

Further insights into those matters were provided by other witnesses' accounts of how the school, in conjunction with the marae and the wider community, was providing the kind of education they wanted for their children. Claimant Te Aroha Adams, for example, spoke of the mana that can only be handed over by the old people. She recounted an experience her daughter had, while at the school, when a kuia invited her to karanga on the marae. In a manner that made it plain that it was a source of great pride for both mother and daughter, Ms Adams said her daughter learned how to karanga and, on the day, had welcomed the visitors onto the marae 'beautifully'.³⁰

Mr Te Hiko spoke of the benefits of the school's approach for children with special needs. With regard to one pupil (his nephew), with whom he had worked at the school, he said:

Prior to my involvement he was attending a special needs school in Taupo. [He] could never handle it, he was always angry. He was very unhappy and didn't appear to be learning anything. When it came to learning the culture of his people and speaking te reo, he began to settle down and was able to express his anger appropriately through haka and he just shined. When I began to work with him in 1997 he began to thrive and seemed to enjoy learning. As [he] gained confidence through his reo Maori he was able to identify who he was and what made him special.³¹

28. First hearing, tape 10B

29. First hearing, tapes 6A, 6B

30. First hearing, tape 4A

31. Document A10, para 9

A strong theme of the claimant evidence was that the opportunity provided to the most recent Mokai school students, to learn their language and about their past through the formal education system, was not available to their parents or grandparents. Claimant witnesses who were directly involved at the school were unanimous in their support of the approach taken by Mrs Koopu to the delivery of a bilingual education. Ms Adams said, for example:

I know what it is like to attend a mainstream school. My mother used to speak Maori to us at home. She was told by the principal at Tihoi School in 1966 not to speak Maori to us and we were told not to speak Maori because English was the number one language. Our reo was taken from us during my years of schooling. I have seen the strength in each individual child because of their reo and as a parent working along side them, it has given me the confidence to be involved with the kura, the whanau, the community and the marae. My tamariki are achieving far more than I did at their age and their reo helps them.³²

While discussing her childhood at Mokai some 60 years ago, Mrs Forshaw observed that ‘All the tamariki the same age as me weren’t able to korero Maori’.³³ She explained that she had learned to speak Maori when she was nearly 60 years old and living away from Mokai but travelling back there ‘nearly every weekend’.³⁴ She returned to live in Mokai in 1997, to ‘be another kanohi [face] for our marae and to help where I could’.³⁵ Mrs Koopu had asked her to help at the school and she began teaching waiata, including waiata tawhito (ancient waiata), about the area.³⁶

Mr Rangikataua said that he did not learn the Maori language while growing up in Mokai but at the age of 55 while living at Murupara. He also said that, upon his return to Mokai, his kaumatua were quick to remind him that, while he could now speak Maori, the dialect in which he spoke was not his own but that which prevails in the rohe of Ngati Manawa.³⁷

Tribunal member Rangitihi Tahuparae questioned Mr Te Hiko in Maori about the relationship between te reo and matauranga specific to Mokai and all other knowledge. He then summarised their exchange, in English, in these words:

Formal education, as I understand it, is [the] accumulation of knowledge from peoples all over the world. [It is] not specifically owned by any one nation. And what you’re saying at this point [is] that Maoridom has a contribution to make to the international plate of knowledge. Maoridom have a quotation: ‘Ko Ranginui e tu iho nei. Ko Papatuanuku e takoto ake nei’ . . . I acknowledge the universe above, and the planet earth below. It doesn’t specifically say the papa is the mud between my toes from Mokai alone. So . . . [no] one people own education as such in terms of the formality of

32. Document A14, para 15 (as amended orally at hearing)

33. Document A12, para 12

34. First hearing, tape 2B

35. Document A12, para 19

36. Ibid, para 20

37. First hearing, tape 2A

it. It is the accumulation of knowledge throughout peoples of the world . . . Every nation has a contribution. But what I can hear coming through is that Maori is an official language. And what I can feel coming through, you're saying, is that you have for Mokai here, a contribution to make to the system that has denied you.³⁸

2.4 EFFECTS OF CLOSURE

The claimants argued that the dual role of the education delivered at Mokai school depended on its delivery in Mokai. The simple reason for this is that Mokai is the children's turangawaewae.³⁹ Ms Adams identified the problems associated with enrolling her children elsewhere:

this is where my children are comfortable and this is where they belong within this supportive community surrounded by their whanau. I am not prepared to put my children into schools that do not value who they are.⁴⁰

In light of all the matters highlighted to this point, the kaupapa of Mokai school was plainly seen to be worth preserving:

I believe that we have something special in Mokai which should be protected and cared for and not destroyed. The Crown has a responsibility to support Maori education wherever possible. This is one opportunity where I believe it is possible.⁴¹

By closing our kura the MOE [Ministry of Education] has taken away my grandchild's opportunity to be educated in her own language – te reo Maori and her right to be brought up in all aspects of tikanga on their own papakainga where they feel comfortable. I am sad that this opportunity has been taken away from us without any consideration for what we wanted for our future mokopuna.⁴²

Mr Rangikataua summarised the claimants' argument:

The closure of the school will destroy the connection between our triangle – the school, the marae and the village. . . . The closure will also destroy the links that the children of Mokai have with the past and with their marae. We were never given the opportunity to learn te reo and our whakapapa links until late in life. These children were growing up in a unique environment where they actively participated in hui, tangi, and whanau gatherings at the marae where they could learn about their history, pakiwaitara, waiata, tikanga, kawa and whakapapa. They will never learn these things anywhere else. This is where they belong and this is where they should be nurtured amongst their own people.⁴³

38. First hearing, tape 3B

39. First hearing, tape 2A

40. Document A14, para 17

41. Document A10, para 13

42. Document A13, para 9

43. Document A9, para 15

2.5 MOKAI PRIMARY SCHOOL, 1996–99: ‘DIFFICULTIES AND PRESSURES’

A range of ‘difficulties and pressures’ facing the school in the last three years of its life were described by claimant witnesses.⁴⁴ They were confident, however, that real progress had been made in that time towards meeting the Crown’s requirements for quality education delivery (see sec 2.7).

The evidence of impediments to the school’s ability to comply with all the matters monitored and reported on by ERO covered a broad area. There was evidence of what may be described as ‘local difficulties’, including the socio-economic circumstances of the Mokai community and associated problems that impacted negatively on the school’s staffing and other resources. These were compounded, it was said, by the additional pressure the school was under during its last three years to respond not only to the three ERO reviews conducted in that time but also to the Ministry of Education, which was, especially from mid-1998, very actively pursuing the process for closing the school. These matters are outlined in section 2.5.

The claimants also relied on information supplied by the Crown, in the form of ERO and Ministry of Education publications, for the purpose of providing a larger context for their ‘local difficulties’. That information, it was said, reveals that the school’s problems are of a kind experienced by other small New Zealand schools, especially those in rural and predominantly Maori communities. That information is outlined in section 2.6.

2.5.1 Socio-economic circumstances

(1) Unemployment, housing, and income factors

Throughout the claimant evidence, there were strong indications that the Mokai community’s low level of financial wealth had a range of negative implications for the school’s governance and day-to-day operations. Underpinning many of the problems, it seems, is the scarcity of regular employment in the small community.⁴⁵ A symptom of that, noted in the school’s own reports as well as ERO and Ministry documents, is the ‘transient’ nature of some of the school’s parents and children who, it was explained, move away from and return to Mokai as their circumstances demand.⁴⁶

Another indication of the community’s circumstances is the scarcity and condition of housing at Mokai. The Tribunal was told that a large number of the homes in the Mokai village do not have running water and that the school has been ‘an important focal point in the very survival of the community’ because for many years it has provided water to the community for every day use.⁴⁷ At the school, the Tribunal saw the school pool’s changing sheds and was told they are used by village residents for showers. The last board chairperson, Mere Wall, said that she knew whanau who wanted to enrol their children at Mokai school but could not do so

44. Document A29, para 2.99

45. First hearing, tape 4B

46. For example, doc A6E, attachment 3.2; Haromi Koopu, first hearing, tape 10B

47. Document A8, para 11

because there was no housing available. She was confident that, if the school was still open and ‘if the issue of housing was dealt with, we probably would have over a hundred kids’ enrolled.⁴⁸

Mrs Koopu referred to the fact that some children at the school did not have sufficient food to eat: ‘The parents struggle to do their best by their tamariki. There were times when tamariki were absent from school due to a lack of food particularly before the benefit was due.’⁴⁹

(2) The school’s decile ranking

It was in light of these matters that the school appealed the decile 6 ranking that it had in 1997.⁵⁰ The decile ranking system is used by the Ministry of Education as a part determinant of school funding so that lower ranked schools receive more funding than higher ranked schools. The system is explained in the 1998 ERO publication *Good Schools – Poor Schools* and Ministry liaison officer Graeme Kitto responded to claimant counsel’s questions about it during the hearing of Crown evidence.⁵¹

The decile system ranks each New Zealand State school into decile (10 percent) groups according to information about all the households with school aged children in the areas from which the school draws students together with ethnic data from school roll returns. The factors taken into account are household income, parental educational qualifications and occupation, household crowding, income support, and ethnicity.⁵² Mr Kitto said that small schools are invited to specify where their students live and the Ministry engages statisticians to study the populations from the relevant census mesh blocks in order to determine the schools’ decile rankings. He agreed with claimant counsel that, by being based on the wider category of all households with school aged children in the relevant mesh blocks, and not on the actual households of a school’s students, the system is not a foolproof measure of a school’s socio-economic status. However, he said, no one has come up with a better system.⁵³

From that information, Mokai school’s level 6 decile ranking put it in the upper half of New Zealand schools in terms of the socio-economic characteristics of school communities. The appeal to that ranking, initiated by Mrs Koopu – and which she said contributed to the demands on her time – resulted in the school being reclassified as decile 3.⁵⁴ Claimant witnesses clearly considered that even this reduced ranking was too high. Mrs Koopu said that the school should have received a decile 1 ranking – the lowest on the Ministry’s scale.⁵⁵ Having noted that most of the parents who did voluntary work at the school had left high school without any formal qualifications,⁵⁶ she later added:

48. First hearing, tape 9A

49. Document A8, para 12

50. *Ibid*, para 11

51. Document A25(27), p 4

52. *Ibid*

53. Second hearing, tape 6B

54. First hearing, tape 6A

55. Document A8, para 11

56. *Ibid*, para 10

Our parents, some of them have been down there at the bottom of the heap. They've been there. And I say that proudly . . . because somebody has to understand that they need encouragement, they need support, they need help.⁵⁷

(3) *The need for and benefits of community involvement in the school*

In order to respond to the socio-economic issues, Mrs Koopu said she perceived a need to involve the community as much as possible in the school's operation. One way in which this occurred was through the parents' voluntary work at the school, which provided them with the opportunity to 'develop their own skill base as well as their understanding of te reo'.⁵⁸ She explained further:

If our tamariki are going to survive in this world, then we have to look beyond our tamariki, and look to the support that we need to give to our parents. So I would say that would be one of the most important roles that I have had in all my teaching is to give the empowerment to the parents, the empowerment to the community to say, 'This is your kura. I'm here to facilitate you. You do the mahi. I haven't got the skills – you have – you have all got the skills.'⁵⁹

Mrs Koopu saw that approach as being facilitated by the Tomorrow's Schools philosophy which she described as encouraging 'parent ownership of the school'. Crown counsel later asked Mrs Wall, the school board's last chairperson, whether Tomorrow's Schools really went as far as Mrs Koopu believed or, instead, provided for 'increased parental involvement in governing the school'. Mrs Wall replied that she did not understand Tomorrow's Schools as merely providing for a greater parental role in school governance, and, if that is all that it does, then, for the last 10 years, she had mistaken the essence of the policy.⁶⁰

Claimant witnesses described how, with the goal of building confidence in the children and their parents, the school attempted to improve self-esteem by mitigating the stigma associated with a low socio-economic status. One very practical example was provided by Mrs Koopu when, speaking of the children who had insufficient food, she said:

We overcame this problem by encouraging the children to bring along vegetables, a potato, kumara or carrots and we would make soup together for lunch. On other occasions we would pick mushrooms and make mushroom soup, make fried bread or pancakes for lunch, whatever was available. I consider it an important part of getting rid of barriers of feeling whakama [ashamed, embarrassed] and in this way we build up their self confidence so they can feel they can come to school no matter what.⁶¹

Further examples, outlined earlier, emphasised the importance of instilling pride in the children about who they are through learning about their 'Mokaitanga'. It was

57. First hearing, tape 10B

58. Document A8, para 10

59. First hearing, tape 10B

60. First hearing, tape 9A

61. Document A8, para 12

apparent that claimant witnesses saw this as a prerequisite to the children's success in the wider world. Mrs Wall's statement about giving the children a 'face' captured this point graphically (see sec 1.4.3(1)). In sum, the holistic approach taken by the school was seen by the wider community to be a necessity in all the circumstances.

