

CHAPTER 3

THE CROWN'S RESPONSE

3.1 INTRODUCTION

Counsel for the Crown interpreted the claim as focusing on the question:

whether there is an obligation on the Crown, through the Minister of Education, to keep open a small sole-charge school in a rural, and predominantly Maori community, in circumstances where the education being provided by the school is inferior to the quality of education to which they have an entitlement, and where there is an alternative education available within a reasonable distance of the homes of the children who attend the school.¹

The Crown's defence of the closure decision focused on the two major concerns the Minister had with Mokai Primary School:

- ▶ the quality of the education being delivered there; and
- ▶ the viability of the school.

To a very large extent, the concerns about education quality arose from the reports of ERO on the seven reviews of the school conducted between late 1991 and mid-1998. This chapter first presents information, drawn from the Crown evidence, that provides the immediate context for understanding the roles and responsibilities of ERO and school boards of trustees (see secs 3.2–3.3). Then it outlines the Crown evidence of:

- ▶ the causes and nature of the problems with the quality of education provided by Mokai Primary School (sec 3.4);
- ▶ the further factors that called into question the school's viability (sec 3.5);
- ▶ the kinds of support available to New Zealand schools (sec 3.6);
- ▶ the appropriateness of the training and support provided to Mokai Primary School and of the school's closure (secs 3.7–3.8);
- ▶ the consultation undertaken as part of the closure process (sec 3.9); and
- ▶ the Crown's policy, in the State primary school sector, for protecting the taonga of te reo and matauranga Maori (sec 3.10).

1. Document A26, para 10

3.2 THE EDUCATION REVIEW OFFICE

The Education Review Office (ERO) is the Government department responsible for independently evaluating and reporting on the quality of educational services provided by all registered New Zealand schools. It is separate from the Ministry of Education, which has responsibility for the development and implementation of education policy across all State-funded education sectors. ERO shares common objectives with the Ministry, however, and works with it in the collective interest of government. All ERO reports on schools are copied to the Ministry and ERO may make direct recommendations to the Ministry. Since the establishment of ERO in 1989, responsibility for the separate ministerial portfolios of education and education review has very often been vested in one Minister.²

The primary objective of ERO is to provide reliable, accurate, and useful evaluations that support and improve the quality of decisions taken by key education stakeholders. To that end, ERO officers review every school on a three to four yearly basis, unless the circumstances at particular schools justify their more frequent review. The ERO report that follows each review evaluates the school's implementation of government education policies and the quality of education provided at the school. It also highlights areas where the school's accountability and education quality would be improved by direct intervention or by changes in its use of training or other services.³

3.2.1 Review criteria

There are no national measures of primary school pupils' educational achievements. In their absence, ERO reviews focus on the performance by boards of trustees of their obligations to govern and manage the delivery of education. These obligations, defined by the school charter and the national education guidelines (see secs 3.3.1–3.3.2), are extensive. As a senior Ministry of Education officer said at the hearing, the role of a school board of trustees in New Zealand 'is no sinecure', for it involves a high level of responsibility for the provision of a quality education to children of the community.⁴

Underpinning ERO's review criteria is the understanding that there is a correlation between the quality of a school's governance and management systems and the quality of the educational achievements of its students. Ms Sewell acknowledged that there is no significant evidence that better governance improves students' learning. However, she noted that in the first three years after ERO's establishment, its 'assurance reviews' revealed that only 6 to 8 percent of schools were fully compliant with their legal obligations. In the next three years, that figure increased to 85 percent compliance as boards of trustees became aware of their obligations. This showed, she said, that ERO's evaluations led to change and that boards want to deliver what is required of them by the education system.⁵

2. Document A23, paras 10–14

3. Ibid, paras 18–19, 24

4. Document A21, para 11

5. Second hearing, tape 8B

With the rise in compliance levels, ERO introduced 'accountability reviews' (see sec 3.2.2), which, Ms Sewell said, focus more on 'the bigger issue' of school performance, including quality of teaching. She said that it would assist the review process, and school boards of trustees, if there were national student assessment practices. However, ERO can and does evaluate teaching quality through evidence such as school records and workbooks. By that means, ERO evaluates the quality of students' learning.⁶

3.2.2 Accountability and discretionary reviews

The regular (three to four yearly) ERO reviews of New Zealand schools, known as accountability reviews, evaluate school boards' compliance or non-compliance with all their legal obligations. In addition, discretionary reviews will be conducted when ERO has concerns about particular schools' performance. Generally, a discretionary review will be done as a follow-up to an accountability review that identifies significant difficulties in a school's governance and management. Among ERO's criteria for conducting a discretionary review are that the areas of poor performance impact significantly on the wellbeing of the children and that the response of the board of trustees to the previous report is not likely to result in improved performance.⁷

Normally undertaken within six to 12 months of the release of an accountability review report, a discretionary review focuses only on the matters identified in the previous report as not complying with the board's obligations. Ms Sewell explained that, because improvements are generally made between an accountability review and a discretionary review, it is extremely rare for ERO to conduct consecutive discretionary reviews.⁸

The three-stage ERO review process begins with a scoping stage, in which information held or gathered by ERO is assessed to determine the extent and focus of the review. The on-site review follows, with a team of trained, experienced, and tertiary-qualified review officers observing the school in action and consulting all key stakeholders in the course of evaluating the school's performance. When the on-site review has been completed, and at a time that suits the school's board of trustees, the ERO reviewers meet with the board for a final 'exit meeting' to discuss the reviewers' findings and assessments. In the post-review stage, the reviewers' unconfirmed report is made available to the school board for its comments, within a minimum of 15 working days. At the end of this process, the confirmed review report is made available to parents and the school. Subsequently, the board is asked to inform ERO of any action it has taken or plans to take in response to the report's findings or recommendations and that response is publicly available.⁹

6. Ibid

7. Document A23, para 46

8. Ibid, para 43

9. Ibid, paras 32-33, 47-60; second hearing, tapes 9A, 9B

3.3 BOARDS OF TRUSTEES' LEGAL OBLIGATIONS

The current school governance model was introduced in 1989 and vests overall responsibility for the successful operation of a school in an elected board of trustees. The board must have a majority of parent representatives. Ms Sewell explained that the model applies to all 2700 schools in New Zealand whether or not special factors apply, such as the size or remoteness of the school or the extent to which a community is able to provide the skills that are required for effective governance.¹⁰

There are two sources of the obligations of a board of trustees: the school's charter and the national education guidelines. The Education Act provisions governing these matters make up an important part of the policy framework which, the Crown submitted, meets its Treaty responsibilities relevant to this claim.

3.3.1 The school charter

Under section 61(1) and (3) and section 62 of the Education Act 1989, every school board is required to have a written charter of the school's aims, purposes, and objectives, prepared following consultation with parents and staff, and consideration of the views of Maori communities in the area. The Act deems certain aims to be included in all charters, namely:

- ▶ the aim of conforming with the national educational guidelines (see sec 3.3.2);
- ▶ the aim of developing policies and practices that reflect New Zealand's cultural diversity and the unique position of the Maori culture; and
- ▶ the aim of taking all reasonable steps to ensure that instruction in tikanga Maori and te reo Maori are provided for full-time students whose parents ask for it (ss 61(3), 63).

A charter is an undertaking by a school board to the Minister of Education that all reasonable steps will be taken, first, to manage and administer the school for the purposes set out or deemed to be contained in the charter and, second, to ensure that the school, its students, and the community achieve the charter's aims and objectives. Accordingly, the purpose of an ERO review is to evaluate a board's compliance with the stated and deemed provisions of the school's charter.¹¹

3.3.2 The national education guidelines

The national education guidelines are promulgated by the Minister under section 60A of the Education Act 1989. They have three components: the national education goals, the national administration guidelines, and the national curriculum statements.

10. Document A23, para 73

11. Ibid, paras 64–67

(1) *The national education goals*

The national education goals are the Government's 10 overarching goals for the State education system. Boards of trustees and teachers are required to consider how best they can contribute to each goal in light of their local circumstances and to demonstrate, by their documentation and activities, that their work is designed to achieve the goals.

As can be seen from the following selection, the national education goals are framed broadly:

1. The highest standards of achievement, through programmes which enable all students to realise their full potential as individuals, and to develop the values needed to become full members of New Zealand's society.
2. Equality of educational opportunity for all New Zealanders, by identifying and removing barriers to achievement.
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5. A broad education through a balanced curriculum covering essential learning areas with high levels of competence in basic literacy, numeracy, science and technology.
6. Excellence achieved through the establishment of clear learning objectives, monitoring student performance against those objectives, and programmes to meet individual need.
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9. Increased participation and success by Maori through the advancement of Maori education initiatives, including education in Te Reo Maori, consistent with the principles of the Treaty of Waitangi.
10. Respect for the diverse ethnic and cultural heritage of New Zealand people, with acknowledgement of the unique place of Maori, and New Zealand's role in the Pacific and as a member of the international community of nations.¹²

(2) *The national administration guidelines*

The national administration guidelines are designed to support learning and assist schools to meet the national education goals. They provide direction to school boards in their governance and management in relation to:

- ▶ the provision of a balanced curriculum;
- ▶ employer responsibilities;
- ▶ financial and property matters;
- ▶ documenting the national education guidelines' implementation;
- ▶ maintaining an ongoing programme of self-review;
- ▶ health and safety; and
- ▶ compliance with legislation affecting schools.¹³

Unlike the national education goals, the national administration guidelines are quite specific in their requirements, leaving little room for interpretation by boards of

12. Document A25(6), p 1

13. Ibid, p 2

trustees. For example, the first guideline requires all boards to ‘foster student achievement by providing a balanced curriculum in accordance with the national curriculum statements’. It then specifies that this requires the implementation of particular learning programmes, the monitoring and assessment of students, and other matters. A substantial amendment to that guideline, notified in the *Gazette* of 22 November 1999 and to take effect from 1 July 2000, provides, among other things, that each board must, through its principal and staff and ‘in consultation with the school’s Maori community, develop and make known to the school’s community policies, plans and targets for improving the achievement of Maori students’.¹⁴

Another example of the guidelines’ specificity is provided by the third guideline, which requires compliance with legislation on financial and property matters and specifies that boards must ‘monitor and control school expenditure, and ensure that annual accounts are prepared and audited as required by the Public Finance Act 1989 and the Education Act 1989’.¹⁵

(3) *The national curriculum statements*

The purpose of the national curriculum statements is to ensure the implementation of the New Zealand curriculum that applies to all schooling from years 1 to 13. The curriculum, revised as a result of education reviews in the 1980s, establishes principles for teaching and learning, identifies seven essential learning areas and eight groupings of essential skills, and defines national achievement aims and objectives. To bridge the distance between the curriculum and the classroom, a number of new curriculum statements have been developed, and the rest are in the process of development by the Ministry of Education. That process involves widespread consultation with educators and the community.¹⁶

Once a new curriculum statement has been trialed and finally approved, it is gazetted and becomes mandatory. Before that time, schools are required to use existing syllabi.¹⁷ By October 1999, when Mokai Primary School was closed, four of the seven national curriculum statements, in English, had been developed and gazetted and four statements in Maori, for use in Maori medium education, had been published in final form but not gazetted.¹⁸

Each curriculum statement relates to one of the seven essential learning areas identified by the national curriculum: language and languages, mathematics, science, technology, social sciences, the arts, and health and physical wellbeing. The statement defines the knowledge, understanding, skills, attitudes, and values described in the curriculum for that area and specifies the learning outcomes for all students. It also identifies strands of learning and achievement objectives for each strand, suggests assessment procedures, and provides guidelines for appropriate teaching and learning approaches.¹⁹ One Crown witness described the curriculum statements as being

14. Document A25(7)

15. Document A25(6)

16. Document A25(9), p 22

17. Document A25(6)

18. Document A21, para 16

19. Document A25(9), esp pp 22–23

sufficiently broad and flexible to allow for local interpretation and elaboration, and sufficiently specific to provide students, teachers, parents, and communities with clear information about what is to be learned and achieved during the years of schooling.²⁰

3.4 THE QUALITY OF EDUCATION PROVIDED BY MOKAI PRIMARY SCHOOL

Mokai Primary School was reviewed seven times by ERO between 1991 and June 1998. Four of the reviews were discretionary in nature, carried out to follow up the unsatisfactory results of previous reviews. In fact, two consecutive discretionary reviews were conducted within a five-month period in 1994 and again in the six-month period between late 1997 and mid-1998.