Asked by Crown counsel if she believed student learning had improved in the last three years at Mokai school, Mrs Koopu replied:

The children's confidence has grown. They've built up their self-esteem, they feel good about themselves, learning is fun ... How else do we measure children's achievement?⁶²

Crown counsel then asked Mrs Koopu if there was a 'measurable, discernible, positive effect' from the children coming to school and asked her to identify areas where that improvement had taken place. Mrs Koopu replied that there 'has to be' a measurable positive effect of going to school, and that it could be seen in the children's improved ability to articulate their thoughts and feelings.⁶³

2.5.2 Staffing difficulties

When Mrs Koopu accepted the position of principal of Mokai Primary School, it was her first full-time teaching position since 1987 – prior to the adoption of the Tomorrow's Schools system.⁶⁴ The position also provided her first experience of sole-charge teaching.⁶⁵ Claimant evidence highlighted the pressures placed on Mrs Koopu and the board because of her need for training in various aspects of the contemporary educational environment while also managing a heavy workload.

(1) *The demands on a sole-charge principal*

The major problem Mrs Koopu identified was that sole-charge teaching of children spanning years 1 to 8 places great demands on the teacher:

Twelve children were on the roll in the fourth term in 1996 and this increased to eighteen. These children ranged from levels Y1–Y8, new entrants to form 2. The children were aged from 5–13 years. The main difficulty with such a wide range of children was catering for all the different levels. Whilst I may have only had eighteen children, you could almost say that I had eighteen different groups of children.⁶⁶

Another matter referred to by Mrs Koopu was the number of children at the school with what she described as 'special needs' but who did not qualify for Special Education Service support. In 1996, she said, among 18 children enrolled, five were 'special needs children', and assessments were done in the areas of language development and

62. First hearing, tape 6B

63. Ibid

64. Document A8, para 2

65. First hearing, tape 6A

66. Document A8, para 6

behavioural management. Five applications were made to Special Education Services but only one was successful and that student did not qualify for ongoing funding.⁶⁷ Mrs Koopu added that the process involved in these applications was ‘quite a burden’ and that she wished there was assistance available in the form of someone else being able to assess the children.⁶⁸ She also indicated that the proportion of children with ‘special needs’ made the school ‘highly dependent on voluntary assistance from the community’ and provided the major reason for the board’s employment of Mrs Forshaw as a part-time teacher working specifically in the areas of language development and behavioural management support.⁶⁹ Between 1997 and 1999, Mrs Koopu said, the school had seven ‘special needs’ children and, at times, another older child enrolled by the Children and Young Persons Service.⁷⁰

Jim Hogan, who acted as principal’s release teacher (one day a fortnight) for the first term of 1998,⁷¹ agreed that the workload was heavy:

When I was there . . . Haromi [Koopu] was a sole-teacher. She was in charge of 14 kids that ranged from 5–13 years of age. To cope with this you have to be a magician, not a teacher. It is very hard to have everybody organised, you have to work about a 12 hour day and then you have to work in the evenings on top of that. You have young people’s programmes, middle group programmes and an older group programme, everybody is on a different programme.⁷²

When questioned by the Tribunal, Mr Hogan explained further:

When you are the only person in the school, from the moment the first child arrives to the moment the last child leaves, there is no time in there to do anything called administration unless it’s a very, very brief period of time . . . [For] most teachers, the day begins either the previous day or at least an hour or so before school begins to be adequately prepared . . . Haromi put me off being a principal. The time that she spent was just unbelievable. I didn’t have it. So, from 7 in the morning – probably earlier – 6 o’clock until later at night, with a break. That’s a long, long day, and that time needed to be spent to be fully prepared and to be one step ahead of everything – which you had to be.⁷³

Mr Hogan also referred specifically to Mr Te Hiko’s role:

There were other people involved in the school, Koti was one of these, he . . . would take a group of special needs children and speak to them totally in Maori. They would sing songs and develop their handcraft skills. He would be just part of the programme and the students had a great respect for Koti and they never said anything wrong with him around.⁷⁴

67. Document A8, para 18

68. First hearing, tape 5B

69. Document A11, para 19

70. Document A8, para 23

71. Document A11, para 4

72. Ibid, para 17

73. First hearing, tape 5A

74. Document A11, para 7

In the course of her evidence, Mrs Koopu mentioned that, under current rules, a sole-charge school can have up to 28 students. Crown counsel asked if the student-to-teacher ratio at Mokai school was too high for the things that Mrs Koopu had to do, to which she replied: 'I want to put it this way. Tomorrow's Schools brought in great changes, but Tomorrow's Schools did not address the situation of sole-charge teaching. It did not.'⁷⁵

Crown counsel also asked if Mrs Koopu believed that the official roll census returns from 1989 to 1999 were accurate. Those returns indicate that the roll was generally lower than 20 students.⁷⁶ Mrs Koopu explained that the returns are taken in March and June each year so that some of the numbers recorded could be lower than the numbers actually enrolled at other times. She noted that the roll peaked at 24 students during her tenure as principal and that, at that time, she had telephoned the general manager of the Hamilton office of the Ministry of Education to ask for help. Later, in its own evidence, the Crown produced a weekly breakdown of the enrolment figures from 1990 to 1999 which shows that the roll peaked at 24 students in 1990 (in the last term) and in 1998 (for the first five weeks of term 2) (see sec 3.5.1).

(2) Training

Another demand on Mrs Koopu's time came from the training courses she attended in her capacity as principal of the school and member of the board of trustees. Describing the limited time she had to attend all the relevant courses, Mrs Koopu said:

It was like you couldn't take all that much. You had so much to comply – to contend – with anyway, it was like you just added another burden to what was already your big load.⁷⁷

Acknowledging Crown counsel's suggestion that there were specific curriculum-related training courses that Mrs Koopu had not attended, she again noted:

There was so many courses to go to, like the technology ones, that you just couldn't keep up. I mean I had the Maori – the Aro Matawai one – the assessment one, that in the end I turned down because I couldn't keep up. I guess I'm saying I couldn't do all the training in that time.⁷⁸

Mrs Koopu also noted that when she was able to attend training sessions, she did not always obtain maximum benefit from them because of how they were run and the pressures of her existing responsibilities:

We did have training sessions. Some of them were held at night at Tokoroa, from 7 o'clock at night till 9 o'clock at night – two hours. It was just really too fast for any of us to take in, especially for me at that hour of the night when your head is just full of what

75. First hearing, tape 6A

76. Document A7, para 59

77. First hearing, tape 6A

78. Ibid

you've just done. Adding to that you had those sessions once a term. By the time you come in to the next one, you'd forgotten what the first one was about . . . So yes, we did receive that kind of help from the Ministry . . . but it wasn't help that was relevant to us.⁷⁹

When questioned by Crown counsel about the rural adviser's support, Mrs Koopu described it as 'absolutely wonderful'. She added, however, that, while it enabled the school's situation to be assessed and planned, it did not assist with implementing those plans. Having earlier observed that the board of trustees was 'continually meeting' and that it was 'a mammoth task, calling on parents who didn't have the skills to fulfil what was required', Mrs Koopu said that 'you need the people to be able to put the plan into action'.⁸⁰

Despite those difficulties, the professional support provided through the Ministry of Education did enable the board to plan for the future of the school. Mrs Koopu said that the meetings held for that purpose contributed to the community's focus on the school by facilitating 'understanding of where they wanted to be' in relation to it and its services.⁸¹ As has been noted earlier, other claimant witnesses attributed the community's increased focus on and support for the school to Mrs Koopu's holistic approach to teaching with its emphasis on empowering parents to take ownership of the school.

(3) Community support

Whanau support at Mokai school seemed to be noticed and acknowledged by all who interacted with it. The January 1997 ERO report commended the school and community in this regard.⁸² The next report, however, notes difficulty in obtaining active parental support for the school.⁸³ The final ERO report comments negatively on the presence at the school of voluntary helpers' pre-schoolers.⁸⁴

Mr Hogan said that it was his impression that the school was a 'community centre'.⁸⁵ Mrs Koopu explained that, from January 1997, when the board adopted a plan, 'backed by all of the school community', to set up proper administration systems, place an embargo on spending, and train board members:

The parents, grandparents and many others who didn't have children in the school gave freely of their time to assist us in the reorganisation of the school. This included the administration, the library and the classification and distribution of teaching resources. Everyone helped out wherever they could with a true sense of purpose and whanaungatanga. This continued right up to the closure.⁸⁶

79. First hearing, tape 6A

80. Ibid

81. Ibid

82. Document A25(3E)

83. Document A25(3F)

84. Document A25(3G)

85. Document A11, para 14

86. Document A8, para 8

It was plain from claimant witnesses' accounts that the level and nature of the community's support for the school was seen as essential both to lighten the load on Mrs Koopu and to promote the 'Mokai-specific' education that was being provided. Also emphasised were the benefits to the adult whanau members who were directly associated with the school, especially those who felt that they had more to learn about their own identity. Mr Osborne, for example, a parent and board member, said that he felt welcome and comfortable at the school. Crown counsel questioned Mr Osborne about his not feeling comfortable at any other school and asked 'but schools are for children, aren't they?' He replied, 'Well it's all a learning thing. Everybody learns something new every day.'⁸⁷ It has already been noted that Ms Adams said that working alongside her daughters at the school gave her the confidence to become involved with the school, whanau, community, and marae.⁸⁸ Jocelyn Kingi, a volunteer aide and grandparent, noted that the school provided her with a chance to participate in her own culture.⁸⁹

Some elements of the community's support were questioned by Crown witnesses for their compliance with education system rules. One was the school's use in the classroom of community volunteers who were not qualified teachers. The Crown's evidence reveals that such people cannot be left alone with children unless they are registered teachers or have a 'limited authority to teach' granted by the Ministry of Education. No such authority had been sought by the school board for its volunteers, and Crown witnesses clearly believed, as a result of ERO report comments, that some volunteers were, at times, unsupervised. Mrs Koopu said that, while all but two of the people who assisted at the school were not trained teachers, they possessed all the skills needed for their roles and that she was 'always there' supporting the volunteers and the children in their programmes.⁹⁰ When claimant counsel asked Mrs Koopu what she would do, if there were no community volunteers, when people came to the school, or the phone rang, or there were some other 'disruption' that she had to deal with, she replied that she would have to rely on the older children to supervise the others while she dealt with the matter. Her preference, she said, was 'definitely' to have parental support.⁹¹

Te Iria Whiu provided an overview of the education quality issues raised by the claim. With 36 years' teaching experience before her retirement early in 1999, Ms Whiu's last position was as principal, for a decade, of the Bernard Ferguson Bilingual School in Ngaruawahia. In her time there, Ms Whiu led the school towards kura kaupapa Maori status. She is also a past president of the New Zealand Education Institute (NZEI), having held various executive positions in that organisation at both the regional and national level over a period of some 20 years. One such position was as chairperson of the Maori council of the NZEI. Ms Whiu also chaired the Waikato group, Akatea, whose members are Maori educators in management positions in

87. First hearing, tape 2A

88. Document A14, para 15

89. Document A13, para 5

90. First hearing, tape 6B

91. First hearing, tape 7B

both the primary and the secondary education sectors. That body, she noted, is acknowledged nationally as a body to be consulted in regard to Maori education.⁹² Responding to questions from the Tribunal, Ms Whiu explained that the goal of Akatea is to ‘work in partnership’, and added, ‘Who better to give a direction to Maori education than Maori? . . . We have to work together.’⁹³

Ms Whiu stated her belief that, if Maori children are going to achieve, one of the ‘key elements’ is that they must be and feel ‘culturally safe within their own environment’. She added that they must also have high self-esteem.⁹⁴ One of the fundamental components in their achievement, she said, is ‘the active support of the whanau’, which ‘can only happen when a parent accepts responsibility for their child’s education and when they feel welcome in the school at any time of the day’.⁹⁵ Later, she added that ‘The essence of Tomorrow’s Schools is to empower parents to take control of their children’s education’.⁹⁶

On the matter of developing a curriculum that addresses Maori children’s needs in terms of language and tikanga Maori, Ms Whiu said that ‘local tikanga is also very important so that the child can relate to his or her turangawaewae’. She explained further:

It is always an ideal situation where the school is situated within a Maori community. This gives the school access to a large number of people who are knowledgeable in local history, tikanga, kawa and all things Maori. It offers an opportunity to hapu and whanau members to teach their own children.

. . . In my opinion it is a ‘quick track’ method of developing high esteem in children. When children hear positive affirmations that value them as people, for example, ‘it is neat to be Maori. It is great to be Maori and I am proud to be Maori’ they are more likely to achieve. The spinoff from that is the change in attitudes towards learning within the classroom. Kura Kaupapa Maori is the best example of this. That is the key thing to remember. It is the attitudes and the learning attitudes that develop the outcomes of quality.⁹⁷

Ms Whiu emphasised that Maori children are ‘characteristically more reserved and shy than their Pakeha counterparts’. She said that Maori children often lack confidence and the ability to communicate effectively and that many have difficulty coping at school ‘in the first instance’ and in environments that ‘do not value who they are’.⁹⁸ Later, in response to Tribunal questions, she added that it is also important to remember that the parents and grandparents of today’s Maori students are ‘products of a system that failed them’. This contributes to their hesitancy about schools, she said, for they will often have unfavourable memories of their own education. This is why, Ms Whiu continued, it is necessary to encourage the parents to become

92. Document A17, paras 2–17

93. First hearing, tape 10A

94. Document A17, para 18

95. Ibid, para 19

96. Ibid, para 28

97. Ibid, paras 20, 22 (as amended orally at hearing)

98. Ibid, para 27

involved. By contrast, she noted, Pakeha parents have ‘so much confidence, they want to tell the teachers what’s right!’⁹⁹

Ms Whiu said that ‘As Maori we instinctively know what is important for Maori’ but noted that this ‘begs the question’ whether the Ministry of Education knows what is right for Maori. She acknowledged that the Ministry develops policies that it believes are in the best interests of Maori children but criticised its provision of resources for the task.¹⁰⁰ With regard to ERO’s reviews generally, she commented that ‘What is not ever recognised in these reports is [the] importance of the wairua in creating a welcoming Maori environment. That is how children, in my opinion, do well within a Maori environment with whanau support.’¹⁰¹

In response to Crown counsel’s questions, Ms Whiu made it plain that, from her own experience of ERO reviews and, through the various positions she held in which she heard other Maori principals’ views, she believed it was very important to know who were the Maori reviewers involved in particular ERO reviews. Only if she knew that, she said, would she offer a comment on the ERO reviews of Mokai school.¹⁰² She acknowledged that there has been ‘some improvement’ in the way ERO conducts reviews and then explained that her concern with ERO reviewers is really a concern with the assessment measures that the office applies:

Perhaps why I made that statement is because I often wonder, having had personal experience in reviews, the question I ask myself is, ‘What standards, what yardstick of measurement are they using?’ Now I know they have terms of reference to meet, et cetera, et cetera, and that’s basically what I think I’m referring to there. What standards are they using? Whose standards are they? Is it a monocultural society standard or is it taking into account the view of the other partner in this game? And that’s a question that continually goes through my mind with reviews.¹⁰³

2.5.3 Resources

(1) Board members’ need for training

In relation to human resources, Mrs Koopu indicated that at the root of many of the school’s governance difficulties was board of trustees members’ lack of relevant skills:

It was a mammoth task . . . [we were] calling on parents who did not have the skills to fulfil the obligations that were required . . . I say that comfortably . . . they will say themselves, ‘This is too difficult for me to understand’ . . . [That] was the reality of the situation.¹⁰⁴

Acknowledging that difficulty, the board had sought training to assist members to better provide for the governance of the school. The training received was, however,

99. First hearing, tape 10A

100. Document A17, para 28

101. Ibid, para 29

102. First hearing, tape 9B

103. Ibid

104. First hearing, tape 6A

criticised for failing to meet the board's needs. In a letter written in August 1998 by the former chairperson of the board to the Ministry's district manager, it is stated:

Last year the BOT undertook training from [a particular provider] to increase its skills at governance. Unfortunately this training was not appropriate in that the practical aspects of governing the school were not covered. The BOT has now arranged further training with [two other providers]. A more practical approach will mean the BOT is able to carry out the activities necessary to ensure appropriate governance occurs.¹⁰⁵

In response to Crown questioning, Mrs Wall elaborated on the inadequacies of the training received by the board:

What is meant is that when you attend a training session you may get a booklet . . . you have up to 1½ to two hours to take this booklet in. You are given basic things on what it is, and then you go away and are meant to implement what is in here. The difficulty the board had was understanding everything that was in here. So once you attended a training session, there was no back up . . . what they [the board of trustees] asked for was, 'Please come to the school, and show practically what you mean, how do you mean to implement it?'

What they needed was processes in simple English for them to understand with a couple of practical exercises for . . . it to be reinforced. They never got that. So what I had to do was take these books away, [and] turn it around into flip charts or to meaningful things that they could understand. That wasn't my job, that was the job of the facilitator. Yet all the contracts that were given never offered the practical support to go with it.¹⁰⁶

Mrs Koopu also mentioned a difficulty the school had in attracting parent board members who lived sufficiently close, or had the money for petrol, to get to meetings and who had the confidence to come onto the board to do what was known to be a big job.¹⁰⁷

(2) *The teaching resources and debt 'inherited' in late 1996*

The poor state of the school's teaching resources and records at the time that Mrs Koopu took up the principal's position were also the subject of evidence. Mrs Koopu said that, before taking up the position, she initiated a meeting with the board of trustees' chairperson, the relieving principal, and the rural adviser to assess the position of the school. The findings of that assessment were described as follows:

- (a) There was a number of records missing. There were no teaching plan or guidelines or student profiles. The admission and withdrawal register had not been updated and contained anomalies, for example in some instances, children were named on the admission and withdrawal register more than once.

105. Document A16(d), p 2

106. First hearing, tape 8A

107. First hearing, tape 6B

- (b) There was no inventory of resources.
- (c) The resources that were in the school at the time were largely outdated and unusable; and
- (d) The resource areas were inappropriately positioned.¹⁰⁸

Mrs Wall, who is employed as an administrator at the kura kaupapa Maori in Taupo, gave evidence that, at the end of 1996, she was involved in a 'total re-organisation of the [school] office' over a period of a month. Then, in the first six months of 1997, she did a substantial amount of voluntary work to restructure the administration of the school's records and train the volunteer administrator.¹⁰⁹ In response to Crown counsel's questions, Mrs Wall added that her mother, Mrs Koopu, had asked her to help in this way and that she did other voluntary work for the school right through to the time of her election to the board (and to the role of chairperson) in the latter part of 1998.¹¹⁰ Among the other tasks Mrs Wall undertook while not a board member were training new board members, writing a report in response to the ERO review of December 1997 and doing the school's financial accounts.¹¹¹

Mrs Wall stated that the ERO reviewers who came to the school at the end of 1997 had told her they were 'very happy with' the school's administration systems.¹¹² In the course of responding to Crown counsel's questions, Mrs Wall made plain that she strongly disputed the statement, in the final ERO report of 1998, that 'Administration systems are ad hoc'.¹¹³ That report then notes that 'The sound procedures which have been documented to ensure consistent practices for dealing with finance, should be extended to other administration responsibilities'.¹¹⁴ Once it became clear that Mrs Wall was referring to the school's 'basic fundamental processes' of office administration (including banking, mailing, and filing), Crown counsel assured her that the ERO report 'had absolutely no quibble with any of that administration'.¹¹⁵ The inference was that the ERO report's reference to 'administration systems' was a reference to the systems the school had in place to meet its overall governance responsibilities, including those in the area of financial management.

Crown counsel and Mrs Wall had a detailed exchange about the debt that the board of trustees also 'inherited' in 1997 and the strategy that was used to discharge it by the end of 1998. During the exchange, Crown counsel focused on the cause of the debt, asking several times if it resulted from the purchase of a school bus. Mrs Wall replied by emphasising the lack of financial skills on the board of trustees at the time, and reiterated the inadequacy of the training that members had received in relation to financial management:

108. Document A8, para 3

109. Document A16, paras 7–8

110. First hearing, tape 8A

111. Document A16, paras 9, 12; first hearing, tape 8B

112. Document A16, para 11

113. First hearing, tape 8A

114. Document A25(3G)

115. First hearing, tape 8A

It [the cause of the debt] was probably an accumulation of things, where the biggest thing was that the board did not understand, or have adequate training to understand, their role in financial governance. Yet, they did the best that they could.¹¹⁶

The strategy employed by the board of trustees to rectify the problem was twofold. First, an embargo on spending at the school was imposed. As part of that, an inventory of resources was carried out to prevent the school from purchasing things it already had. Secondly, as Mrs Wall put it, the board got ‘innovative and resourceful’. Among the matters mentioned in this regard were that the services of a bus driver and cleaners were obtained on a voluntary basis; that board members did not claim fees for their work; that companies were invited to provide their products to the school free of charge; and that weekly fundraising activities were held in Tokoroa.¹¹⁷

Despite the success of the strategy in meeting the board’s financial responsibilities, it seemed that the spending embargo set back the school’s ability to purchase as many new or better teaching resources as would otherwise have been possible. The scarcity of the school’s science resources was highlighted in Mr Hogan’s evidence:

The science equipment was pretty thin. The resources supplied by the MOE were pathetic for what they were asked to do and I think [that] there has to be some serious questions asked. If criticism is made of the children’s achievement and their educational ability, [then] questions need to be asked about why the MOE didn’t supply more equipment to learn, especially science.¹¹⁸

When questioned by Crown counsel on this matter, Mr Hogan accepted that the school board, rather than the Ministry of Education, was responsible for purchasing science resources, and that science was one area that required more development.¹¹⁹

Mrs Koopu highlighted more widespread deficiencies in the school’s teaching resources and the impact of this upon her role. Plainly, she believed that the embargo on spending during 1997 and 1998 was partly responsible for the situation:

I was forever saying, ‘How can you expect . . . quality delivery of quality education if you haven’t got the resources?’ I am referring to reading books . . . maths equipment. You just had to make the best that you could with what you had. . . .