The following table shows the timing and nature of the seven reviews. (It should be noted that before accountability reviews were introduced in 1997, the non-discretionary reviews conducted by ERO were known as assurance reviews or as reviews.)

Date of review report	Type of review
October 1991	Review
September 1993	Assurance
March 1994	Discretionary
July 1994	Discretionary
January 1997	Assurance
December 1997	Discretionary
June 1998	Discretionary

Timing and nature of ERO reviews. Source: doc A25(3A)-(3G).

The claimants highlighted the fact that the number of non-compliances identified in the last three ERO reports declined steadily during the tenure of Mrs Koopu, the school's last principal. The Crown acknowledged the decline (from 14 to nine to six non-compliances) but cautioned the Tribunal against reading too much into it. One reason is that the last two reviews, being discretionary, were confined in their scope to the areas of non-compliance identified in the previous accountability review. This means that any 'fresh' non-compliances occurring since the accountability review (occasioned, for example, by the failure to maintain systems that had earlier been assessed as complying with requirements) would not have been investigated in the last two reviews.²¹ The other reason for caution, given far more weight by the Crown, is that the non-compliances remaining at the time of the final review were of a significant nature, being 'critical to the school's effective delivery of quality education'.²²

20. Document A24, para 20

21. Document A30, para 76

22. Document A22, para 39

3.4.1 Long-term systemic problems

The Crown did not confine its assessment of the school to the period when Mrs Koopu was principal. Instead, as was explained by Mr Kitto, the Ministry liaison officer with operational responsibility for the considerations relevant to the closure of the school:

all the reports of ERO need to be considered to understand the cumulative impact of the quality of education delivered at Mokai. The statements included in the ERO reports disclose a picture of significant non-compliance in major areas of governance and delivery. The board's non-compliance with the statutory requirements over a period of at least eight years has culminated in a state of affairs which in the end could neither be rectified nor continue to be tolerated.²³

Ian Hill, the ERO area manager with responsibility for the last three reviews of the school, outlined the problems remaining at the time of the final review in 1998 as follows:

In summary, ERO found no basic documentation in the school. The board had not, since March 1994, and over five ERO visits, been able to show how it implemented the National Education Guidelines and did not demonstrate an understanding of the need to implement systems to address the National Administration Guidelines. In ERO's judgment, such a situation amounted to an administration that was disorganised and ad hoc. In the review report of July 1998, ERO commented:

- There was little formally-adopted policy to guide management in following the board's direction.
- A 1997 objective of the school development plan to establish board roles and responsibilities had not been implemented.
- Basic material such as the charter, codes of conduct, and handouts on the national Administration Guidelines had not been given to trustees.
- Individual documents for administration were developed in isolation, often with little relationship to other documents.²⁴

3.4.2 Frequent changes of board members and principal

Crown witnesses identified, as a major reason for the school's difficulties over the years, the frequency of change in the school board's membership. Mr Kitto said that 'in effect the board was always needing to start again'.²⁵ He summarised the practical consequences of this:

- the board made statements of intent that were not completed due to changes in personnel;
- progress made by the board was not sustained;
- key governance matters that were the responsibility of the board were not complied with or compliance was not sustained;

23. Document A22, para 37

24. Document A24, para 52

25. Document A22, para 15

—there was a lack of continuity and progress in meeting goals because of the loss of knowledge, training and experience that go with the operation of a stable board.²⁶

Commenting on the frequent changes of school principal before late 1996, Mr Hill said that each new principal needed training and 'documentation requirements had to be spelled out again, and the systems which were needed had to be yet again identified'.²⁷ Commenting on the situation since Mrs Koopu was appointed, he said:

Except for the fact that the same principal remained at the school between October 1996 and its closure, the problems experienced at the school before that time remained the same, in spite of the good intentions of the board and staff. There continued to be a lack of achievement data on the progress of students. Data on the levels which the children had achieved were, on the principal's own admission, not available. Therefore, there was no evidence of any progress of the students at Mokai School.²⁸

Further, in response to claimant evidence of the pupils' achievements during the last principal's tenure, Mr Hill said:

ERO would contest any suggestion that the level achieved by the students at Mokai School is on a par with the standards achieved elsewhere, including other comparable schools in rural areas, with a wholly or largely Maori community, a small roll and a decile 3 rating. There is no doubting that Mokai School provided a caring environment and that the principal worked to develop the self esteem of the children who attended. The fact is, however, that the curriculum was not being delivered according to the national curriculum. Therefore, the children were not receiving the education to which they were entitled. This contrasts with the many small rural schools of low decile rating which ERO has reviewed, where the curriculum is being delivered.²⁹

3.4.3 Curriculum issues

The Crown placed particular weight on the school's problems in delivering the curriculum to its students. Mr Hill observed that all the ERO reports between 1991 and 1998 recorded curriculum difficulties to varying degrees, such as:

- ▶ a lack of planning of appropriate objectives;
- ▶ a lack of statements and objectives of the curriculum being taught;
- ▶ difficulty in implementing learning programmes;
- ▶ a lack of review or appropriate benchmarks of what was being taught and achieved;
- ▶ difficulty in keeping children on task; and
- ▶ a lack of assessment of student progress.³⁰

26. Ibid, para 14

27. Document A24, para 15

28. Ibid, para 16

29. Ibid, para 17

30. Ibid, para 21

(1) Curriculum content and planning

Crown witnesses emphasised the critical importance of quality planning of teaching and learning objectives, methods, resources, and assessment. Mr Kitto said that teaching is ‘about planning, assessing and reporting’ and that, without the necessary documentation, it would be only ‘by chance’ that a satisfactory educational outcome might be delivered.³¹ He explained that the questions teachers need to address are ‘what are the appropriate levels for these children to reach and how am I going to know [how they are doing]?’ The current curriculum, Mr Kitto said, is very different from the earlier one and this is critical to teachers’ need to plan and record. He also noted that, once detailed planning has been done for a unit of work, it does not need to be done again.³²

Mr Hill said that the learning programmes at Mokai Primary School were not based on current curriculum statements. Nor was there any school scheme or implementation plans. He was clear that, without some form of planning and record keeping, sequential learning will not occur, notwithstanding that there were examples at Mokai of interactive learning experiences for the children which affirmed and respected Maori culture. While the 1998 ERO report had noted that the children were in a caring environment, it stated:

they are not receiving progressive and sequential coverage of skills in all learning areas. Learning opportunities could be improved considerably by a more organised and planned approach to curriculum delivery and regular monitoring of achievement against national achievement objectives.³³

From the three most recent ERO reviews, Mr Hill highlighted the school’s failure to develop long-term (year) plans in each learning area within a reasonable time; the lack of comprehensiveness of the plans that were developed; large gaps in term plans; and inadequate weekly planning. He also referred to the teaching programme’s heavy reliance on visiting speakers and performers and a teacher trainee, all of which, he said, can be ‘a good thing when it complements planned sequential learning based on the New Zealand curriculum’. However, he said, that was not the case at Mokai school.³⁴

(2) Monitoring and assessment

Mr Hill identified the problems with monitoring and assessment as being particularly serious. He explained that the national curriculum builds on the close relationship between learning and assessment and provides clear learning outcomes against which students’ progress can be measured. Assessment of the progress of individual students is an integral part of successful curriculum delivery because it enables teachers to improve teaching and learning. This is done by diagnosing learning strengths and weaknesses, measuring student’s progress against defined achievement

31. Second hearing, tape 7A

32. Ibid

33. Cited in doc A24, para 23

34. Document A24, paras 25–26

objectives, and reviewing the effectiveness of teaching programmes. These profiles are then used to inform teachers about each student's learning and development and to provide the basis for feedback to students and parents.³⁵

Describing monitoring and assessment as 'a major problem' at Mokai in all the years since ERO began reviewing the school, Mr Hill stated:

There was no organised assessment to indicate children's progress. There was also a lack of monitoring of the coverage of the curriculum. ERO considered that the lack of systematic planning of curriculum delivery was the problem.³⁶

Mr Hill strongly criticised the most recent principal's observation-based approach to assessing children's progress. He said that the principal's suggestion that she would have welcomed an expert coming in to the school to monitor the students was, in ERO's view, inconsistent with a teacher's responsibility for monitoring. That responsibility, he explained, is an integral part of the learning process as well as of the job for which a teacher is paid.³⁷ Mr Hill gave examples from the last two ERO reviews of students' very limited use of their exercise books and of the general absence of marking of the work in those books.³⁸ He also challenged the release teacher's views of the children's achievement levels and progress for not being based on any systems of assessment and said that parents would not be able to ascertain progress by being alongside the children at the school.³⁹

3.4.4 Governance issues

Acknowledging that 'There is no question about the board's commitment to the school and community vision', Mr Hill concluded that 'the ability of the board to govern the school was severely under strain, because the board did not develop the required infrastructure, nor take advantage of the training provided'.⁴⁰ One example he gave of 'ad hoc' administration by the board included the school's use, in the classroom, of unsupervised resource people who were not trained teachers. Another example was the lack of formal definition of the administrative role undertaken by the principal's daughter, Mrs Wall, before she became a board member. Mr Hill accepted that, in light of her experience, Mrs Wall may not have needed direction from the board.⁴¹ However, he explained, ERO's concerns stem from the lack of accountability of such helpers, which puts their work outside the legal framework within which the board is required to operate.⁴²

35. Ibid, para 36

36. Ibid, para 37

37. Ibid, paras 38–39

38. Ibid, para 40

39. Second hearing, tapes 9B, 10A

40. Document A24, para 45

41. Second hearing, tape 10B

42. Document A24, paras 46–48

Mr Hill provided a list of ‘serious and ongoing problems’ that were evident in the last three ERO reviews and that, the reports indicate, arose from board members’ incomplete understanding of what is involved in school governance:

- the board lacked an understanding of its roles and responsibilities;
- it did not provide an adequate infrastructure with documented systems for the governance and day to day management of the school;
- it failed to demonstrate familiarity with the National Education Guidelines and their significance in the continuing operation and administration of the school;
- it allowed the principal and one member of the board to take all the responsibility for the running of the school;
- it had some members who were unwilling to make the necessary commitment to training;
- the board was not well informed about curriculum delivery nor about the progress of the pupils.⁴³

Examples of those matters were given which, in Mr Hill’s view, indicated the board’s unsatisfactory attitude towards its responsibilities. One example was the board’s delegation to the principal, by June 1998, of full responsibility for all property management. This matter was ‘more properly the responsibility of the board or of a board subcommittee’ and its delegation ‘would have detracted from [the principal’s] ability to fulfil curriculum responsibilities’.⁴⁴ Another example was that, in June 1998, the principal and board chairperson were the only board members working on the school’s self-review long-term plan and intending to undertake training for that purpose.⁴⁵ The inference was that there is a fundamental inconsistency between, on the one hand, board members’ acknowledgements in recent years of their need for training to understand their roles and responsibilities and, on the other, the board’s preparedness to let the principal and chairperson shoulder such important board responsibilities.

A major theme of the Crown’s evidence was that, despite all the training and support available to and utilised by the school, its benefits were not applied within a reasonable time-frame to improve the school’s governance and management. This suggested that the problem was not caused solely by the frequent changes in board membership. Rather, there must be an additional factor – that board members, especially longer serving members, lacked the skills or commitment to implement what was learned in training sessions. If board members had used the knowledge gained in training to set up the required systems, a differently composed board would be able to follow those systems rather than having to ‘start again’ by obtaining training and support in the same areas.

Mr Hill said that the experience of the board usually stays with it in the form of some members who can keep things going while new trustees familiarise themselves

43. Document A24, para 50 (as amended orally at hearing)

44. Ibid, para 51

45. Ibid

with their role. Normally, he said, six to 12 months is enough time to 'rectify the situation'.⁴⁶ Mr Kitto said:

In my professional opinion, the amount of training and support offered to Mokai was extensive and appropriate. The quality of the support and training can be determined by comparison with other schools in similar positions. As the Ministry Liaison Officer for the region, I have received positive reports about the training provided by the above agencies, both about the people delivering and about the applicability or suitability of the training received. The success of these support mechanisms in other similar schools contrasts significantly with the lack of success at Mokai School. This suggests to me that the failure identified at Mokai cannot be attributed to deficiencies in the training and support offered.⁴⁷

3.4.5 Elaboration of ERO evidence

Mr Hill was questioned closely by claimant counsel about his evidence, particularly about the circumstances surrounding the last three ERO reviews and the content of the ERO reports.