Unfortunately, boards [of trustees] are expected to come out with a surplus to be good organisers of finance. Where to me its like, ‘Hey, why can’t we go into debt because we need this money?’ . . .

I accepted that the board wanted to come out with a plus. [But] it just placed more strain on us the teaching staff . . . with the resources that we had. I mean, look at them. They were your tamariki you’re talking about – giving them quality education, you didn’t have the quality resources.¹²⁰

116. First hearing, tape 8B

117. Ibid

118. Document A11, para 21

119. First hearing, tape 5A

120. First hearing, tape 6B

When Crown counsel informed Mrs Koopu that it was not correct to say boards of trustees are required to ‘come out with a profit’, she replied that there was an assumption that the failure to come out with a surplus indicated that the board was not managing the finances well.¹²¹

(3) Pupils – the small roll in 1999

The Crown’s evidence of the small and fluctuating nature of the school’s enrolments over the years is outlined in section 3.5.1. A point in issue between the parties that is not dealt with there was the cause of the low enrolments at Mokai school in 1999, for the three school terms before its closure. In 1997 and 1998, enrolments were consistently higher, and claimant evidence was that the roll dropped in 1999 (to a minimum of six and a maximum of nine pupils) because of the ‘threat of closure’. As is elaborated later in this chapter, and in chapter 3, the Minister’s ‘decision in principle’ to close the school was conveyed to the board by letter of 27 July 1998. Mrs Wall said:

During 1998 we had 23 children enrolled at our school including two of my own. The school roll dropped because of the effects of the closure on the families. We lost ten children in one term.

At the end of 1998 we received 15 enquiries from people who wanted to enrol their children at the school. Because we couldn’t give a definite answer, the kids were enrolled elsewhere.¹²²

Mrs Koopu also referred to the ‘uncertainty’ over the school’s future during 1998 as the cause of the ‘dramatic drop in student numbers and in prospective enrolments’.¹²³

Crown counsel questioned Mrs Koopu about the effects of other factors on the school’s roll, noting that low enrolments had been of concern to the community and Ministry for several years and that the board had acknowledged that the roll was affected by such matters as children moving on to secondary school or out of the district. Mrs Koopu acknowledged that a combination of factors impacted on the roll and that there was ‘nothing sinister’ in the board recognising that. She emphasised, however, in support of her view that the 1999 roll was affected by a new factor – the uncertainty over the school’s future – that ‘whanau here were saying, “Is the school going to be open?”’¹²⁴

(4) Funding issues – decile ranking, rural funding, and transport subsidies

The level of funding received by the school is clearly relevant to its resources. The claimants’ dissatisfaction with the school’s decile ranking, even after its reduction to decile 3, has already been noted. Another matter of concern to claimant witnesses was the school’s ineligibility for targeted rural funding. That funding is available to schools that are at least 30 kilometres from a trade service centre with a population of

121. Ibid

122. Document A16, paras 26–27

123. Document A8, para 25

124. First hearing, tape 6A

2000 or more.¹²⁵ Mrs Koopu explained that, when she arrived at the school, it qualified, under different rules, for a ‘shopping day’ each month. However, the new targeted rural funding rules meant that the school was no longer recognised as having particular needs because of its location. Yet, she said, the school is 28.5 kilometres from the centre of Taupo and ‘it’s not just down the road to get a bottle of milk’.¹²⁶

Also of concern to the school community were the rules governing school transport subsidies. Mrs Wall explained her understanding of the effect of those rules to be:

that MOE would not allow the [Mokai] children to travel on the bus because they were within a radius distance, even though the buses went past their door. So while that was fine for some of them, it was not fine for the rest of them. But I’ll say that the MOE did pay a conveyance allowance for the children, but not nearly as much as what it costs to run a bus to get your children [to Mokai school].¹²⁷

Evidence supplied by the Crown provides some further clarification. In the Ministry’s response to Tribunal questions, it is noted that:

There is some flexibility in Ministry policies to recognise that a desired specialist school may not always be the closest school. For example, transport funding policies are flexible to support children wishing to attend a Kura Kaupapa Maori. Currently schools offering bilingual education are not included in this policy.¹²⁸

From this, the Tribunal understands that, at least for some children travelling from outside the immediate vicinity of Mokai school to attend it, the Ministry’s transport funding policies meant that Ministry-funded buses that take other children to other schools drove past the homes of some Mokai pupils, and then past Mokai school (or a point near to the school) but could not pick up the Mokai pupils and take them to the school. Therefore, the parents’ choice of Mokai school for their children, rather than the kura kaupapa in Taupo for example, was one that had comparatively adverse financial effects. The Tribunal gained the impression from the claimants’ evidence (which did not dwell on this matter) that the transport funding rules represented one of a number of examples of Ministry rules that they believed denied funding to the school community unfairly. From the community’s perspective, the underlying purpose for which the funding is available was met by the circumstances of Mokai school, and yet it fell outside the limits of the Ministry’s policies.

In chapter 3, more detailed information is provided about the level of funding received by the school in recent years (see sec 3.5.3).

125. Document A25(27), p 5

126. First hearing, tape 6A

127. First hearing, tape 9A

128. Document A25(1), p 10

2.6 THE WIDER CONTEXT: SMALL PRIMARY SCHOOLS

The claimants relied on written evidence supplied by the Crown (largely in the form of ERO publications) and Crown witnesses' knowledge of the 'larger picture' of New Zealand schools, to support their view that the problems faced by Mokai Primary School and, in particular, their effects on the school's ability to attain and maintain compliance with national education standards, are also faced by other New Zealand schools. In closing submissions, claimant counsel summarised the claimants' position in these words:

ERO and MOE have been critical of both the Board in its management performance of the school and the Principal in her delivery of the curriculum. These criticisms should not be considered in isolation. As the ERO literature clearly indicates, Mokai Primary School was not alone in facing difficulties. The difficulties Mokai faced were the same difficulties facing a number of small and poor schools. It is submitted that this is an important contextual issue for the Tribunal to bear in mind when it considers the quality and viability arguments raised by the Crown.¹²⁹

The ERO publication to which claimant counsel gave most attention is the 1999 report *Small Primary Schools*.¹³⁰ It presents the results of an analysis of 500 ERO reports on full or contributing State primary schools. Of those reports, 400 (completed between June 1996 and August 1998) were on small schools (schools with fewer than 150 pupils). The other 100 reports, completed between July 1997 and August 1998, were drawn from all State primary schools (excluding intermediates) and formed a control group for comparison. The 400 small schools were divided into four groups, each of 100 schools, depending on their rolls. The first group, with one to 25 students, are classified as 'very small schools'. The next group, with 26 to 49 students, are 'smaller schools'. The next two groups, with 50 to 99 students and 100 to 149 students respectively, are classified simply as 'small schools'. Each of the 500 ERO reports was analysed against a range of indicators that focus on school management performance. Those indicators fall into three main groups: governance and management; curriculum management and delivery; and school climate.¹³¹

Claimant counsel's summary of the results of the study pointed out that in the areas of school governance and management and curriculum management and delivery, the performance of very small schools (with rolls of fewer than 26 pupils) was consistently below that of the control group.¹³² Indeed, the ERO study notes that the performance of very small schools was consistently below that of all 400 small schools (one to 149 pupils) in those areas.¹³³ By contrast, all small schools performed best on the 'school climate' indicators. In fact, they bettered the control group's performance on the matters of 'Effective school/community relationships' and 'Effective Board/

129. Document A29, para 2.20

130. Document A25(24)

131. *Ibid*, pp 11–12

132. Document A29, para 2.15

133. Document A25(24), p 12

Principal/Staff relationships'.¹³⁴ For very small schools, these were the only two matters in which their performance bettered that of the control group.¹³⁵

Counsel quoted the major part of the ERO study's identification of the most common issues facing all 400 small schools, observing that 'those were exactly the sort of things which ERO and the Ministry identified that were occurring on the ground' at Mokai Primary School.¹³⁶ In full, the issues are:

Boards of trustees of small schools may:

- have difficulty achieving and maintaining full membership;
- experience high turnovers;
- be deflected from their priorities by other difficulties;
- face a spiral of decline at their school in response to governance difficulties;
- face challenges through significant changes in the school roll;
- rely excessively on the principal to carry out governance responsibilities; or
- receive inadequate professional support and advice, especially on curriculum monitoring, where principals or teachers are inexperienced.

The quality of **curriculum management and delivery** in small schools may be compromised by:

- difficulty recruiting and retaining skilled and experienced staff;
- appointment of inexperienced or unqualified teachers or teachers unfamiliar with the New Zealand Curriculum;
- high turnover in sole-charge or teaching principal positions;
- the multiple roles of teaching principals or the time spent out of the classroom;
- roll fluctuations; or
- the range of student needs in multi-level classes and sole-charge schools.

Learning opportunities for students in small schools may be limited by:

- their individual needs not being identified and met because of lack of systems to facilitate this;
- issues such as transience or absenteeism;
- lack of classroom stability through the impact of roll fluctuations or transience;
- the small student roll precluding some sports and other group activities; or
- the school's isolated rural location. [Emphasis in original.]¹³⁷

In light of this information, claimant counsel asked Karen Sewell, ERO's national manager reporting services, about her statement that the majority of schools are functioning well, and there is no one particular type of school where this [the Tomorrow's Schools'] governance model has failed'.¹³⁸ Ms Sewell agreed that small schools are more likely to have problems complying with national education standards than other schools and said the most helpful parts of the *Small Primary Schools* study are its identification of examples of good practice in small schools and the discussion of possible interventions in small rural primary schools. She stated

134. Document A29, para 2.15

135. Document A25(24), pp 54-57

136. Document A29, para 2.16 (as amended orally at hearing)

137. Document A25(24), pp 15-16

138. Document A23, para 75

that, while ERO considers there are more difficulties in small rural schools, there are a number of such schools that are succeeding.¹³⁹

2.7 PROGRESS MADE IN MEETING THE CROWN'S REQUIREMENTS FOR QUALITY EDUCATION DELIVERY

2.7.1 Introduction

The responsibilities of school boards of trustees and the functions of ERO are described in chapter 3 (see sec 3.2). In brief, school boards are required by law to comply with, and to demonstrate compliance with, national education standards that cover governance (or administrative) matters as well as matters directly related to the content of schools' teaching and the monitoring of students' progress. (Those last matters are prescribed by the national curriculum.) ERO is the Government department responsible for assessing schools' compliance with the national standards and publicly reporting on any areas in which individual schools are not meeting their governance or management obligations.