(1) *The dilemma of attracting a principal*

Mr Hill's criticism of the last principal's teaching led claimant counsel to ask him about the ease or difficulty of attracting a suitable principal to a sole-charge school. Mr Hill said it was the responsibility of the board to ensure the principal can deliver what is needed, and to have a performance agreement with that person (which, he noted, Mokai school did not have for some time). Then, if there were problems with the principal's delivery of the curriculum, the board should look to training to overcome them. He then acknowledged that attracting principals to sole-charge rural schools does pose 'a dilemma' for boards. He noted that an ERO publication identified a need for experienced, high-quality teachers in such schools. When asked who would pay to attract those people, Mr Hill said it would be 'up to the government' to decide. He confirmed that there is no incentive scheme whereby the Crown encourages teachers to go to such schools, although there had been a rural incentive allowance available in the past. He also commented that it may now be open for boards to offer incentives to attract suitable teachers.⁴⁸

(2) *The meaning of the ERO reports*

Claimant counsel's questions to Mr Hill, and his answers, about the precise meaning of the ERO reports has been outlined already in chapter 2 (see sec 2.7.4). Crown counsel, in closing submissions, rejected the inference from claimant counsel's questions that non-compliances by the board, as opposed to the principal, are 'somehow not apposite to the quality of education at Mokai or the learning outcomes of the

46. Second hearing, tape 9B

47. Document A22, para 59 (as amended orally at hearing)

48. Second hearing, tape 9B

students'.⁴⁹ The board's non-compliance with the requirement to document how the national education guidelines are being implemented was given as an example of a matter that is vital to education quality:

Unless the board achieves its primary task of demonstrating that it knows how the National Education Guidelines are being implemented, it cannot take action on the delivery of the curriculum being undertaken on its behalf by the principal. The board otherwise has no basis on which to call the principal to account, nor to account to the Crown, as it must under its school charter, for the implementation of the curriculum requirements. It is not merely a matter of perfunctory recording. The matter goes to the heart of the governance of the school and its operation in delivering a quality education.⁵⁰

The same point was made in relation to the ongoing non-compliance with the requirement for a programme of self-review and the non-compliance relating to the health syllabus.⁵¹

(3) A school under pressure?

Mr Hill stated that if a board does not respond to the unconfirmed ERO report, ERO assumes that it accepts the report's contents.⁵² He said the Mokai board had not responded to the 1996 unconfirmed accountability review report. His description of the board's responses in 1997 and 1998 suggested that they were very limited in nature.⁵³

In response to claimant counsel's questions, Mr Hill said he was aware of the 'wider context' – that the board was faced with various issues at the time of the last three ERO reviews and, in particular, meetings and correspondence with the Ministry of Education about the school's closure. He also indicated that he was not suggesting the board's responses to unconfirmed reports were more important than the actions taken between reviews. When asked whether Mokai Primary School was 'a school under pressure' during its last two years, Mr Hill said that it was 'no more than other schools'. He then acknowledged, however, that 'probably not' many schools would have three ERO reviews in such rapid succession and be the subject of closure discussions as well.⁵⁴

Later, claimant counsel referred to the 'underlying difficulties' for the school's problems which, he said, were that rural Maori schools have a small and comparatively unskilled population base from which to draw school board members. Mr Hill acknowledged these difficulties. Counsel also referred to 'the reality on the ground' which, he said, was that 'the same small group of people' was making attempts to comply with the ERO reports while at the same time responding to the Ministry of Education over the threatened closure of the school. Counsel asked

49. Document A30, para 79

50. Ibid, para 80 (as amended orally at hearing)

51. Ibid, paras 80–81

52. Document A24, para 11

53. Ibid, paras 11–13

54. Second hearing, tape 9B

whether, in light of these matters, Mr Hill's criticisms of the board's attitude and ability were not 'unduly harsh'. Mr Hill replied that they were not because, in 'comparative situations of schools of similar sizes', there were 'plenty of examples' of schools that had 'set up systems' to meet their legal obligations. However, despite considerable amounts of training and its stated intentions, the Mokai school board failed to meet its obligations.⁵⁵

3.4.6 The school's charter

A further governance issue highlighted by Mr Kitto was that Mokai school had not amended its charter at any stage since 1990 to reflect its bilingual teaching. Crown counsel emphasised that the school was a mainstream school and that there is no such thing as a 'bilingual school', although a mainstream school can teach bilingually. This emphasis was directed at correcting some claimant witnesses' descriptions of the school, and the school's description of itself since about 1997, as 'Mokai Bilingual Primary School' or 'Mokai Bilingual Kura'.⁵⁶

Clearly, the Ministry's concerns about the school's charter stem from the fact that a charter is a legal undertaking to the Minister which is required to describe in clear terms the education services that the school will deliver in recognition of the hopes and wishes of its community. Mr Kitto explained that, like Mokai school, most New Zealand schools originally adopted a variant of a 'model' charter circulated by the Ministry. However, he said, many schools have since amended their original charters to reflect their own aspirations. He estimated that, since mid-1997, about 30 percent of the schools in the Hamilton area had submitted amendments to their charters.⁵⁷ Mr Kitto also noted that the Ministry is encouraging all boards to initiate charter reviews at the end of their three-year terms so that new boards can start out by doing the reviews, becoming aware of their responsibilities and taking ownership of the charters.⁵⁸

Mr Kitto acknowledged claimant counsel's point that the Mokai school charter contained references to the Treaty of Waitangi, the desire for children to learn some Maori, the relationship between the school and the marae and the socio-economic position of the community. Those references, he said, do allow others to understand better the local goals of the school – but only as at 1990 when the charter was approved. He acknowledged that the Ministry knew that the school was delivering a bilingual education and said that amending the charter to 'cement' the school's aims was a simple matter. It was important, however, that the charter accurately reflect the school's aims because, as Mr Kitto put it, 'if you don't know where you're going you'll probably end up somewhere else', whereas, 'if you know what you want to achieve [and] write it down, then everybody knows what you want to achieve'.⁵⁹

55. Second hearing, tape 10A

56. See, for example, docs A25(4F), A6 E(4)

57. Second hearing, tapes 5A, 7B

58. Second hearing, tape 5A

59. Second hearing, tape 5A, 5B

3.5 VIABILITY

While the Minister's greatest concern was with the 'serious questions' raised by ERO about the quality of education provided at Mokai Primary School, 'there was also concern about the school's ongoing low and fluctuating roll numbers and the question of viability which flowed from that'.⁶⁰ Kathleen Phillips explained that viability refers to 'the viability of a community over time to actually sustain quality of education' and that a number of considerations are relevant to this, including roll numbers, the potential for new pupils, the wider network of schools in the geographical area, and the cost-effectiveness of the school.⁶¹ The Crown's evidence of educational quality at Mokai Primary School has already been outlined. Sections 3.5.1 to 3.5.3 outline the Crown's evidence of the other matters relevant to viability.

3.5.1 Roll numbers and sustainability

When considering a school's viability, the Ministry considers both the size and the sustainability of its roll. Mr Kitto explained that there is no minimum roll which will automatically result in a school's closure. This contrasts with the situation before 1989, when a roll of nine students would lead to that result. There is also no policy to 'target' small schools for closure. These schools, namely sole-teacher schools with fewer than 29 students, make up 4.5 percent of all New Zealand schools.⁶²

Mr Kitto described the roll at Mokai Primary School over the last decade as being 'generally low' and with numbers that 'fluctuated, sometimes on a week to week basis'.⁶³ He noted that the Tribunal had been given written evidence that showed that ERO, successive school principals, and the board were all conscious of this issue for some time.

An analysis of the school register of attendances from 1990 to 1999 was presented in evidence, and the situation from late 1996 was summarised as follows:

- the maximum number of children on the roll at any one time since Term 4 of 1996 was 24 (during the first five weeks of Term 2 1998);
- during the 122 school weeks of Mrs Koopu's tenure, there were 7 weeks when the roll showed 20 or more students; 84 weeks with between 10 and 19 children enrolled, and 31 weeks where fewer than 10 children were enrolled.⁶⁴

Apart from the fluctuations in the roll, it was said that further difficulties arose because some children had substantial periods of absence. Also, in its report of July 1998 ERO expressed concern that the attendance, admissions, and withdrawals registers were unreliable.⁶⁵

60. Document A30, para 84

61. Second hearing, tape 4A

62. Document A22, para 10; second hearing, tapes 5B, 7B

63. Document A22, para 40 (as amended orally at hearing)

64. Ibid, para 42; doc A25(1), pp 4-7

65. Document A22, para 42

From the Ministry's analysis of the Mokai school roll, the total number of children enrolled at the school for any period of time in each of the years from 1990 is as follows:

1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
29	25	20	19	15	26	22	29	28	12

Total number of enrolments in each year from 1990

Clearly, the total number of enrolments in a year does not equate with the enrolments in particular weeks of the year. From the Ministry's analysis, for example, it can be seen that during the 30 school weeks of 1999 that Mokai school was open (when a total of 12 children were enrolled at some point), the maximum weekly school roll was:

- ▶ nine children (for nine weeks);
- ▶ eight children (for 15 weeks);
- ▶ seven children (for five weeks); and
- ▶ six children (for one week).

As for fluctuations in the roll numbers, there were three weeks during the 1999 year, including the last week the school was open, when there was a difference (of one or two students) between the minimum and maximum enrolments for the week.

The Ministry's analysis also shows that, in both 1997 and 1998, the weekly enrolments were not only consistently higher than in 1999 but also more variable. In 1997, with a total of 29 children enrolled during the year, the enrolments in the first half year were fairly constant, at between 12 and 14 students, for all but three weeks (when 16 children were enrolled). In the second half year, the enrolments were also fairly constant (but at between 10 and 12 students) for all but five weeks at the start of term 3. In those five weeks, the roll started at 14 and dropped to nine before settling at 10 for the rest of the term.

In 1998, with a total of 28 students enrolled during the year, roll numbers were consistently higher than in 1997 (with between 14 and 24 students every week of 1998) but also more variable. Generally, it appears there were fluctuations in the roll in about 10 weeks of that year and that, in one week, the roll changed by five students and, in three other weeks (two of them in term 1), by three students.

In terms of the sustainability of the Mokai Primary School roll, Mrs Phillips explained that the Ministry believed there were very few pre-schoolers in the school's catchment area and this was evidenced by the absence of a kohanga reo at Mokai.⁶⁶ Mr Kitto acknowledged the claimants' evidence that whakapapa links were important to the size of the catchment area and that those links extended beyond the immediate geographical area surrounding the school. He also acknowledged the 'mobility of Maori' and the evidence, from both the claimants and the Crown, that children travelled some distance to attend Mokai school. Mr Kitto explained, however, that, 'normally, the core of the enrolments' comes from the immediate area of a school and

66. Second hearing, tape 4B

this provides the Government with some assurance that the school can sustain a reasonable population of children'.⁶⁷

Crown counsel stated in closing submissions that the Crown does not accept the claimants' contention that the school's roll dropped in 1999 because of the discussions about closure. Rather, she submitted, the fact of the roll being generally low and fluctuating is attributable to socio-economic factors in the area. Counsel referred to the work in the area being seasonal in nature and to the board's acknowledgement, in its 1999 submission to the Minister, that, in addition to the uncertainties arising from the closure process, socio-economic factors contributed to the enrolment situation. She noted that Mrs Wall, the last board chairperson, had said in evidence that, before the school roll could be enhanced and stabilised, 'housing and employment' would be needed in Mokai. From this, it was concluded that the threat of the school's closure did not create the roll problems at Mokai.⁶⁸

3.5.2 The availability of other schools

With the Crown's responsibility being to maintain a national network of schools, the number of other successful schools operating in an area can tilt the balance for or against the closure of a school that is not meeting its responsibilities. In the case of Mokai Primary School, the Crown considered there were alternative schools available where the children could obtain a good quality bilingual education (see further section 3.9.5).

3.5.3 Cost-effectiveness

(1) Staffing and operations funding

The Ministry of Education is responsible for ensuring a fair allocation of education funding so that a viable network of schools is maintained.⁶⁹ A fair allocation does not mean that all students obtain equal funding because the Ministry recognises that students and schools have differing needs. One example of differential funding is the Maori language resourcing policy 'which is a recognition by the Ministry that it is more costly to provide quality education in te reo Maori than instruction in English'.⁷⁰

In response to questions from the Tribunal, Mrs Phillips stated that, while effective use of education funding is one thing the Minister must look at in assessing a school's viability, the Ministry sees the issue of viability in terms of the school's ability to sustain quality education over time, not merely its cost-effectiveness or the cost-effectiveness of the network of schools in the area.⁷¹ Certainly, Crown witnesses emphasised the quality of education as the most important factor in the decision to

67. Second hearing, tape 5B

68. Document A30, para 93

69. Document A21, para 46

70. Ibid, para 50

71. Second hearing, tape 4A

close Mokai Primary School. In addition, Crown counsel's questions of claimant witnesses drew attention to the high cost of the school. It was because those questions suggested that the school's cost was a significant factor to the Crown that the Tribunal asked it to produce statistics that compared the funding of Mokai school with that of similar schools.