Mrs Koopu stated that, in response to the audit of Mokai school's records and resources that she initiated upon her appointment as principal in October 1996, she contacted ERO and invited it to review the school. When Crown counsel suggested that ERO had decided to review the school in December 1996 anyway, Mrs Koopu replied that her reason for contacting ERO was that she 'was not going to be responsible for somebody else's doings'. While making it plain that she was not criticising the previous principal, Mrs Koopu said that the high turnover of principals in the year prior to her appointment had culminated in a state of affairs for which she would not accept responsibility.¹⁴⁰ ERO's January 1997 report on the school notes that since the previous review, in 1994, there had been six changes of principal, including four relievers, which had a negative impact on both curriculum delivery and board performance.¹⁴¹

Between 1991 and mid-1994, ERO had reviewed Mokai Primary School four times. Those reviews identified a number of areas in which the school's governance and management systems did not comply with the requirements of the State education system. After Mrs Koopu's appointment, ERO conducted three further reviews of the school, the last of which was reported on in mid-1998. Claimant witnesses and counsel drew attention to the fact that, while the January 1997 ERO report (based on the December 1996 review) identified 14 areas in which the school did not comply with national requirements, the December 1997 report identified nine such areas and the last ERO report identified six outstanding non-compliances.

The claimants clearly believed that the progress made by the school in complying with the national education standards during Mrs Koopu's tenure as principal, coupled with the benefits to the community from the approach she was taking,

139. Second hearing, tape 8B

140. First hearing, tape 6A

141. Document A25(3E)

counterbalanced the weight the Minister had placed, in the decision to close the school, on the poor quality of the education delivered there. Claimant counsel summarised the challenge to the Crown's conclusion that the quality of education delivered at Mokai Primary School was poor by pointing to these matters:

- ▶ that ERO reports measure school management performance, not individual student achievement;
- ▶ that it is the Crown's position that good school management performance in terms of governance and curriculum management is likely to have a positive effect on student achievement;
- ▶ that there are no national assessment standards against which individual student achievement can be measured;
- ▶ that ERO reports review management performance against a number of performance indicators, some of which are more critical than others to the delivery of education;
- ▶ that there is no evidence that pupils at Mokai were achieving at levels less than their average contemporaries; and
- ▶ that criticisms made by ERO about the delivery of a balanced curriculum, the planning and implementation of programmes, and the monitoring of students' progress must be contrasted against what the ERO reports of December 1997 and June 1998 actually say. In particular, the ERO report of December 1997 indicates that a balanced curriculum was being delivered, that planning and implementation of programmes were in place, and that at least some monitoring had commenced.¹⁴²

Attention was focused at the hearing on the level of compliance with national standards that had been reached by the school at the time of the last ERO review in mid-1998. The six non-compliances recorded in ERO's review report at that time are:

- ▶ monitoring student progress against the national achievement objectives;
- ▶ documenting how the national education guidelines are being implemented;
- ▶ maintaining an ongoing programme of self-review;
- ▶ consulting with the community to reach broad agreement on the desirable treatment of the health syllabus;
- ▶ developing and implementing an equal employment opportunities (EEO) programme each year and reporting annually to ERO on the extent to which the board was able to meet the programme for that year; and
- ▶ developing and implementing a maintenance programme to keep buildings and facilities in a safe condition.¹⁴³

In response to questions from claimant counsel, ERO's Hamilton and Rotorua area manager, Ian Hill, identified the first of those matters as the principal's responsibility and the other five as the board of trustees' responsibility. He made plain that ERO regarded the inadequate monitoring of student progress to be very serious because it

142. Document A29, para 2.44

143. Document A25(3G)

is a ‘fundamental’ part of education delivery that is critical for sequential learning to take place (see sec 3.4.3(2)).¹⁴⁴

2.7.2 Monitoring student progress against national achievement objectives

Mr Hogan, the principal’s release teacher at Mokai school for the early part of 1998, acknowledged that the lack of monitoring was a problem at the school and that the board should have attended to it. He then described the difficulty of the task involved and the context in which he considered the school’s non-compliance should be seen:

That [monitoring of student progress] is a behemoth. That is a monster. It’s something that we should all do all the time, and I’m not surprised to see it is not achieved. I would like to see a school where it is achieved.¹⁴⁵

Mrs Koopu acknowledged, in response to Crown counsel’s questions, that she had not complied with the national standards for assessing and recording student progress but said that she had observed each student’s development:

Some of the things that I would have lacked would have been having put down what would be the outcome of what your objective was. . . . That was pointed out to me . . . my naïve reply was ‘But I can see it.’ . . . It was about me coming to grips with all this assessment and monitoring, and a lot of time that was spent on it. I really felt that I couldn’t get into the depth of the actual teaching. Because there was so much time in assessing, I was thinking, ‘When am I going to get to really teach?’¹⁴⁶

Crown counsel asked Mrs Koopu if the progress record cards for each child were filled in on the basis of ‘progressive, ongoing work that you had from the children that you could look at and measure their progress’. Mrs Koopu replied that she believed she was able to do that and that, if she had failed in her documentation, that did not worry her because she had the parents alongside her and they knew and could see ‘where we were at’.¹⁴⁷ She also noted that the progress record cards were filled in at least twice a year and that other documentation was being set up in the form of personal profiles for each child. The intention was that these would be forwarded to the parents to enable them to gauge their child’s achievement.¹⁴⁸

Mr Hogan praised Mrs Koopu’s organisation of the children’s work and her knowledge of the level each child was working at:

Whenever I came out to the school . . . the work left by Haromi was of excellent quality and it was very easy to pick it up and work with the separate groups. She would leave individual work programmes for each student. That work I could pick up and work with and add on whatever I was doing with maths and science.

144. Second hearing, tape 10A

145. First hearing, tape 5A

146. First hearing, tape 6B

147. Ibid

148. Ibid

... She knew exactly the level the students were at and could lay her finger on the exact page of work in her workshop, her office, that all these different students were working on. She was very efficient and well organised. Haromi always showed a very powerful sense of aroha, love for the students and a very welcoming attitude towards anyone who came into the school.¹⁴⁹

Mrs Wall was asked by Crown counsel how the board knew that the core curriculum, with its seven essential learning areas (see sec 3.3.2(3)), was being delivered and that the progress of the children was being measured. She replied that, at the board's monthly meetings, the principal reported on her teaching, giving a practical demonstration using the children's work and term plans. Mrs Wall referred, as an example, to a board meeting in January where it was decided, from the principal's term plan, what the children would participate in. She also said that the board saw the children's progress records and could see improvements in the children's behaviour and work. In sum, Mrs Wall said, the board saw quality education being delivered even if it was not documented to the standards required by the Ministry of Education.

Mrs Wall also provided the example of her own son who, at the time of the hearing, was in form 1 in a Taupo school. She explained that he had attended Mokai school for three terms in 1998 and had left the school only because 'his father missed him'. At the school in Taupo he had been invited to sit tests to join the progressive class there. Out of 147 students who sat the tests, she said, there were only three Maori students. Her son 'made it into the progressive class with marks from 96 to 92'. Therefore, she said: 'I know at the end of 1998, he must have done some learning up to the national education guidelines criteria because he would have not made it into that class.'¹⁵⁰

Mr Hogan also gave his view of the quality and effects of the teaching that he saw and took part in at Mokai school during the first term of 1998. He introduced his comments by saying:

Everyone would get on with their work pretty much as individuals, as you would expect any other student to work. When you were working with one group, the others would work on their own. This meant that they developed into very confident people responsible for their own learning and that was impressive.¹⁵¹

On the matter of his own maths and science teaching at the school, which occupied most of his time, Mr Hogan was complimentary about the children's abilities and the standard of their knowledge and work:

I taught them at their entry level and their standard of maths was very good. They were certainly very sharp on all their numerals, their tables, very quick, intelligent little kids. The 7-8 year olds were well up to date with their maths, if you put them in a line of everybody, they would be good average students. The older kids in Form 1 and 2, the 10-11 year olds, were well up to date with what was happening and they would get on

149. Document A11, paras 25, 30

150. First hearing, tape 8B

151. Document A11, para 6

with their work and were completing some quite difficult work on their own. That was of a standard you would expect of a good Form 1 and 2.

When I hear the comment that the quality of education was not up to standard, I would have to seriously ask what evidence suggests that? The maths ability of these children was very good. Most of their maths was working out of books and most of it was working on their own.¹⁵²

Asked again by the Tribunal about the standard of Mokai students in maths, Mr Hogan replied that in the course of travelling to assist some 10 primary schools, which he named, he found that:

when you have the privilege of walking into a school . . . it's painfully obvious what schools are and are not doing. . . . And I have to say in all honesty that the students here [at Mokai], while they weren't perhaps at the 99 percent level of achievement, they were certainly not at the 10 percent level of achievement. And I would guess . . . that they were at a level that I would expect them to be at, and certainly would be able to hold their heads up in a national examination if you like.¹⁵³

Mr Hogan also referred specifically to one student at the school when he was there who he knew was able to 'go straight into the form 3 level . . . without too much problem'. That, he said, was indicative of the fact that she was 'actually up to scratch'. Reiterating his earlier comments, he added, 'When you say, "Were they of a good standard?", "Yes", I have to say, "Yes"'.¹⁵⁴

2.7.3 The board's response to the 1998 non-compliances

Mrs Wall produced and spoke to a 'road map' that the board of trustees had developed at the end of 1998 for meeting all the outstanding non-compliances with the national standards.¹⁵⁵ She noted that the board acknowledged the enormity of the task of achieving full compliance with national education standards and that the 'road map' identified the issues, objectives, and time-frames for the implementation of remedial action in each area.¹⁵⁶

Mrs Koopu stated that she believed the school had reached a position, by the time of its closure, where it complied with all the national education standards.¹⁵⁷ Late in August 1998, the former chairperson of the board had written to the Ministry of Education's district manager stating:

All compliances are being addressed or have already been met. The outstanding issues are not of such a nature that the school should be threatened with closure. ERO was invited into the school in the last term of 1996 by the new Principal to assist her getting the school into shape. Since that first review the school has steadily reduced the

152. Ibid, paras 19–20

153. First hearing, tape 5A

154. Ibid

155. Document A6E, attachment 3.3

156. First hearing, tape 8B

157. First hearing, tape 7B

outstanding compliances and is now in a position to have all met in the near future. Not everything can be addressed simultaneously and it is unfair to penalise the Principal and BOT [board of trustees] for bringing the school to the attention of ERO.¹⁵⁸

The bulk of the claimants' evidence of the progress made in remedying the non-compliances is contained in a letter dated 2 March 1999 from the board to the Minister of Education and in the more than 100 pages of attachments to that letter. The following paragraphs summarise that information, which was also presented in person by the board to representatives from the Ministry's Hamilton office at a meeting on 2 March 1999. Mrs Wall said that, to her surprise, the Ministry officials at that meeting did not ask any questions about the school's progress and responded in writing only to seek clarification about transport issues. She described the course of the meeting in these words: 'We presented to them. I read the covering letter out. They accepted it. We had lunch. Kua mutu.'¹⁵⁹

In brief, the claimants' evidence of the school's most recent efforts to comply with the matters identified in the 1998 ERO report is as follows:

- ▶ The letter of 2 March 1999 states, with regard to the requirement to monitor student progress against the national achievement objectives that unit and term plans have been developed and that monitoring systems have been revamped. Samples of individual student profiles and of the new monitoring and evaluations are attached to the letter.
- ▶ The same letter reveals the board's belief that it had complied with the requirement to document how the national education guidelines are being implemented. It states:

During the Christmas break period, a 'Planning Team', made up of board members, staff and advisors where necessary, undertook to develop and implement what we called foundation documents for the school. One of the core tasks was to develop and implement the National Administration Guidelines and National Education Guidelines into the school management system. I am pleased to say that the school now has in place a full set of documentation on the NAGS and NEGS relating to our kura.¹⁶⁰

The attachments to the letter include two pages that list the documentation required to comply with national administration guidelines 2 to 6; 10 pages that set out, for five of the essential learning areas, the rationale, achievement goals, and year-by-year achievement profile for each area; and (in the board's self-review documents) six pages that list the policies, procedures, and supporting documentation required by national administration guidelines 1 to 6, and 10 pages that list the 10 national education guidelines and what is needed to be done to achieve each one.