The statistics produced by the Ministry for 1997, 1998, and 1999, when the 'resourcing roll' of Mokai Primary School was, respectively, 15, 18, and eight students, do not allow a direct comparison of the school with other decile 3 schools that have similarly low rolls. Mr Kitto said it would be possible to obtain such comparative figures and that the small roll at Mokai school was 'the single greatest reason' why it received more funding per pupil than any of the five categories of school identified in the Ministry's statistics.⁷² Indicating the dramatic effect of a small school roll on the school's operational funding (which is one component of its funding), Mr Kitto said that the smallest schools in New Zealand, of whatever decile ranking, receive a fixed minimum sum of operational funding irrespective of their actual roll size. This meant, he said, 'that in 1998 the staffing and operational grants to the smallest primary schools totalled around \$10,500 per pupil, while the average primary school received \$3,250'.⁷³ It was this fact, the Tribunal understood, which led Mr Kitto to say that Mokai Primary School had been 'generously resourced over a significant period of time'.⁷⁴

The Ministry's statistics show that, in 1997 and 1998, the staffing and operations funding of Mokai Primary School on a per pupil basis was \$6508 and \$6422 (including ACC, GST, and the salaries grant for management). Mokai school's 1999 per pupil costs had not been finalised by the Ministry, but the estimate provided, with eight pupils as the basis, was over \$14,000 per pupil.⁷⁵

In the five categories given by the Ministry as comparators for Mokai school, the highest average per pupil cost is for 'all rural decile 3' schools. In 1997, the average per pupil cost in those schools was \$3761 and, in 1998, \$4454. Clearly, those figures are considerably lower than the actual per pupil cost of Mokai school in 1997 and 1998. (For 1999, the Ministry's statistics compare only the operations grants to Mokai school and the five categories of schools.)

While the Ministry did not provide specific cost information about small schools, the 1999 ERO publication *Small Primary Schools* states that the Government 'recognises that small schools experience diseconomies of scale, and therefore spends considerably more per student in small primary schools than large ones'.⁷⁶ It then presents the following table of estimates of the average per pupil cost of various sized schools in 1996.

72. Second hearing, tape 6A; doc A22, para 50

73. Document A22, para 47

74. Ibid, para 44

75. Document A25(1), p 11

76. Document A25(24), p 5

Roll range primary schools	Estimate of average funding per student in 1996 (\$)
Under 13	9029
13-24	5411
25-49	4159
50-99	3293
100-149	3040
150-199	2899
200-249	2852
250-299	2837
300-349	2663
350-399	2585
400-449	2554
450-499	2515
500-599	2490
Over 600	2411
Average	2795

Average cost per pupil for various size schools. Source: Education Review Office, *Small Primary Schools*, Wellington, Education Review Office, 1999, p 5.

Claimant counsel drew Mr Kitto's attention to that table's estimate of the average cost in 1996 of schools with between 13 and 24 students (\$5411) and asked if it was 'not too far away' from the actual costs of Mokai Primary School (\$6508 in 1997 and \$6422 in 1998) Mr Kitto said that the table's figure was 20 percent less than Mokai's costs. He acknowledged, however, that Mokai school's costs were not in excess of 100 percent more than that figure – which is how the Ministry's statistics depict Mokai school's costs in relation to all the selected comparator categories. Mr Kitto also agreed that Mokai school had not received funding to which it was not entitled.⁷⁷

The 1996 per pupil estimates in the *Small Primary Schools* table reveal very clearly the problems inherent in relying on the average cost of a broad range of schools as a comparator for the actual cost of a small school. For example, that table shows that all nine groups of schools with rolls over 150 students have average per pupil funding figures of under \$3000. As a result, the average of all schools, from under 13 pupils right through to over 600 pupils is \$2795. Yet, as the table also shows, that amount is approximately half of the average cost of schools with 13 to 24 pupils, and a third of the average cost of a school with fewer than 13 pupils.

While the *Small Primary Schools* figures are merely estimates, and are for 1996, the Tribunal believes they indicate that the actual per pupil costs of Mokai Primary School are not as far removed from the actual cost of similarly small schools of low decile rankings as tended to be suggested by the Crown's questions and evidence. Overall, however, Crown witnesses' evidence on the relevance of Mokai school's cost to the closure decision can be seen to be consistent with their accounts of Government policy on the matter. That policy is summarised in *Small Primary Schools* in these words:

77. Second hearing, tape 6A

For very small schools which are the most expensive per student, the Government needs to balance its interest in ensuring access to schooling against the educational and financial viability of the school and the need to obtain value for money in the use of taxpayer funding. The Government considers whether it should resource very small schools on a case by case basis, taking into account factors such as current and predicted rolls, proximity to other schools and alternative education options for the students involved.⁷⁸

(2) Maori language resourcing

One cost-related matter to which Crown witnesses gave attention was the school's receipt of Maori language resourcing. Between 1996 and 1999, it received that resourcing at the level 2 rate, which is available to schools that teach in te reo Maori for between 51 and 80 percent of class time. This level, Mr Kitto explained, was informally confirmed by a Maori liaison officer in March 1998 when Mr Kitto and that officer were invited to the school by the principal to discuss the possibility of raising the resourcing level to level 1. At that meeting, it was agreed that the school was not ready to provide level 1 immersion teaching and that no change should be made to the school's Maori language resourcing.⁷⁹

Mr Kitto explained that a school's entitlement to level 1 Maori language resourcing (for teaching 81 to 100 percent of class time in te reo) is determined by Ministry verifiers who make annual visits to all level 1 schools to assess and monitor the level of teaching in te reo. For levels 2, 3, and 4 resourcing, however, schools assess their own level, after discussion with a Ministry official. Verifiers visit only a sample of schools each year to determine whether the level of teaching matches the level of resourcing provided.⁸⁰ In response to claimant counsel, he said it seemed that Mokai school had not been visited by a verifier.⁸¹

Mr Kitto also explained the history of Mokai school's Maori language resourcing from the time the community 'opted' for bilingual education late in 1993 and a principal with bilingual skills was recruited. He noted the principal's report of 1994, which acknowledged difficulties in maintaining delivery of te reo at 50 percent level or higher and identified the contributing factors (see sec 2.3).⁸²

Mr Hill made strong suggestions in his evidence that the school was not teaching te reo to the extent required by its level 2 resourcing status.⁸³ The force of his evidence was reduced, however, by his answers to claimant counsel's questions. In particular, it emerged that Mr Hill's suggestions were based on file notes made by ERO reviewers and that neither he nor the reviewers were aware of the Ministry's March 1998 informal assessment of the school's Maori language resourcing level. In closing submissions, Crown counsel stated that it was not suggested that Mokai school received more than its funding entitlements.⁸⁴

78. Document A25(24), p 6

79. Document A22, para 21

80. Ibid, paras 19–20

81. Second hearing, tape 5B

82. Document A22, para 18

83. Document A24, paras 32–34

84. Document A30, para 88

3.6 SCHOOL SUPPORT STRATEGIES

3.6.1 Support versus intervention and the schools support project

Underpinning the Crown's approach to the assistance needed by schools in difficulty is the school governance model introduced by Tomorrow's Schools. It requires, as a logical consequence of vesting substantial responsibilities in school boards that they also be allowed a substantial measure of independence to self-manage, including by making decisions about and implementing the actions that they consider are needed to ensure their schools' delivery of quality education. Crown counsel summarised the effect of this for the Ministry of Education:

The Ministry acknowledges that improvement of such problems [as those of successive boards and principals at Mokai] is most sustainable when driven by the people most affected and most responsible. For this reason, the Ministry prefers to support schools through funding a variety of agencies to support the school directly rather than through imposing intervention measures. The success of this approach is evident in some schools which have 'turned round' their performance (Hill). Graeme Kitto discussed the success of these support mechanisms in schools similar to Mokai.⁸⁵

In the context of an urgent hearing, and in light of the Crown's clear view that the support provided to Mokai school was appropriate and the decision to close it fully justified, Crown witnesses did not provide detailed evidence of the full range of measures available to assist schools in difficulty. However, the 1999 Ministry of Education paper 'Schools Support Project', submitted by the Crown, elaborates the partnership established between the Ministry and education sector groups in 1994.⁸⁶ That partnership is intended to provide 'a range of safety net strategies' that will:

- enable earlier intervention in an at risk situation;
- provide support to local communities to improve/resolve difficulties before they began to place student achievement at risk;
- support an improvement in community capability to self manage as opposed to dependence on central Government for support; and
- provide for long term sustained change and continued improvement.⁸⁷

The partnership was needed because of problems the Ministry had experienced in taking responsibility for the interventions available under the Education Act. (In 1994, the possible interventions were appointing a commissioner; directing the board to engage a financial manager; and taking legal proceedings against the board). The Ministry's experience was that:

the 'one size fits all' scenario of one board of trustees taking responsibility for one school and delivering an effective education for the students of the surrounding community had its problems, eg

85. Document A30, para 101

86. Document A25(14)

87. Ibid, p 2

- Not all communities had access to sufficient people with the skill capability to make up an effective board of trustees;
- Ineffective and/or weaker boards of trustees had particular difficulties in respect of managing their human resource, performance management, financial and property responsibilities.

And, in some schools, the consequences in terms of educational delivery were problematic:

- Principal leadership and teacher quality was unable to be maintained;
- School organisation and curriculum delivery could not be guaranteed;
- Health and safety of students could not be guaranteed;
- Student achievement was not acceptable to the parents of students.⁸⁸

Before 1994, the Government and Ministry were concerned that there was an increase in the number of commissioners and financial managers being appointed. There was also concern that, even after having a commissioner and a new board, some schools still struggled to provide an acceptable standard of governance, management, and student achievement.⁸⁹

The schools support project utilises two kinds of support: schooling improvement initiatives and 'safety net' actions for individual schools. Schooling improvement initiatives involve clusters of schools with similar characteristics being invited to work together with the Ministry. By November 1999, 10 such initiatives had been established and four more were nearing the completion of scoping.⁹⁰ Each initiative is assumed to require up to three years additional resourcing from the schools support project to initiate and implement change, with a phased exit by the Ministry 'over an agreed medium time frame to bed in the changes'.⁹¹ However, it is noted, in relation to the schooling improvement initiatives that are now in their third year of implementation, that 'bedding in change and change management, and creating sustainability, will in many communities take longer to achieve than originally planned'.⁹²

The individual school safety net actions are described by the Ministry paper as forming a continuum 'from an early, low level intervention through to a statutory intervention by the Ministry of Education'.⁹³ Four types of action make up this continuum: informal action, formal action, business case, and statutory action. From the descriptions given of each of those, it appears that Mokai Primary School was assisted with informal actions prior to the statutory action of closure being taken. The two actions that were not utilised are described in terms that suggest they are of limited availability. Formal actions need to be agreed between the Ministry and the school board and the Ministry may provide financial support where implementation of an action plan involves less than 10 percent of the school annual operations grant or less than \$25,000 (whichever is the lesser amount) and the board can afford to repay the assistance over one year. The business case process is described as 'a serious

88. Ibid, p 1

89. Ibid, pp 1-2

90. Ibid, p 2

91. Ibid, p 5

92. Ibid, p 10

93. Ibid, p 5

one, involving the development of a viability report on the school, and it is by no means certain that the Ministry or Ministers will agree to resourcing and reforming independent of structural change to the school'.⁹⁴ The viability report referred to there 'will always include consideration of resolving the problems by resourcing and reforming the school as a single entity, merging/combining/closer cooperation with neighbouring schools, and possible closure'.⁹⁵

Claimant counsel asked several Crown witnesses whether, apart from the informal actions of support and training, and the statutory interventions such as appointing a commissioner (discussed at section 2.8), there are other 'informal interventions' that the Ministry can suggest to a school. In particular, he asked whether the Ministry could suggest that a school get in a specified person to help. Mr Kitto explained that the Ministry has a contractual obligation to provide school support services, which come at no cost to a board, and that the membership of associations also comes at no cost to the board and can lead to assistance tailored to its needs.⁹⁶ But neither he nor other Crown witnesses could identify any informal, intermediate steps that the Ministry can take to assist under-performing boards.