- ▶ The letter of 2 March 1999 states, with regard to the requirement that the board maintain an ongoing programme of self-review, that the board developed and

158. Document A6C, p 3

159. First hearing, tape 9A

160. Document A6E, attachment 4, p 1

completed a range of specified tasks towards this end in 1998. Attached to the letter is a 'Mokai Bilingual School: Development Plan and Self Review Plan', which spans some 40 pages.¹⁶¹

- ▶ The school's view that it had complied with the requirement to consult with the community to reach broad agreement on the desirable treatment of the health syllabus is recorded in a letter dated 24 August 1998, from the then chairperson of the board to the Ministry's district manager. It states:

The community has been supplied with a copy of the full health syllabus and has been asked to comment. The panui also indicated that a full hui would be held if anybody wished to discuss this further. The health syllabus has been accepted as set out by the Principal.¹⁶²

- ▶ With regard to the requirement to develop and implement an EEO programme each year and to report to ERO on the extent to which the board was able to meet the programme, the attachments to the letter of 2 March 1999 contain, in a section headed 'Examples of Self Reviews Completed', five pages which suggest that a policy had been drafted, and perhaps approved by the board, in February 1999. One of the five pages is a Ministry circular to all State and State-integrated schools, dated 26 November 1998, which reminds boards of their EEO responsibilities and records that 'significant numbers of schools' are experiencing difficulty in meeting the annual reporting requirement and, to this end, a standard report form is attached.
- ▶ On the final matter, the development and implementation of a maintenance programme to keep buildings and facilities in a safe condition, the board chairperson's letter of 24 August 1998 states that compliance has been achieved. It notes that audits are taking place and that the matter is reported on monthly at the board's meetings.¹⁶³ Mr Osborne gave evidence that, in 1998, he had been co-opted to the board as property manager and to assume responsibility for health and safety matters.¹⁶⁴ He had attended one training seminar 'run by the MOE . . . at a pretty fast pace' but his previous work experience meant that he understood what was expected of a property manager. Despite that, he noted that he had found it difficult to 'figure out exactly what it was that MOE wanted and how to meet the compliances'.¹⁶⁵

2.7.4 The meaning of the ERO reports

The board's understanding of the ERO reports on Mokai school contributed to its view that, by the time the school was closed, it had achieved at least a substantial degree of compliance with all national education standards. Claimant counsel

161. Ibid, sec 4

162. Document A16(d), p 3

163. Ibid

164. Document A15, para 6

165. Ibid, para 7

questioned Mr Hill about the apparent contrast between the comments made, and compliances recorded, in the most recent ERO reports and Mr Hill's criticisms of the school since 1991.

One ERO report extract that was discussed was the section in the December 1997 discretionary report that states:

3.5 Provide a balanced curriculum in accordance with the national curriculum statements. . . .

Compliance has been achieved

All essential learning areas are being taught based on curriculum statements or syllabi. There is evidence of this in long term and daily planning, in student's books and in work on display around the classroom.

The principal has obtained copies of all statements and syllabi and is planning from these documents. Her knowledge and understanding of the mathematics and science curriculum statements has increased following considerable assistance from advisors. This is reflected in the planning and science and mathematics programmes. Training in the implementation of the English curriculum statement is arranged for early 1998. In the meantime, the principal is making a genuine effort to plan and implement programmes from this document.

A draft curriculum delivery statement has been developed. The Principal/teachers are directed to deliver a balanced curriculum in accordance with the National Education Guideline requirements.¹⁶⁶

When asked how the opening statements in that section squared with Mr Hill's criticisms of the school's curriculum delivery (see sec 3.4.3), he replied that the provision of a balanced curriculum is a planning exercise and that, while there had been long-term planning done, there was no evidence of its implementation. Mr Hill was then referred to his written evidence, where he stated that the learning programmes at Mokai were not based on current curriculum statements and there was no school scheme and no implementation plans.¹⁶⁷ Mr Hill said that this criticism was consistent with the above quoted passage from the ERO report. He explained again that his point was that, while there was evidence of overview or long-term planning, the implementation of the plans was not happening in the day-to-day operation of the school. Therefore, the intention was not being implemented.¹⁶⁸

Mr Hill was then referred to the next section of the December 1997 ERO report, which states:

3.6 Plan and implement programmes based on the underlying principles, stated essential learning areas and skills, and the national achievement objectives. . . .

Compliance has been achieved.

A sound beginning has been made towards addressing this requirement. A recently developed draft curriculum delivery policy provides direction for specific learning

166. Document A25(3F), p 3

167. Document A24, para 22

168. Second hearing, tape 10A

outcomes to be developed for all learning programmes. This is being implemented in the majority of learning areas.

The principal has recently written some unit plans, skilfully integrating a number of essential learning areas into one theme. For the most part, learning outcomes are stated for each learning area integrated into the study. The challenge now is to plan units which identify learning outcomes for all essential learning areas, not just those integrated into units of work. This should include learning outcomes for physical education, health education, music, and all aspects of language (including reading).

There is a strong focus on attitudes and values in all planning. Learning outcomes are stated for these in some of the units planned. Objective assessment of these should enable the principal to make informed judgements about how successful the school is in the continued thrust to improve students' self esteem.¹⁶⁹

Claimant counsel pointed out that the first lines of that section say that compliance has been achieved with both planning and implementing learning programmes and yet Mr Hill had criticised the school in both these regards. He replied that the next paragraph in the section reveals what ERO found, namely that there was no school scheme – only an overview with 'no next steps'. Mr Hill explained that is why the ERO report says 'a sound beginning has been made' in this area in the 12 months since the previous accountability report. Mr Hill also explained that the above-quoted section of the ERO report acknowledges the work done, but does not say that the school is 'there' yet. ERO's remaining concerns, he said, are indicated in that section of the report, as well as in the previous section (section 3.5, quoted above), where it is said that there is still much to be done.¹⁷⁰

The Tribunal also questioned Mr Hill about the effectiveness of the most recent ERO reports for alerting the Mokai school board to the seriousness of the continuing non-compliances, and therefore their likely impact on the closure process that was in train at the time. He acknowledged that the language and structure of the discretionary reports may be confusing to the lay person.¹⁷¹ Mr Hill said that the summary at the start of each report, and the brief concluding statement at the end, were provided specifically to assist boards' understanding of the report. As well, the purpose of the 'exit meeting' that takes place between the reviewers and the board is to tell the board about the issues ERO thinks exist and to go over them.¹⁷² As well, since 1998, ERO has produced an 'open letter to the community' about each review report, providing an overview of its main points. Such a letter was written about the last ERO review of Mokai school.¹⁷³

Ms Sewell was asked by claimant counsel why the ERO reports, which counsel described as 'quite positive' in their tone, did not spell out more clearly the Crown's concerns about education quality at Mokai school. She replied that the State Sector Act 1988 prevents ERO from saying anything that interferes with the employment relationship between a school board and principal. While there were times, she said,

169. Document A25(3F), p 4

170. Second hearing, tape 10B

171. Ibid

172. Ibid

173. Ibid

when the board could have ‘read into’ ERO’s reports what they wanted to see there, she emphasised that every report referred to the absence of self-review processes (which she described as a key to quality education delivery) and to the fact that the curriculum was not being properly delivered. Ms Sewell said that ‘the way we described the curriculum weaknesses would have been clear to professionals and should have been clear to the board [of trustees] but may not have been clear to the community’. The addition of the ‘community pages’ to each report is now done, she explained, so that ‘the messages get through’. Ms Sewell also said that the exit meeting between the ERO reviewers and board would make clear ERO’s view of how things were going at the school.¹⁷⁴

In his closing submissions, claimant counsel identified, ‘probably more as an aside’, three issues that arise out of the language used in the ERO reports on Mokai school:

- (a) Whether the reports are written in such a way that all recipients of the reports will understand what is being said.
- (b) If the reports are identifying serious issues of non-performance perhaps they need to be more clearly spelt out. If a serious issue is highlighted but couched in positive language, there is a danger that a mixed message might be received by the recipients of the report.
- (c) If certain areas of non-compliance are more critical than others, then that should in some way be identified for the recipients.¹⁷⁵

2.8 THE AVAILABILITY OF ALTERNATIVES TO CLOSURE

The claimants’ position, in brief, was that the support and training provided to the school was unsuitable yet the Ministry of Education, which knew about other options for strengthening the school’s performance, did not give sufficient attention to utilising them. Instead, it was asserted, the Ministry pursued the closure of the school with too narrow a view of the issues involved.

In large part, the claimants’ evidence of possible alternatives to the school’s closure was provided through Crown witnesses’ answers to claimant counsel’s questions. The following paragraphs outline the evidence that was given about:

- ▶ statutory interventions, other than school closure, that are available in respect of a school that is in difficulty; and
- ▶ the school-initiated options, other than training and support, that are available and that, the claimants contended, the Ministry should have explored with the school community.

In chapter 3, an outline is presented of the Crown’s evidence that the training and support provided to Mokai Primary School was adequate (see sec 3.7).

174. Second hearing, tape 8B

175. Document A29, para 2.45

2.8.1 Statutory interventions

(1) *Appointment of a commissioner*

Section 107 of the Education Act 1989 provides that the Minister can dissolve a board of trustees and appoint a commissioner in its place when the Minister is satisfied that the board should not continue in existence because:

- ▶ of mismanagement, dishonesty, disharmony, incompetence, or lack of action (either generally or in relation to any particular matter or matters); or
- ▶ it has taken or intends to take an unlawful action, or has failed or refused, or intends to fail or refuse, to take an action required by law (s 107(1)(a), (b)).