3.6.2 Iwi–Ministry schooling improvement initiatives

Some information was provided about four schooling improvement initiatives established in the Far North, the East Coast (Ngati Porou), Tuhoe, and Tuwharetoa.⁹⁷ It has been noted in chapter 1 that the area of the seven Mokai hapu is within the boundaries of both Ngati Tuwharetoa and Ngati Raukawa. The very new Tuwharetoa initiative was clearly of interest to the claimants.

Crown counsel said that the four partnerships with iwi groups operate predominantly in mainstream State primary schools within rural Maori areas.⁹⁸ The information provided about the Far North initiative was the most extensive and is summarised here to provide an indication of the purpose and potential scope of such initiatives.⁹⁹

Te Putahitanga Matauranga is a partnership between the Ministry and Te Reo o Te Tai Tokerau (TROT), an organisation of Maori professionals in the education sector in Northland. TROT is a charitable trust, with a board of four kaumatua and kuia trustees and a management group of Maori representatives from early childhood education, primary, secondary, area schools, and kura kaupapa Maori.¹⁰⁰

The goal of the partnership initiative is to deliver excellent education to students so that they will achieve well at school and throughout their lives. Its 'long-term vision' is to establish governance and management structures for schooling which will

94. Document A25(14), p 6

95. Ibid, p 6, n16

96. Second hearing, tape 6A

97. Document A25(14)

98. Document A30, para 39

99. Document A25(14)

100. Ibid

deliver strong, enduring education outcomes. The initiative has the potential to apply to all 76 schools in the Far North local territorial authority area. Over 80 percent of those schools are in the lowest three socio-economic deciles and, based on ERO reports, 41 percent of the schools perform poorly. Ministry statistics suggest that Maori students are 85 percent of students in those poorly performing schools.¹⁰¹

To overcome the schools' difficulties, the initiative proposes to combine short-term, external support to individual schools with more enduring support to enhance local capacity to manage education provision. Doing this 'may involve developing new structures for delivering quality education based on clustering arrangements for governance and leadership'. This could include the merging of boards and extending the administration clusters. It could also include 'incorporating future changes in the nature of principalship'.¹⁰² That seems to be a reference to the possibility that, for particular schools with poorly performing boards, principals may be empowered to assume responsibility for a school's governance as well as its day-to-day management.¹⁰³

It is proposed that education action clusters of schools will be created around successful schools and that 'highly regarded education leaders' will be seconded to develop a range of services that support improved education outcomes within each cluster. Community facilitators will assist school communities to strengthen links between families or whanau, board, and schools. In addition, barriers to student learning will be reduced through collaborative approaches with health and welfare agencies.¹⁰⁴

To date, the Ministry and TROTT have each appointed a strategic project manager, and these two people have been working together to implement the policies and decisions made by the partnership. For these purposes, funding of \$310,000 was available in the 1998–99 year. For the 1999–2000 year, \$920,000 is available. Additional human resources to be added in the 1999–2000 year include two team leaders and a number of educational and community facilitators, whose work will be overseen by the team leaders.¹⁰⁵

The more limited information provided about the other Maori–Ministry initiatives suggests that all three have been more recently established. The foundation for the Whaia Te Iti Kahurangi (East Coast) initiative was an area-wide ERO report in 1997. With 21 schools already affiliated, and funding for a strategic development framework made available in 1999, the initiative is expected to continue for up to five years. The Tuhoe initiative is underpinned by area-wide research commissioned by the Ministry in 1997. With 15 schools affiliated and a salaried executive manager running the day-to-day operations of the project, funding of \$337,500 was available in the 1998–99 year.¹⁰⁶

101. Ibid

102. Ibid

103. See doc A25(26), pp 17–20

104. Document A25(14)

105. Ibid

106. Document A25(14)

The Tuwharetoa partnership initiative is the most recent, having been formally signed only in December 1999 during the hearing of the present claim. The Tuwharetoa Maori Trust Board is the Ministry's partner in the initiative. Funding of \$19,490 is available in the current financial year to begin the process of preparing 'an Education Strategic Plan for Ngati Tuwharetoa'.¹⁰⁷

Rawiri Brell described the 'education visions' of the Maori partners in these initiatives as being 'a quality education in Maori which is inclusive of both tikanga and their language'.¹⁰⁸ He said the initiatives are medium- to long-term projects by which the Ministry has the opportunity to work with iwi, using their infrastructure within communities and schools, to find innovative ways to address education quality issues in their areas. Mr Brell also explained that, so far, the opportunity for schools to be part of such initiatives was, for the most part, limited to those in the tribal areas that have chosen to 'go down this particular track'. The exceptions that he noted related to the clusters of predominantly Maori schools in areas such as Mangere and Otara, and to a kura kaupapa management project, which is available to all kura kaupapa.¹⁰⁹

When asked by claimant counsel whether Mokai school fell within any of the clusters of schools supported by such initiatives, Mr Brell replied that he was not familiar with the tikanga between Tuwharetoa and Mokai and that the Ministry's agreement with Tuwharetoa had been signed just a few weeks earlier.¹¹⁰ He elaborated by explaining that, while a school can enter other school support projects, there is 'a much bigger kaupapa behind the agreements between the Ministry and iwi'. He noted that the Ministry relies 'on the other partner to seek the mandate on the Maori side of the partnership'.¹¹¹

Crown counsel also asked Mr Brell if it would be up to schools in the area to join the Tuwharetoa initiative or whether that was a matter internal to Tuwharetoa. He replied that, in other iwi projects, there was neither any insistence that particular schools join nor any exclusion of schools. The only limitation, Mr Brell noted, was the resources available to support each of the various projects. He then noted that the aim of the Tuwharetoa project is to strengthen education in the schools of the rohe and to find the best ways to do that.¹¹²

Asked by claimant counsel whether, if Mokai school was on the East Coast, it would be the sort of school to qualify for the school support project there, Mr Brell said that it would be invited into that project. He noted that not all schools join the initiatives into which they are invited but that any initial reluctance usually gives way in the face of encouragement to seek help.¹¹³

107. Document A25(14)

108. Document A20(a), para 8

109. Second hearing, tape 1B

110. Ibid

111. Ibid

112. Second hearing, tape 3A

113. Second hearing, tape 1B

3.7 THE TRAINING AND SUPPORT PROVIDED TO MOKAI SCHOOL

The Crown's position is that, over the years, the Mokai Primary School board and principal received assistance from the Ministry of Education and, especially, from service providers funded by the Ministry, that was extensive, appropriate, and sufficient to enable compliance with all the board's legal responsibilities.¹¹⁴ The Ministry supplied a comprehensive year-by-year list of the training and other events in which the school had been involved since 1989. It also supplied a summary of the main types of training and other support utilised by the board and principal over the years.¹¹⁵

Together, the list and summary depict a situation in which there was a range of opportunities available to the board and principal to attend training sessions on all aspects of school governance and management. In addition, there was more direct 'hands-on' assistance available in the area of curriculum delivery and, in the classroom, especially through the principal's and kaiawhina te reo support programmes. Mr Kitto provided this general overview of the situation:

The Mokai School log book and other records disclose that advisors and trainers have worked extensively with the Mokai School board and successive principals in a great variety of ways in the decade of Tomorrows Schools. The training covered such matters as board governance responsibilities, financial and accounting services, budgeting, charter requirements, EEO non-compliances, property matters, monitoring and review, and principal appraisal. The records also disclose other services available to the board and principal, and how these were utilised . . . Providers included MultiServe Education Trust, Independent Education Services, New Zealand School Trustees Association, School Support Services and Rural Education Activities Programme. Most of this support was provided through Ministry funding at no charge to the school.¹¹⁶

In her closing submissions, Crown counsel summarised the training and support available to and utilised by Mokai Primary School:

- Training was provided in governance areas, including the role of trustees, board organisation, performance management, curriculum, school review, strategic planning, obligations of boards, budgeting, ERO and compliance issues by Multiserve and Independent Education Support (IES).
- Training was also provided in operational areas by School Support Services (SSS) covering the various curriculum areas.
- Support was provided by Rural and Maori Advisers from SSS whose direct role was to advise the board and principal on operational matters and how best to progress through to compliance. The principal described this support as 'absolutely wonderful'.
- The New Zealand School Trustees Association also gave on site assistance including a weekend session on the marae for the board.

114. Document A22, paras 56–59

115. Document A25(22)

116. Document A22, para 57

- The Central Plateau Rural Education Activities Programme (REAP) also supported the school by funding Kaiawhina te reo support.¹¹⁷

The Ministry's summary of the assistance provided to the school notes that not all the opportunities for training and other support were utilised by the board and principal.¹¹⁸ It is the Tribunal's impression, nevertheless, that the school availed itself of support that was extensive and time-consuming for the few individuals involved. Mr Kitto appeared to agree when he said that, if anything, the training and support that the board and principal tried to undertake may have been too extensive.¹¹⁹ Crown counsel explained this by saying that the board and principal undertook 'several parallel courses covering the same ground' and, as a result, appear to have 'missed focused training on National Education Guidelines, Charter and compliances'.¹²⁰

3.8 OPTIONS OTHER THAN CLOSURE OF MOKAI SCHOOL

The Crown was clear that, in all the circumstances, the closure of Mokai Primary School was the most appropriate course of action that could be taken. Claimant counsel's questions of Crown witnesses explored other possible intervention options, particularly that of appointing a commissioner to the school. The exchanges on those matters, and also on the possibility of school-initiated options that Mokai school may have relied on had it known about them earlier, have been outlined at section 2.8.

In her closing submissions, Crown counsel summed up the Ministry's position in these words:

There was much questioning around interventions that may have been available, including the appointment of a commissioner or of a specialist adviser. Some internal consideration was given to whether a commissioner should be appointed (Kitto). However the Ministry was aware that the Board was working with training staff from various Crown agencies and it was felt that the board must be given the opportunity to do things they were embarking on.

The main objective of installing a commissioner is to establish a new board (Sewell). A commissioner is not a permanent institution of any school. As Crown witnesses testified, if previous history shows a lack of available people or skill, even in the face of the extensive training and support as discussed above, there is little advantage in imposing a commissioner upon a school. The situation of instability had already gone on long enough, at the expense of the students' education, and the Minister decided that the situation had reached the point that closure had to be seriously considered.

Karen Sewell also indicated her appreciation that there could be cultural concerns associated with imposing a commissioner on a community.¹²¹

117. Document A30, para 101

118. Document A25(22)

119. Second hearing, tape 7B

120. Document A30, para 108

121. Ibid, paras 104–107

3.9 CONSULTATION ABOUT THE SCHOOL'S CLOSURE

3.9.1 Introduction

The Crown defended the consultation undertaken in the process of the school's closure, under section 154 of the Education Act 1989, as being consistent with the principles that have been developed by the Court of Appeal about consultation in the context of the Treaty partnership.

The three steps required by the Education Act 1989 in the process of closing a school have been described in chapter 2 (see sec 2.9). In brief, the Minister needs to be satisfied, after consulting the school board, that the school should be closed (s 154(1)). That is the point at which a decision in principle to close the school is made. (In relation to Mokai school, the consultation commenced with a meeting on 14 November 1995, and the Minister's decision in principle was conveyed to the board by letter dated 27 July 1998.) At that point, the Minister may 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 that are made by the board within 28 days after it was asked for them (s 154(2)). The other step 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)).

Much of the Crown's evidence of how the first two steps were followed in relation to Mokai school is contained in the affidavit sworn by Mrs Phillips in September 1999 for the High Court proceedings and the documents accompanying that affidavit,¹²² particularly a submission to the Minister, dated 24 July 1998, entitled 'Consideration of Closure of Mokai School', also prepared by Mrs Phillips.¹²³ However, Mrs Phillips was not personally involved in any meetings with the school board. That responsibility belonged to Mr Kitto. Therefore, his responses to questions, especially from claimant counsel, about the consultation process supplemented the written evidence.

3.9.2 1993 to 13 November 1995

Mrs Phillips' affidavit dates the start of the closure process back to late 1993, when the then principal requested information about it as a result of concern about low roll numbers.¹²⁴ After that, it is stated that meetings between the Ministry and the school board were held in 1994 and 1995 to discuss the possible closure of the school and to provide information about the closure process.¹²⁵

Mr Kitto referred to 'his first visit to the school' as being to attend a meeting in March 1994 to discuss closure.¹²⁶ No other evidence was given of meetings held that year for that purpose. Crown counsel did not mention the March 1994 meeting in her

122. Documents A7A–A7S

123. Document A7J

124. Document A7, para 12

125. *Ibid*, para 13

126. Second hearing, tape 5B

closing submissions about the meetings held in this period but referred to an earlier hui, held at the school on 9 October 1993. She noted that the school logbook entry about that meeting records that it was held:

to discuss viability of school's future. About 60 people attended. Consensus was to keep school open and go bilingual. Things put into motion. A positive meeting.¹²⁷

The 1995 meetings referred to in Mrs Phillips' affidavit took place on 30 August and 12 October. A Ministry submission to the Minister dated 19 October 1995 refers to those meetings, immediately after noting that the school roll 'rose to 19 before declining to 12 during Term 3', as follows:

The Ministry met with the Board and parents on 30 August 1995 when it was learned the principal had resigned and that 8 of the children will leave the school at the end of Term 3.

The Ministry met again with the Board and parents on 12 October and confirmed a suitable relieving principal had been appointed for the remainder of 1995 and that the current roll is 7.¹²⁸

Mrs Phillips' affidavit notes that the Ministry submission of 19 October 1995 expressed concerns about the low roll and stated that there were alternative schools available. The Minister then instructed the Ministry to write to the board 'outlining that the Minister had decided to consider the closure of the school under s 154 of the [Education] Act'.¹²⁹ That letter, from the acting senior manager of the Ministry's national operations, Heather Colby, was dated 7 November 1995. It notes that the Mokai board 'has recently discussed the future of Mokai School with the Ministry of Education' and that the roll of the school has fallen from 'a high of 19 this year to 7 at present'. Ms Colby then states 'I am mindful that the New Zealand curriculum encourages balanced programmes where students learn in a variety of social settings'. The letter continues, 'For these reasons it has been decided, under the provisions of section 154 of the Education Act 1989, to consider the closure of Mokai School'. It is then explained that section 154 'provides that if, after consulting with the board of a school the Minister of Education is satisfied that a school should be closed, he may close the school'. Therefore, the letter concludes, the Ministry's Hamilton office has been directed to consult with the school board.¹³⁰

3.9.3 14 November 1995 to 26 July 1998

Mr Kitto explained that he delivered Ms Colby's letter of 7 November 1995 to a meeting of the school board and community on 14 November 1995. At the meeting, Mr Kitto also provided a flow chart on the closure process.¹³¹ He was very clear that

127. Document A25(19) (cited at doc A30, para 119)

128. Document A7B

129. Document A7, para 13

130. Document A7D

131. Second hearing, tape 7A

the meeting initiated the consultation with the board that is required by section 154 before the Minister can be satisfied there are reasons to close the school and make the decision in principle to close it.¹³²

Mrs Phillips' affidavit states, after referring to Ms Colby's letter of 7 November 1995, that, 'although consultation had commenced, problems were encountered'. Her understanding of 'one of the major reasons' for this is said to be 'the refusal of the Board of Trustees to meet with Ministry officials to discuss, or provide information relating to, the possible closure of the school'.¹³³ The affidavit then states Mrs Phillips' understanding that Ministry officials in Hamilton made numerous attempts to meet and discuss the possible closure of the school with the board, and refers in this regard to a letter dated 11 December 1995 from the Ministry to the board.

That letter, from Mr Kitto to the Mokai board chairperson at the time, records the Ministry's discussions, the night before, with the boards of Tihoi and Marotiri schools and states that Mr Kitto has not heard from the Mokai board since he visited on 14 November, some four weeks earlier. It then asks the chairperson to let Mr Kitto know the earliest date on which they can meet 'to continue the consultation process which I discussed with you on my last visit' and also to tell him of any specific information the board requires as part of the consultation.¹³⁴

The Tribunal understands that the meetings with the other school boards (Tihoi and Marotiri) were held because of the requirement in section 157 of the Education Act that other boards likely to be affected by a school's closure be consulted. Tihoi school was subsequently closed. In 1998, the Ministry consulted Tirohanga and Marotiri schools about the closure of Mokai school.¹³⁵ However, there appears to be some confusion in the Ministry's records as to whether it was Tihoi school or Tirohanga school that was consulted in 1995. While Mr Kitto's letter says he consulted Tihoi and Marotiri schools in 1995, the Ministry's 24 July 1998 submission to the Minister says that Tirohanga and Marotiri schools were consulted in 1995 and again in 1998.¹³⁶

Mrs Phillips' affidavit also notes that, 'Apart from a meeting on 8 March 1996 at the request of the Ministry, such attempts [at consultation with the Mokai board] were unsuccessful'.¹³⁷ That statement would seem to suggest that the Ministry believes that it barely met, or did not meet, the requirements of section 154 of the Act to consult the Mokai school board about closure after 7 November 1995 and before late July 1998 when the Minister reached the decision in principle to close the school. That suggestion appears to be strengthened by a statement in the 24 July 1998 Ministry submission to the Minister entitled 'Consideration of Closure of Mokai School'. There, it is stated, under the heading 'Consultation under Sections 154 and 157 of the Education Act 1989':

132. Ibid

133. Document A7, para 14

134. Document A7E

135. Document A7J

136. Documents A7E, A7J

137. Document A7, para 14

Meetings between the board and the Ministry to discuss possible closure under Section 154 of the Education Act 1989 took place on 30 August and 12 October 1995. It was made clear to the board at these meetings that no decision about closure had been reached. The board understands that all relevant information will be given to you for your consideration before you decide if you are satisfied the school should close.¹³⁸

Those two 1995 meetings are the only meetings referred to in the submission as being relevant to the section 154 consultation process. However, later paragraphs of the submission's section on consultation refer to other efforts taken by the Ministry to obtain the board's views. First, it is said that the board has been encouraged to make a written submission to the Minister giving its views on the possible closure of the school, but has not taken this opportunity.¹³⁹ Second, it is stated that the Mokai board had been given the opportunity to comment on the Ministry's present submission before it was prepared in final form.¹⁴⁰ The board's response is then noted, in these terms:

In comments received from the board on 5 June 1998 it was claimed the roll had grown to 22 and that this was because the school is offering a bi-lingual programme unlike its neighbours at Marotiri and Tirohanga. It commented that few students would be likely to attend either of these schools if Mokai School were closed. It appears a significant number of students are temporarily staying with relatives in the area and have come from a range of other schools in the wider Rotorua/Taupo regions.¹⁴¹

Mr Kitto's firm statement that the consultation required by section 154 of the Education Act started with the meeting on 14 November 1995 appears to conflict with the statement in the Ministry's 24 July 1998 submission that meetings held before November 1995 were relevant to the section 154 consultation process. It is also notable that the July 1998 submission does not mention any consultation meetings held after November 1995.

Claimant counsel questioned Mr Kitto closely about the meetings he had with the school community to discuss closure. Mr Kitto acknowledged that, with the benefit of hindsight, his records of the telephone and other discussions he had with the school about its closure were not adequate.¹⁴² However, he recalled making numerous attempts to set up consultation meetings which were unsuccessful because, he said, the school board did not prioritise such discussions. He acknowledged that, after November 1995 and before the Minister's decision in principle was reached in July 1998, there were no meetings called by the Ministry specifically to discuss the issue of school closure. Rather, he said, the communications with the school about closure occurred in the course of discussions that were primarily about other matters involved in the ongoing operation of the school.¹⁴³

138. Document A7J, para 10

139. *Ibid*, para 12

140. *Ibid*, para 14

141. *Ibid*, para 15

142. Second hearing, tapes 7A, 7B

143. *Ibid*

Explaining the context, after late 1995, for the Ministry's discussions with the school about closure, Mr Kitto said that the school board was 'not in any mind or any hurry' to set a date to discuss closure to keep the section 154 consultation process going. He said it was 'quite understandable' that the board did not give priority to that consultation when there were many day-to-day practical matters it wanted to discuss first. In 1996, for example, the board was 'faced with having to continually find principals for the school' and the discussions he had with it were about such practical operational considerations as that, and the school bus. The Ministry was 'involved in the very practical considerations of keeping the school operational' he said, and, as a result, 'the communications we had were usually about practical day-to-day matters first and, perhaps in part, about closure'.¹⁴⁴

In the absence of a record of his own of the various discussions about closure that Mr Kitto recalled having with the school, he noted that the school logbook contains an entry for 6 March 1996, 'Visit by MOE. Graeme Kitto re closure procedure.' He also referred to a letter to the Minister written in October 1996 by Mokai kuia Marina Jacobs which, he said, showed that the school community was considering the issue of closure.¹⁴⁵

Another letter referred to by Mr Kitto was from the then chairperson of the school board to the Ministry's Hamilton district manager, dated 24 March 1998. It mentions a meeting held on 16 March 1998 with Mr Kitto and a Maori liaison officer from the Ministry. Mr Kitto's own written evidence of that meeting was that he and the Maori liaison officer attended the school at the invitation of the principal to discuss Maori language resourcing.¹⁴⁶ In his answers to claimant counsel, he said that he recalled closure being 'discussed quite specifically' at that meeting.¹⁴⁷

That recollection appears to be confirmed by the letter of 24 March 1998 from the board's chairperson which opens by saying that the board and whanau of the Mokai Kura met with the two Ministry officers 'to discuss the future and viability of Mokai Kura'.¹⁴⁸ However, it then states: 'We have been told your office is to make a recommendation to the Minister of Education by the end of term 2, on the future of the school *and why this school should remain open*' (emphasis added).¹⁴⁹ The chairperson then asks the Ministry to delay its recommendation to the Minister until after ERO has finalised its report on the next discretionary review of the school, due to be held at the end of May 1995. At that time, it is said, the school board will also make its own submissions to the Minister. The reason for asking for the delay is stated to be:

The Board of Trustees has made significant progress over the past year in all areas of School Management, Governance and Delivery of the Education Standards.

The measure of this progress is to be determined when the Education Review Office undertakes another discretionary review during the week 25–29 May 1998.¹⁵⁰

144. Second hearing, tapes 5B, 7A

145. Second hearing, tape 7A

146. Document A22, para 21

147. Second hearing, tape 7A

148. Document A7F

149. Ibid

150. Ibid

From Mr Kitto's evidence, it was apparent that, from at least late in 1995, he knew the board did not want the school to close. While he was courteous in his explanation of the board's reluctance to discuss the matter, Mrs Phillips' understanding, from briefings by the Hamilton office of the Ministry, is stated to be that the board refused to meet to discuss closure.¹⁵¹ Crown counsel said that the board declined to talk about closure, and asked 'where was the good faith in that?'¹⁵² Claimant counsel accepted that the board did not respond to the Ministry's letter of 7 November 1995 but submitted that the meeting in March 1996, where closure was discussed, showed that the board was prepared to discuss the issues.¹⁵³

Claimant counsel asked Mr Kitto whether he believed that, in the meetings he had with the school between March 1996 and March 1998, the Ministry discharged the obligations that arise when consulting Maori – such as those listed in the 30 August 1999 edition of the Ministry's *Tukutuku Korero*. Mr Kitto replied:

In any of our meetings, we would always seek to both provide information and to be involved in any discussion about the topic, and to do so to the best of our ability. So I see that as being something that should be common to all consultation – all people are to be given their due respect. To the best of my limited ability, I'll try to respond within the kawa of the meeting and understand as I best can. Yes, I think we made an honest effort to listen and to provide information as requested.¹⁵⁴

The effect of Crown counsel's closing submissions about the adequacy of the consultation with Mokai school was that, in all the circumstances – especially the board's reluctance to discuss closure – what the Ministry did was as much as could reasonably be done. Noting that section 154 of the Act requires the Minister to first consider and determine, after consultation with the board, if there is a reasonable basis for closure, Crown counsel said there were 'already several indicators of this by 1995'.¹⁵⁵ She then referred to the school having raised the issue of closure in 1993, and information on closure having been supplied on request at that stage. Noting that the school hui in October 1993 resulted in a consensus to keep the school open and 'go bilingual', Crown counsel then said:

The fact that discussions extended over a considerable space of time is indicative of the complex matters that had to be dealt with, changing circumstances, and community determination.¹⁵⁶

It was also submitted that, in addition to the times when the Ministry sought to consult and the board was not prepared to do so, there were periods of such difficulty for the school that closure was 'virtually the only course open'. However, 'intervening events', such as the appointments of new principals in 1994 and 1996 and a new board