Kathleen Phillips, the Ministry's senior manager responsible for six management centres (including the Hamilton office), told claimant counsel that, while Mr Kitto would know the details, to the best of her knowledge the appointment of a commissioner had not been considered in relation to Mokai Primary School.¹⁷⁶ More generally, she referred to the 'tight set of criteria' that define the circumstances in which a commissioner can be appointed and said the commissioner's role is to work with a community to generate a new board of trustees. It was generally implicit in a commissioner's appointment that the school would continue, Mrs Phillips said, but the new board of trustees might look at closure of the school as an option. As to whether the statutory criteria for appointment of a commissioner were present in the Mokai situation, Mrs Phillips referred again to the commissioner's role of generating a new board and said that it might be 'really difficult' to generate a board and this factor would need to be balanced against other factors.¹⁷⁷ A summary of Ministry policies supplied to the Tribunal states that a commissioner's appointment 'will only be practicable in situations where an election is likely to give rise to a different, and more capable, group of trustees than were originally on the board'.¹⁷⁸

Mr Kitto said that there had been consideration given by the Ministry and ERO to appointing a commissioner for Mokai Primary School but, to his knowledge, this had not been discussed with the school board. He added that the discussion between the Ministry and ERO on the matter was informal and nothing was written down.¹⁷⁹

The outcome of the Ministry's and ERO's consideration of a commissioner for the school, Mr Kitto indicated, was that the agencies were uncertain that the statutory criteria for an appointment were satisfied. He was referred to section 107 of the Education Act (see above) and asked why the agencies doubted that the Mokai school board fitted the descriptions given there. Mr Kitto replied that because the concerns related to the board not sustaining action, it was not clear that a commissioner's appointment was authorised. And, as for whether the board was incompetent, it needed to be given the benefit of the doubt.¹⁸⁰ Agreeing that the appointment of a commissioner is a less final step than school closure, Mr Kitto said it is also a totally

176. Second hearing, tape 3B

177. Ibid

178. Document A25(1), p 25

179. Second hearing, tape 5B

180. Ibid

different step and mentioned three considerations relevant to the decision not to recommend the appointment of a commissioner for Mokai school.

The first consideration was that the school had a low roll as well as other viability issues. The second ‘critical thing’, Mr Kitto said, is that a commissioner is expected to work towards the election of a new board of trustees whereas the evidence showed that there was a limited number of people available to be on the Mokai board and that the board was taking steps to try to meet the requirements on them. The other consideration, he said, was that:

all of us are aware . . . of the particular nature, character, of this community. There’s a consideration that we often have in these sorts of circumstances . . . that comes under the heading of ‘tino rangatiratanga’ . . . Is it better for the people to work through these issues themselves or do their best to achieve them, or do we impose somebody from the outside – assuming that someone acceptable can be found? We have considerable discussions about these sorts of things. We don’t lightly move the idea that a commissioner may be what is going to save a particular situation.¹⁸¹

Ms Sewell was asked about the role of ERO in recommending a commissioner or another intervention authorised by the Education Act. She explained that ERO can recommend to its Minister that he or she recommend to the Minister of Education that a commissioner or financial management specialist be appointed. Ms Sewell added that ERO had taken that course from time to time in relation to the financial management specialist option. When asked whether ERO could have recommended a method of resolving the school’s problems in its reports, Ms Sewell said that maybe ERO could have done that but indicated that, each time there was a review, there was some significant action promised, or recently taken, that made it difficult for ERO to assume that role.¹⁸²

To illustrate that point, Ms Sewell referred to the 1994 ERO review and said a commissioner was not recommended at that time because a new principal had been appointed and the hope and expectation was that she would make ‘the difference that everyone was seeking’. Then, in January 1997, there was another new principal and, in December 1997, a new board chairperson. She continued:

Sometimes it’s really clear when you go to a school, when you carry out a review, that there’s no option but to recommend a commissioner, but it’s not a decision that we would take lightly because it’s a taking away . . . of a community’s right, at least for a time, to manage its own educational outcomes. The decision [about Mokai school] was by no means clear cut at any stage in this process given the things that were said. I suppose each of these times when something new was happening we hoped that the board statements of intent would be translated into practice because of all the changes in personnel.

I think I should also say from reading all of the reports . . . it seems to me that I think there was a further consideration being applied even if it wasn’t stated overtly. It seems to me that there was an underlying concern that the recommendation of a

181. Second hearing, tape 5B

182. Second hearing, tape 8B

commissioner might damage the mana of the board and the community, who, whether they succeeded or not, were significantly trying to meet the needs of their students. . . . So I think in looking at Mokai as Mokai, rather than Mokai as just any old school, that we tried to take that into account too. In looking at that, I suppose we would have thought that damaging the mana of the community [and] the board to that extent might have made a commissioner's job very difficult.

In hindsight . . . I think they were the right decisions . . . [with] two new principals and a new board chairperson and their will to improve that. We wanted to give them the opportunity to do so.¹⁸³

In closing submissions, claimant counsel stated, in relation to Crown witnesses' concerns for the impact of a commissioner on the Mokai school community:

Counsel accepts that might be a fair argument when considered in isolation. In this case however the Crown chose closure which is far more final than the appointment of a Commissioner. If the Crown's case is that the appointment of a Commissioner would have impacted upon the tino rangatiratanga of Mokai where does that leave the decision to close? Closure in that sense completely removes the tino rangatiratanga of the Mokai community, which it is submitted the Treaty principles do not permit.¹⁸⁴

(2) Direction to engage specialists

By an amendment to the Education Act in December 1998, the Secretary of Education is authorised, when satisfied that a board is not meeting its statutory obligations, to direct the board to engage, for a specified period, specified people or organisations acceptable to the secretary who can provide the board with appropriate assistance (s 64A(1)). There was no evidence that this recently created intervention had been considered in relation to Mokai school. Commenting more generally in response to claimant counsel's questions, Mrs Phillips said that, in the tertiary education area, there is power to appoint someone onto a board – a ministerial monitor – to give information back to the Ministry and that perhaps section 64A could be used in the future to similar effect.¹⁸⁵

Ms Sewell said that ERO had used the financial support provision (s 81B) to prevent things getting to a critical stage and had also, before the enactment of section 64A, recommended the appointment of independent people, such as mediators and facilitators. She said that these things were not recommended for Mokai because, for the most part, that sort of support was already in place.¹⁸⁶

Mr Kitto noted that section 64A is broader than section 81B, but that both provisions require a board to pay for the services engaged. On this, he commented:

it seems a little illogical to say, 'Well, we know you haven't any money, but we're going to require you to spend some of it that you may or may not have to a particular person that the Secretary [of Education] is going to appoint to do certain parts of the work'.¹⁸⁷

183. Ibid

184. Document A29, para 3.53

185. Second hearing, tape 3B

186. Second hearing, tape 8B

187. Second hearing, tape 5B

2.8.2 School-initiated options

Claimant counsel also asked Crown witnesses about other options for educating children at Mokai that could have been initiated or pursued by the school community. Underlying these questions was the claimants' view that, as the 'gatekeeper' of the information about such options, the Ministry should have told the school community about them and assisted with the implementation of any that were appropriate in all of the circumstances.

The effect of the Crown witnesses' responses was that, apart from improving the quality of governance and management of the school, any actions that might have been pursued by the school in an effort to ensure the children's education in Mokai – such as satellite schooling – were unlikely to have been available to it in the circumstances that prevailed in recent years. One factor working against Mokai becoming a satellite school, it seems, is that funding policies effectively require a roll at the satellite school sufficient to generate an additional teacher for the host school. Satelliting also depends on the availability of a willing host school. Crown counsel observed in closing submissions that the Ministry has no authority to 'impose' a satellite arrangement on a host school: the arrangements must be agreed between the schools.¹⁸⁸

(1) Educational development initiative

The Crown referred to Mokai school having considered an 'educational development initiative' in 1993 or 1994.¹⁸⁹ The Tribunal inferred that the Crown considered that the school could have, and should have, pursued such an initiative at or after that time. The information provided about the educational development initiative policy explains that, whenever the provision of education in an area is 'rationalised' (by the closure of a school or the merger of schools, or by some other reorganisation of existing arrangements), the boards involved can negotiate with the Ministry 'enhancements from the savings of the rationalisation to benefit the education of students in their 'new' schooling arrangement(s)'.¹⁹⁰

From the evidence, it seems that Mokai school considered such an initiative near the time, in late 1993, when its then principal wrote to the Ministry asking for information about the school closure process. The response from Mr Kitto, on 22 September 1993, enclosed standard information about the procedures involved that included a brief statement about the educational development initiative policy.¹⁹¹ Mr Kitto said that, in March 1994, he had attended a meeting at the school with the then principal and kuia Marina Jacobs to discuss the closure process. That would have provided the opportunity for further information to be supplied about the policy.¹⁹²

Plainly, the school did not pursue an educational development initiative at that time or later. It seems to the Tribunal (in light of the viability of nearby schools –

188. Document A30, para 137

189. Second hearing, tapes 8B, 14B

190. Document A25(1), p 25

191. Document A25(20)

192. Second hearing, tape 5B

except for Tihoi school, which was closed in 1996) that Mokai school could have relied on such an initiative only if it were prepared to close. The reasons for the school community's opposition to that possibility are at the heart of the present claim. Therefore, to the extent that the Crown may have considered the school community to have been unreasonable, or parochial, for not pursuing an educational development initiative in 1994 or later, the community's 'defence' would involve many of the grounds on which, in this claim, it challenged the Crown's conduct.

(2) *Other options, including satellite schooling*

On the matter of the information provided by the Ministry to the Mokai community about any other options for educating the children in Mokai, Mr Kitto said that, at all the meetings he attended with the school community, he provided information as requested. However, he said, it became clear (from at least late 1995, it would seem) that the school community did not want to discuss options that would involve closing the school and so he did not discuss those, including satellite schooling and school mergers. It was not the sort of information he was asked to provide, he said, and it would be illogical in the circumstances to discuss options that may depend on school closure. When asked if the Ministry, which has the necessary information, has a responsibility when it is concerned about a school to inform the school community of all the alternatives that exist to sending their children to another school, Mr Kitto said:

I don't believe there is any obligation on the Ministry to do that. Every situation is different. Sometimes those sorts of questions may be asked of us. . . . in my experience never have they been asked of me in the closure of 11 or 12 schools.¹⁹³

Rawiri Brell was asked by the Tribunal to clarify the situation regarding Mokai school becoming a kura kaupapa – a matter referred to by the claimants as a longer-term aspiration for the school. He was not sure of the details about Mokai and the kura kaupapa in Taupo but said that it is difficult to 'navigate the way round the education system and get the right information'. The Ministry, he said, 'has some responsibility for tidying that part up'. Mr Brell then explained that the satelliting option has been used by the kura kaupapa Maori movement to overcome the fiscal and resource constraints that exist in establishing a new kura kaupapa.¹⁹⁴

In light of all the evidence, the Tribunal asked Crown counsel during her closing submissions whether there is any way that a New Zealand community can have a school if it proves unable to elect a board of trustees with the necessary skills to perform the role required of it. Counsel replied that a number of schools have been closed because their boards have failed to 'get their governance, management, and curriculum delivery together'. She then said that 'shared boards' can be arranged and referred to Mokai school having looked at an educational development initiative at one stage.¹⁹⁵

193. Ibid

194. Second hearing, tapes 2B, 3A

195. Second hearing, tape 14B

The reference to shared boards is to the possibility of school boards combining. Section 110 of the Education Act provides that, when the Minister is satisfied that the boards concerned have consulted the parents and that, in relation to each school, most parents favour combining the schools' boards, the Minister can establish a combined board for those schools. Therefore, this is a school-initiated action which depends on cooperation between or among two or more schools. Another school-initiated and cooperative action provided for by the Act is the merger of schools (s 156A). As Mr Kitto indicated, merger results in the continuation of one school and the closure of the merging school or schools.¹⁹⁶

The claimants' evidence suggested that such options as combining boards or merging with another school were not suitable for Mokai school because of the importance to the community of the children receiving an education in te reo and matauranga specific to Mokai. The Crown's understanding of the claimants' reasons for wanting to keep Mokai school open was challenged most directly in connection with the Ministry's view of the alternative schools available to Mokai pupils. The Crown's response to that challenge is outlined in chapter 3 (see sec 3.9.5).