151. Document A7, para 14

152. Document A30, para 128; second hearing, tape 15A

153. Document A29, para 2.91 second hearing, tape 12B

154. Second hearing, tape 7A

155. Document A30, para 118

156. *Ibid*, paras 119–120

chairperson in 1997, provided 'a window of opportunity for things to be turned around'.¹⁵⁷ As well, the frequent changes of board membership made it difficult for the Ministry to set up and maintain a liaison with the board.¹⁵⁸

Nevertheless, Crown counsel submitted, the Ministry did have discussions with the board, first, in August and October 1995 about the future of the school and then at the 14 November 1995 meeting with Mr Kitto where a flow chart on the process of closure was provided.¹⁵⁹ After that, Mr Kitto attempted to continue the consultation process, and was 'partially successful' – as demonstrated by the 6 March 1996 meeting which, Crown counsel said, was 'specifically to discuss closure'.¹⁶⁰ The 16 March 1998 meeting was also referred to, and the communications that 'would so often shift to the day to day management topics, such as transport', partly, at least, because of the board's 'refusal to address the possibility of closure'.¹⁶¹

Crown counsel said that, 'for the most part', Mr Kitto's requests 'were not responded to', and he accepted that this was 'completely understandable as he was aware that the community had debated the issue and did not want the school to be closed'.¹⁶² She said that it was 'inevitable that in such a situation the school, staff, board and community would be unwilling to engage in a process which could have an outcome which they were not prepared to consider, namely closure'.¹⁶³ Crown counsel also submitted that claimant counsel's questions of Crown witnesses, about the school being under pressure at the time of the most recent ERO reviews because of the discussions about the possibility of the school's closure, showed that the school community was very aware of, and was talking about, the issues during the relevant period.¹⁶⁴

Finally, Crown counsel placed weight on written communications between the Ministry and board by which information was exchanged. Important among these was the opportunity that was given to the board, and used by it in a response of 5 June 1998, to comment on the draft of the ministerial submission dated 24 July 1998.¹⁶⁵ That was the final written communication to occur before the Minister made the decision in principle to close the school, conveyed to the board by letter dated 27 July 1998.

3.9.4 27 July 1998 to 24 June 1999

The claimants did not place emphasis on the exchanges between the Ministry and school after the decision in principle to close the school was made. Claimant counsel submitted that, from that time, and for the reason that the decision in principle had been made, the school was not being consulted 'to generate alternative options and

157. Ibid, para 120

158. Ibid, para 121

159. Ibid, para 122

160. Ibid, para 123

161. Ibid, paras 125, 127

162. Ibid, para 124

163. Ibid

164. Document A30, para 128

165. Ibid, paras 127–128

outcomes other than closure'.¹⁶⁶ Instead, the threat of closure was then very real, so that what the school and community was responding to, through their written and oral input to the Minister and Ministry, was 'the Minister's request for clarification on certain issues'.¹⁶⁷

Crown counsel submitted that, after the decision in principle was made, the Ministry was 'careful to ensure that the Minister was fully informed on all relevant matters by seeking clarification on a number of issues raised by the ERO reports'.¹⁶⁸ Mrs Phillips' evidence explained that, as required by section 154 of the Education Act 1989, the Mokai school board was requested, by the Minister's decision in principle letter of 27 July 1998, to provide any arguments as to why the school should remain open. The board presented its response in person in Hamilton on 25 August 1998 and provided a written submission at the same time.¹⁶⁹ A Ministry submission to the Minister, dated 10 December 1998, presented the school's arguments. On 11 December 1998, the Minister of Education noted the board's arguments that there had been a number of recent improvements at the school and asked for clarification from it, by the end of February 1999, on four matters:

- ▶ the training, and the outcomes of it, that the board had undertaken with MultiServe and the New Zealand School Trustees Association;
- ▶ documentation on how the national education guidelines are being implemented;
- ▶ evidence of the monitoring of students' progress that has taken place since July 1998; and
- ▶ evidence that the board has an ongoing programme of self-review.¹⁷⁰

On 2 March 1999, Ministry staff attended a hui at the school to receive the board's written submission and to hear its views in reply to the Minister's request for clarification. The Ministry then prepared a submission and background paper for the Minister, dated 31 March 1999, attaching the board's written response to the four issues.¹⁷¹ After receiving all that information, the (now new) Minister wrote to the school board, on 24 June 1999, conveying his final decision to close the school as from 3 October 1999.

In the background paper accompanying the final submission from the Ministry to the Minister, dated 31 March 1999, the board's responses to the four issues listed above are summarised and commented on. The Tribunal notes that the final paragraph of that submission raises a matter that was canvassed at length by the claimants at the hearing of the claim, although under a different heading. The paragraph is headed 'Mana of Mokai' and it reads:

In written and oral presentations, the history of schooling in Mokai from the gifting of the land by Hitiri Paerata in 1901 and the desire to 'preserve the taonga of te reo o te

166. Document A29, para 3.48

167. Ibid, para 3.46

168. Document A30, para 128

169. Document A7, para 18

170. Document A7D

171. Document A7, paras 19–22

Maori' have been emphasised. The board of trustees' response of 24 August 1998 outlining its arguments in favour of the school staying open states that the Mokai 'marae is an integral part of the kura'. In the opinion of the Ministry, the mana of the Mokai marae derives from the *marae* and does not depend on the school staying open. [Emphasis in original.]¹⁷²

3.9.5 The Minister's consideration of alternative bilingual education

The claimants' challenges to the adequacy of the consultation process for informing the Crown of the importance of education in Mokai, and to the adequacy of the Crown's prior knowledge of this, became focused in the hearing on a particular question. That question was when did the Ministry, and so the Minister, first consider that the alternative education needed by Mokai children, if the school closed, was bilingual education at a level comparable to that provided at Mokai school?

In closing submissions, and in response to questions from the Tribunal, Crown counsel acknowledged that the Ministry's 24 July 1998 submission to the Minister, which led almost immediately to the decision in principle to close the school, did not give information about alternative bilingual education providers. Instead, that submission notes that:

Marotiri School and Tirohanga School are 8 and 12 kilometres away respectively from Mokai School. Their rolls may be affected if Mokai School should close. In November 1995, on your behalf, the Ministry undertook consultation with the boards of trustees of these schools as required by section 157 of the Education Act 1989. The Board of Trustees of Tirohanga School had no comment to make, while the Board of Trustees of Marotiri School noted that the closure of Mokai School would remedy a transport difficulty being experienced by some families whose children have traditionally attended Marotiri School. The views of these schools remained the same when the Ministry consulted them again in July 1998.¹⁷³

That submission then notes the earlier quoted comments of the Mokai board, received by the Ministry on 5 June 1998. They were that Mokai school 'is offering a bilingual programme unlike its neighbours at Marotiri and Tirohanga' and that 'few students would be likely to attend either of these schools if Mokai School were closed'.¹⁷⁴ The submission does not, however, identify any schools in the area which do provide a bilingual education.

Claimant counsel asked Mr Kitto about the omission from the 24 July 1998 Ministry submission of any mention of alternative bilingual schools for the Mokai pupils. Mr Kitto said:

Perhaps . . . we should have been more explicit about saying it. Perhaps we took it for granted. We didn't see that as an issue. If that's what people wanted, that's fine. Then

172. Document A6E

173. Document A7J, para 13. It seems that the 1995 consultation was with Tihoi and Marotiri schools: see section 3.9.3.

174. Ibid, para 15

that could be offered in other places. But we didn't sort of see it as a particular issue separate from the others. We accepted, as we do, if people want bilingual education, great, that is fine. That is the choice. As long as it's good education, then that's quite okay by us.¹⁷⁵

In closing submissions, Crown counsel submitted that the 'critical briefing' of the Minister was the one that occurred next, in March 1999. That briefing identified, in a 'landscape sheet' that was appended to the Ministry's submission, 'both the nearest alternative school for each child attending Mokai and the "nearest bilingual provider", a total of 6 alternatives, including the two nearest schools'¹⁷⁶ – Marotiri and Tirohanga, which do not teach bilingually. The Tribunal notes that the landscape sheet does not state the level of Maori language resourcing provided to the three schools that are identified as being the nearest bilingual providers. Nor does it give the distance in kilometres from each child's home to the two schools in Taupo that are among those three nearest bilingual providers. However, the sheet does note the travel times involved for each child in using bus services to get to and from those schools and the further time involved in getting them to and from the bus. For example, one entry relating to two children states that their travel time to the two Taupo schools is '7.40 am – 4.10 pm (+ time between home and service (ca 7km))'.¹⁷⁷

Mr Kitto's evidence included information about the level of te reo taught at seven schools within 30 kilometres of Mokai school.¹⁷⁸ Only four of the schools listed are shown to teach in te reo at a level sufficient to attract Maori language resourcing. (The lowest level, level 4, applies to schools that teach in te reo for less than 30 percent of class time.¹⁷⁹) The other three schools are listed as providing 'some te reo', with one of those schools listed as providing te reo for '1–2 hours per week'.¹⁸⁰

The Crown did not accept the claimants' allegation that the Crown took a narrow approach in considering the possible alternatives to State education located at Mokai.¹⁸¹ Emphasising the 'critical briefing' of March 1999, with its attached 'landscape sheet', Crown counsel stated:

The Minister was therefore well aware that the closure of Mokai school would not cut the children off from the opportunity to access education in te reo Maori and tikanga. The Minister was, moreover, confident that the alternative schools were providing an acceptable standard of education to their students. . . .

. . . consideration was given to the distance the children could have to travel to attend alternative schools and any costs to the whanau for that travel. Calculations were made and it was found that many of the children were travelling approximately the same distance to attend Mokai as they would to attend any of the possible alternatives. The Mokai bus was travelling a 71km circuit twice a day.¹⁸²

175. Second hearing, tape 6A

176. Document A6E, attachment 1; doc A30, para 42

177. Document A6E, attachment 1

178. Document A22, para 52

179. Document A21, para 23

180. Document A22, para 52

181. Document A30, para 41

182. Ibid, paras 43–44

3.10 CROWN POLICY FOR PROTECTING TE REO AND MATAURANGA MAORI

3.10.1 The framework provided by the Education Act 1989

Throughout their evidence, Ministry witnesses highlighted the Crown's commitment to protecting the taonga of Maori language and culture and improving the quality of the education provided to Maori children. The Education Act policies relevant to those goals were mentioned at the outset of this chapter. In her closing submissions, Crown counsel highlighted the provisions of the Act that:

- ▶ require school boards of trustees to take reasonable steps to discover and consider the views of the Maori communities in their geographical areas (s 62);
- ▶ deem school charters to contain the aim of developing policies and practices for their schools that reflect New Zealand's cultural diversity and the unique position of Maori culture (s 63(a)); and
- ▶ require every school board to take all reasonable steps to ensure that instruction in tikanga Maori and te reo Maori are provided for full-time students whose parents ask for it (s 63(b)).¹⁸³

Also highlighted were national education goals 9 and 10 (set out in section 3.3.2(1)), which promote Maori language and culture and must be implemented by all schools.¹⁸⁴ Reference was made too to the new national administration guideline (guideline 1(v)), which will, from 1 July 2000, require schools to develop policies, plans, and targets for improving the achievement of Maori students.¹⁸⁵

Summarising the evidence, Crown counsel listed five ways by which those policy statements are implemented and supported by the Crown:

- ▶ through the flexibility that is afforded to school boards to implement programmes in te reo Maori and to deliver the curriculum through the medium of Maori language and traditional knowledge;
- ▶ through the financial and professional support available to boards from providers funded through the Ministry of Education and through the special support programmes identified for Maori medium education;
- ▶ through the Ministry's active development of Maori curriculum statements which stem from and encompass a Maori world-view;
- ▶ through ERO's ability to independently review all schools' delivery of education including, through its Maori Reporting Services, its ability to review curricula delivered wholly in Maori; and
- ▶ through the strategic initiatives adopted by the Ministry (and underpinning school curriculum activities) to develop policies, programmes, and partnerships for and in collaboration with Maori and to provide and allocate funding for all such initiatives through Vote: Education.¹⁸⁶

183. Ibid, para 25

184. Ibid, paras 25–26

185. Ibid, paras 26–27

186. Ibid, para 28

The third of those matters was the subject of least oral evidence during the hearing. However, Crown counsel drew the Tribunal's attention to the Maori curriculum documents prepared by the Ministry, referring to them as a 'significant development of the curriculum for Maori in Maori' that are not merely translations of the 'Pakeha curriculum'.¹⁸⁷ Mr Brell had described the Maori medium curriculum as 'parallel to the Pakeha curriculum' but noted that the Maori arts curriculum was very different from the Pakeha arts curriculum.¹⁸⁸