2.9 CONSULTATION DURING THE CLOSURE PROCESS

The claimants criticised the consultation process undertaken by the Ministry for not sufficiently engaging the school community in discussion about the range of issues relevant to the school's future, including possible alternatives to closure that might preserve and strengthen the delivery of education in Mokai. Underlying that criticism is the claimants' view that the Crown's prior understanding of the school's unique value was inadequate and so could not be relied upon to remedy the deficiencies in the consultation process.

Sections 154 and 157 of the Education Act 1989 require three major steps to be taken in the process of closing a school. First, the Minister needs to be satisfied, after consulting the board of the school, that the school should be closed (s 154(1)). The point at which the Minister is satisfied was referred to as the point at which a decision in principle is made to close the school. Once a decision in principle is reached, the Minister may, by written notice ask the board if it has any arguments in favour of the school staying open (s 154(1)).

The second step is that the Minister must consider any arguments made by the board within 28 days after it receives written notice asking for them. After that, the school may be closed as from a specified day, which is effected by notice in the *Gazette* specifying the day on which the school will close. On that day, the school ceases to be established (s 154(2)). The other step that must be taken in the closure process is that the boards of all State schools whose rolls might be affected by the school's closure must be consulted (s 157(3)(f)).

196. Second hearing, tape 5B

A detailed chronology, and Crown witnesses' accounts, of the consultation engaged in before the closure of Mokai school is presented in chapter 3 of this report (see sec 3.9). The two most important dates involved are:

- ▶ 14 November 1995 – when Mr Kitto delivered to the school community a letter from the Ministry's acting senior manager of national operations dated 7 November 1995. The letter informed the school board that it had been decided, under section 154 of the Education Act, to consider the closure of the school and that the Hamilton office of the Ministry had been directed to consult with the board; and
- ▶ 27 July 1998 – when the Minister wrote to the school to convey the decision in principle to close the school and ask for any arguments it had in favour of the school staying open.¹⁹⁷

Claimant counsel challenged the adequacy of the consultation on two bases: that it did not comply with the requirements of the Education Act or with the principles of the Treaty of Waitangi. While it is not the Tribunal's task to determine the legality of the consultation undertaken by the Ministry of Education, all the claimants' allegations of deficiencies in the consultation process are relevant to our assessment of its consistency with Treaty principles. In summary, those allegations were that:

- ▶ any meetings between the Ministry and board before November 1995 could not be relied on the Ministry as part of the consultation process because, under the Education Act, that process commenced with the delivery of the letter on 14 November 1995;
- ▶ a meeting in March 1996 could not be relied on because it was 'historical' by the time the decision in principle to close the school was made in July 1998;
- ▶ in the period between November 1995 to July 1998, there were no meetings specifically dedicated to the issue of closure;
- ▶ in that same period, on the occasions where the issue of closure was raised, it was raised in the context of discussions about other matters and the discussion was not of a quality to generate 'ideas, solutions and alternatives to closure';
- ▶ the Ministry did not consider, before the decision in principle to close the school was made, whether alternative bilingual education was available to Mokai school students; and
- ▶ after the decision in principle was made, the Ministry did not investigate options other than closing the school but merely sought and recorded the board's views on particular matters about which it wanted clarification.¹⁹⁸

Claimant counsel summarised the claimants' position in this way:

Clearly the closure of Mokai Primary School involved Treaty implications – that is local autonomy (tino rangatiratanga), te reo Maori and matauranga Maori.

Therefore the Crown was under an obligation to consult and in doing so, have a fully fledged discussion about all alternatives and options in an attempt to find an agreed position in accordance with Treaty principles.

197. Document A7D; doc A6B

198. Document A29, paras 2.89–2.95, 3.45–3.56

It is submitted that the Crown failed to do so. No such meetings appear to have been specifically designated on the topic of closure, no generation of alternatives and options were made. It appears that the Crown simply took on board the views of the Mokai community and Board that they did not want the school to close, consider[ed] that there was bilingual education within the local area and relay[ed] that on to the Minister. In those circumstances it is submitted that the consultation with regard to Treaty principles was inadequate and in breach of the Treaty principles.¹⁹⁹

In chapter 3, the outline of the Crown's response to this challenge includes Crown witnesses' answers to the questions put by claimant counsel about the elements of the consultation process that the claimants criticised. That outline serves to highlight the points of difference in the parties' quite detailed evidence about all the matters listed in the bullet points above. Therefore, we refer readers to section 3.9 for that further information.

2.10 THE SCHOOL LAND

In the amended statement of claim, the claimants sought as a recommendation (but only if the Tribunal did not recommend reopening Mokai Primary School or using the school facilities for a new educational institution) that the land upon which the school is situated 'be returned to the successors in title of the original donors'. Also sought was a recommendation 'that all assets seized by the Ministry of Education pursuant to the closure process including school buildings be transferred to the successors in title of the original donors of the land'.²⁰⁰

At a meeting with claimant and Crown counsel during the hearing of claimant evidence, and in a telephone conference before the hearing of Crown evidence, it was agreed that the history of the land's acquisition was uncertain and that the research needed to clarify the matter was unlikely to be completed in time for the January hearing of the claim. Both counsel agreed to pursue that research independently of the other issues raised by the claim and, only if necessary (as a result of the Tribunal's findings and recommendations or the parties' inability to agree on the land's history, or both) to pursue the matter before the Tribunal at a later date.

In closing submissions, Crown counsel noted that there is a statutory process (under the Public Works Act 1981) for dealing with the school land and that the former Minister of Education had assured the school board that the process would be followed. As for the school assets, the Crown objected to the claimants' assertion that these had been 'seized' by the Ministry and referred to the Education Act's provision, in section 154(3)(b), that all assets, liabilities, and debts of a school board become, upon the school's closure, those of the Minister.²⁰¹ In his closing submissions, claimant counsel amended the recommendation sought in relation to the assets but

199. Document A29, paras 3.54–3.56 (as amended orally at hearing)

200. Claim 1.1(b), para 40

201. Document A30, paras 132–134

only so as to include, as an alternative recipient of the school assets, ‘such legal entity as agreed by the Crown, claimants and the wider Mokai community’.²⁰²

We observe that, if the recommendations made in chapter 4 of this report are adopted, they will have the effect of rendering irrelevant any remaining doubts about the history of the school land and the status of the school’s assets. If any other outcome should eventuate and the status of the school land is contested between the parties, we would hope the Public Works Act process would be utilised to settle the matter. However, on the basis that the issue was raised and deferred in this claim, we consider that the claimants can return to the Tribunal should they believe that to be necessary.

As for the school assets, we note that the provision of section 154 of the Education Act that vests school assets in the Minister assumes that a school has been closed lawfully. The determination of that matter is outside the Tribunal’s authority. Therefore, should our recommendations in chapter 4 not be adopted and the matter of the school’s assets remains in contention between the parties, it would seem that court action is the only avenue available to resolve the matter.

2.11 THE EDUCATION ACT CLAIM

In the statement of claim and claimant counsel’s opening submissions, it was claimed to be inconsistent with the principles of the Treaty that the Education Act 1989 does not contain a ‘Treaty clause’ requiring its implementation to be consistent with the principles of the Treaty.²⁰³

In his closing submissions, claimant counsel withdrew that claim. Instead, it was observed that the absence of a Treaty clause in the Education Act leaves the claimants, and other Maori, in the position of having to resort to the Waitangi Tribunal to challenge Crown conduct on the basis of its alleged inconsistency with the Treaty. Further, it was submitted that, because the education sphere is so important to the retention and active protection of te reo Maori and matauranga Maori, and the Crown is committed to those ends, ‘then there can be no harm’ in amending the Act to include a Treaty clause. The claimants then sought as a recommendation from the Tribunal that the Education Act be amended to include a clause preventing the Crown from acting in a manner inconsistent with Treaty principles.²⁰⁴

Crown counsel was invited to make written submissions in response to the claimants’ amended position because no warning of that amendment had been given and the Crown’s closing submissions had been prepared on the basis that the claimants would adhere to their original Treaty arguments. The Crown submitted a memorandum dated 20 January 2000, to which claimant counsel responded by memorandum dated 21 January 2000. Crown counsel then submitted a further memorandum, dated 23 February 2000.²⁰⁵

202. Document A29, para 5.3.3

203. Claim 1.1(b), paras 21–24; doc A18, paras 3.1–3.22

204. Document A29, paras 4.8–4.12, 5.3.4

205. Papers 2.23–2.25

The Crown's response to the claimants' amended argument is that the Tribunal lacks jurisdiction to consider the question 'Where is the harm in including a Treaty clause in the Education Act 1989?' Observing that section 6 of the Treaty of Waitangi Act 1975 confers jurisdiction in respect of allegations of inconsistency with Treaty principles, Crown counsel submitted that, because claimant counsel withdrew the allegation that the Education Act itself is inconsistent with Treaty principles, the question he posed in its place is not one upon which the Tribunal is entitled to make findings or recommendations.²⁰⁶ In addition, the urgent nature of the hearing of the claim and the fact that the question raises matters of 'high constitutional import and belongs in the arena of high policy' would make it inappropriate for the Crown to enter debate on those matters, even if the Tribunal had jurisdiction.²⁰⁷

The response from claimant counsel acknowledges that the Education Act claim 'was not sustainable' but submits that, as a commission of inquiry, it is for the Tribunal to decide whether or not there has been a breach of the principles of the Treaty and, if so, to recommend the action that should be taken to remove the prejudice.²⁰⁸ Crown counsel's further response argues that the Tribunal's powers as a commission of inquiry do not enlarge its jurisdiction but relate only to its procedures.²⁰⁹

Our approach to this matter is guided by our awareness of the very large implications of the question posed by claimant counsel. As Crown counsel suggested, the question indirectly challenges the constitutional position that the Treaty of Waitangi is not enforceable in the courts without express legislative incorporation of its principles. That position, which has been debated in the public arena in the past and will, no doubt, continue to be debated in the future, requires far greater consideration than the Tribunal can give it. And that is especially the case in the context of an urgent hearing of a claim relating to one school in the primary education sector, which is just one of the sectors in the education sphere, which is, in turn, just one of the many spheres of Crown activity, all of which are subject to the constitutional position.

We observe that an inevitable consequence of the constitutional arrangements is the 'prejudice' identified by claimant counsel – that Maori individuals or groups may be compelled in the education sphere, and in other spheres, to resort to the Tribunal to challenge contemporary Crown conduct for its inconsistency with the principles of the Treaty. The conferral of the right to resort to the Tribunal for those purposes was, however, the primary purpose of the Treaty of Waitangi Act 1975, which was only later amended (in 1985) to enable challenges to be made to past Crown conduct, back to 1840.

Accordingly, we have declined claimant counsel's invitation to make the recommendation sought in relation to the Education Act 1989, even although, as we discuss in chapter 4, we consider that the Crown's conduct in relation to the closure of Mokai Primary School was not consistent with the principles of the Treaty of Waitangi.

206. Paper 2.23, paras 7–13

207. *Ibid*, para 14

208. Paper 2.24, paras 2–7

209. Paper 2.25, paras 3–4