The fifth matter listed above – the strategic initiatives adopted by the Ministry – was the main subject of Mr Brell's evidence. An outline of those initiatives is presented here because it provides part of the larger context for the Ministry's dealings with Mokai school. Mr Brell explained that while he was 'part of the [school's] closure process' in that his group was consulted and he was quite aware of what was happening, his responsibilities are such that he cannot take an intensive interest in such matters.¹⁸⁹

3.10.2 Ministry of Education strategic initiatives

The position held by Mr Brell, group manager Maori, was established in the Ministry in 1991. His role, as the leader of a group of six analysts and advisers, is to provide strategic oversight and leadership in Maori education across the Ministry and so across every level of the education sector from pre-school to tertiary. Mr Brell explained that this involves 'working closely inside the three main policy, implementation and operational groups of the Ministry' to 'bring a Maori dimension and consideration in all of this work'.¹⁹⁰ In addition, Mr Brell has responsibilities to work with other officials on education and joint projects, and with Maori education stakeholders involved in education developments and to advise the Minister and associate Ministers with responsibility for Maori education.¹⁹¹

Mr Brell said that, over the years, the Ministry of Education has been increasingly proactive in the development of a more strategic approach to Maori education and to improving the education system's responsiveness to Maori.¹⁹² He explained the overall goal of the Ministry's approach to be:

a highly effective education system providing a high quality education to Maori, an education of the quality that will equip all young people with the skills, knowledge and confidence to live successful lives anywhere in New Zealand or indeed the world. The education system provided to our children also needs to ensure that they are confident in their own identity, culture and language.¹⁹³

187. Second hearing, tape 13B

188. Second hearing, tape 3A

189. Second hearing, tape 1B

190. Document A20, para 5

191. Ibid, para 7

192. Ibid, para 8

193. Ibid, para 19

The three broad objectives guiding the Ministry's approach to attaining that goal are:

- ▶ support for and strengthening the growth of kura kaupapa Maori and kaupapa Maori education;
- ▶ provision for greater Maori involvement and authority in education; and
- ▶ enhancement of the success of Maori in the general school system.¹⁹⁴

In his brief of evidence and the appendix attached to it, Mr Brell gave examples and details, including funding details, about Ministry initiatives directed at each of those objectives. With regard to the first objective, Mr Brell highlighted the Ministry's efforts to recruit and train Maori medium teachers; to expand learning resources; to develop assessment in Maori medium education; and to develop curricula in Maori medium that reflect Maori culture and values.¹⁹⁵ On the development of assessment criteria, Mr Brell explained in answer to questions from the Tribunal that kura kaupapa Maori have not been running long enough to make any assessments but that some 'intermediate indicators' are that the children like to go to school, that truancy is down, and that there is parental support for the school.¹⁹⁶

In the second area – providing greater Maori involvement and authority in education – Mr Brell said that several paths are being followed, including the formal partnerships by means of the Maori schooling improvement initiatives (see sec 3.6.2). Other initiatives are concerned with finding ways for kura kaupapa Maori to have more authority and involvement in the development of kura; refocusing curriculum development to include a Maori world view; and reviewing education regulations 'to focus on more flexible governance, accountability and purchase arrangements to support Maori in their efforts to strengthen their education'.¹⁹⁷ On that last matter, Mr Brell stated, in response to questions from the Tribunal, that the 'one size fits all' governance model of Tomorrow's Schools does lead to problems for Maori education and there is a need to look at alternative governance models.¹⁹⁸

In the third area – raising the success of Maori in the general school system – Mr Brell pointed out that the majority of Maori receive their education in the general system (rather than in Maori medium). For that reason, a 'key strategy' is to build the responsiveness of the general education system to Maori. He explained that the Ministry has recently placed an increased focus on understanding the barriers to schools serving Maori students more effectively. The approach involves people close to the problem establishing the causes and determining effective responses and relies on links with health, welfare, and other policies which impact on Maori. Mr Brell also said that developmental and consultative approaches to working with parents and communities are likely to work better for schools. He gave as examples the new policy on school suspension and the forthcoming guidelines on consultation with Maori. Referring to the new national administration guideline that will come into effect on

194. Ibid, para 10

195. Ibid, para 11

196. Second hearing, tape 2A

197. Document A20, paras 13–14

198. Second hearing, tape 3A

1 July 2000, which requires all schools to have strategies to address the needs of Maori students (see sec 3.3.2), Mr Brell said it will be supported by a 'better flow of quality information both to schools and Maori'. To that end, a new liaison and advisory support service will be established for schools and for Maori parents.¹⁹⁹

In light of Mr Brell's reference to consultation with Maori, claimant counsel questioned him about the principles that should guide the Ministry's consultation with Maori communities. Counsel referred to the 30 August 1999 edition of the Ministry's publication *Tukutuku Korero*, which outlines forthcoming guidelines for consultation between schools and Maori communities. One of the guidelines states 'Do not come with all the answers; provide the opportunity for Maori to identify the issues and direction'.²⁰⁰ When asked if that guideline should apply to the Ministry when consulting Maori communities, Mr Brell replied that it should because:

our behaviour had to be encouraging of Maori starting to take and to encourage responsibility for these sorts of things and the intent of this is to help encourage that understanding that it takes time to build those kinds of things within communities, and also within organisations like ourselves.²⁰¹

Mr Brell also agreed with claimant counsel that, for consultation to be effective, it must be inclusive and 'a two way street'.²⁰²

With regard to the Ministry's various efforts to pursue the three objectives for improving Maori education, Mr Brell was very careful to explain that change takes time. He gave as one reason for this the need to improve Ministry, and wider Government, responsiveness to the needs of Maori. In his words:

The Ministry continues to develop structures and tools to improve consultation and communication with Maori, to understand Maori education issues, and to improve the responsiveness of our research and policy advice to meet the needs of Maori.²⁰³

Mr Brell noted that the involvement of Maori will be integral to the success of these developments and that 'many of the answers to education success rest within local communities'.²⁰⁴ The challenge, he said, is to find the best path to the goal of high quality education for Maori children.²⁰⁵

Another reason given by Mr Brell for the time that is needed to bring about change in the education of Maori children is that quality standards need to be developed for the delivery of education in tikanga and te reo Maori. He emphasised that the quality of education to be delivered to Maori children cannot be compromised and that the standards to be developed must, at the very least, be commensurate with what is expected for all students.²⁰⁶ As well, community involvement must be developed by

199. Document A20, paras 15–16

200. Document A18, app B

201. Second hearing, tape 1B

202. Ibid

203. Document A20, para 17

204. Ibid, paras 18–19

205. Ibid, paras 19–20

206. Ibid, paras 22–23

finding 'effective ways of empowering parents and communities' so that their involvement will 'enhance, not impair, the quality of education which the children receive'.²⁰⁷ On this point, Mr Brell referred to the fact that for every hour primary school children spend in school classes, they will spend eight hours outside class. Therefore, the 'importance of the role of the community in this extra-curriculum area should not be underestimated'.²⁰⁸

With regard to schools with a strong focus on te reo and tikanga Maori, Mr Brell said there are 'considerable challenges for teachers and parents to establish a strong foundation in the core language and cognitive skills'.²⁰⁹ He then noted evidence of an understanding, within many kura kaupapa, that proficiency in both English and Maori is important to the development of well-educated students. With regard to te reo and tikanga Maori, Mr Brell emphasised that the formal and informal processes of the marae, and their integration with education, are 'critical to the formal process of education'.²¹⁰ He said that integrating all parts of the education sector into the life of the marae is more effective than relying simply on the education sector. However, Mr Brell noted that there is a point 'where the responsibility to provide intimate local tikanga must be given over to the community. This will be more successful if the children's grasp of te reo is of a high standard and their education has included broad exposure to tikanga'.²¹¹

Relevant to these matters are claimant counsel's questions to Mr Brell about whether the Ministry's view of the education quality and viability of a Maori school is influenced by such 'wider considerations' as the school's links with the community and the role it plays in delivering tikanga. Mr Brell said that those are relevant features that must be weighed up by the Ministry. However, he noted, a primary school is only a part of quite a significant education system and, ideally, all parts of it should contribute to strengthening tikanga.²¹²

Another part of the reason for Mr Brell's warning that improvements in the education of Maori children will take time relates to the resources available to Maori medium education. The main challenge here, Mr Brell said, is to 'meet increasing demand for an education in Maori without compromising the quality of that education' when there are numerous factors complicating the situation. He listed 10 such factors, including:

- ▶ a diminishing pool of native speakers;
- ▶ a Maori medium teaching force which has a wide range of language proficiency, from beginners to fluent speakers; and
- ▶ the increased demands for professional development and new learning and teaching resources as a result of the introduction of a new Maori medium curriculum over the last 10 years;

207. Ibid, paras 26–27

208. Ibid, para 28

209. Ibid, para 29 (p 9)

210. Ibid, para 30 (p 9)

211. Ibid, para 31 (pp 9–10)

212. Second hearing, tape 1B

- ▶ increased demands from iwi wanting to protect their own linguistic characteristics by making and using their own resources; and
- ▶ tensions of priority as between the revitalisation of Maori language and the improvement of Maori education generally.²¹³

On that last matter, Mr Brell's clear message was that a balance needs to be achieved between the focus on Maori language and the 'overriding importance of a quality education'. The 'key constraint' for the Crown in working to achieve this balance in Maori medium education:

is a general lack of expertise and capability in the education system to help build the necessary resources to ensure a good education in Maori. A similar constraint affects iwi and hapu. Overcoming this cannot be achieved overnight.²¹⁴

In hindsight, Mr Brell said:

had the Crown responded more vigorously in the mid-seventies when the first bilingual school was opened in Ruatoki, and when there was a larger pool of native speakers than now exists, and later, in the early eighties in response to kohanga reo, then the situation could have been different today.²¹⁵

3.11 CONCLUSION

In her closing submissions, Crown counsel outlined the Crown's understanding of the claim:

The closure of Mokai School is said to be a breach of the Treaty. The cause of this breach . . . is that the closure of Mokai School denies their children access to an education in te reo Maori and matauranga Maori at the place of their choice, Mokai. They do not acknowledge that there are any relevant considerations that would modify the right they claim . . . even though their children can access an education in Maori language and culture in bilingual or immersion programmes at schools within travelling distance.

. . . The claimants do not appear to accept that there is any onus on the elected board of trustees of the school to demonstrate its capacity to provide the necessary governance and management to ensure that the school is a successful one. Their position is that, irrespective of the failure of the school to provide a balanced curriculum and coherent learning for the children, the board has no responsibility for this, they have a right to expect the provision of State education at Mokai. They maintain this position, irrespective of the viability of the school itself or the viability of the overall network of schools. They take that position despite the documented difficulties of the school to meet its basic statutory obligations. They allege that the failures of the school are the fault of the system: the load was too heavy for the principal;

213. Document A20, para 30 (pp 10–11)

214. Ibid, para 35

215. Ibid, para 36

support was not available; the Crown did not adequately intervene in the board's exercise of its responsibilities to govern and manage the school.

They assert that Article 2 of the Treaty supports an argument that a community such as that at Mokai has an absolute right . . . to receive a State education which accommodates that community's interests in the taonga of the Maori language and traditional knowledge and customs, disregarding all other considerations. They further assert that that right extends to [the] delivery of that education in the context of the particular identity and place of that community.²¹⁶

In response to that interpretation of the claim, the Crown's position is that there is an onus on it to provide education that enables and empowers Maori to protect and enhance those values which they identify as taonga. That obligation, however, does not override all other relevant considerations.²¹⁷ Accordingly:

It was reasonable and responsible for the Minister to close the school, as he could not be satisfied that . . . the students would receive quality education. There was not an appropriate alternative to closure which the Ministry could provide and which would have enabled mainstream State education to continue to be delivered at Mokai. The Ministry could not, for example, impose the obligations of a satellite at Mokai on another board of trustees. There were, however, alternative State schools within the area where the children could access te reo Maori me ona tikanga, in accordance with the wishes of the parents and community.

. . . As the Minister stated in his letter to the Board, closing Mokai School was not an easy decision to make. He recognised that the school was a central focus of the community. However the place of the school in the life of the community could not come before the best interests of the students.²¹⁸

216. Document A30, paras 8–10

217. Ibid, para 135

218. Ibid, paras 137–138

