

CHAPTER 6

THE MĀORI TREATY INTEREST IN THE PETROLEUM RESOURCE

6.1 INTRODUCTION

In light of our findings in chapter 5, what rights or expectations do the claimants now have in the modern Treaty settlement process in respect of the loss of their petroleum interests? At the start of the last chapter, we indicated that, where Māori legal rights to petroleum were extinguished in breach of the Treaty, a new interest arose. We call this a Treaty interest. It arises whenever legal rights are lost by means that are inconsistent with Treaty principles. When it arises, there will be a right to a remedy and a corresponding obligation on the Crown to negotiate redress for the wrongful loss of the legal right. Most importantly of all, the Treaty interest creates an entitlement to a remedy for that loss additional to any other entitlement to a remedy. Applied to these claims, the effect of this reasoning is that it is wrong in principle for the Crown to refuse to provide separate redress for its Treaty breaches in respect of the petroleum resource. It is also wrong in principle for the Crown to exclude petroleum-based remedies.

In this chapter, we explain the bases for our analysis and its meaning for the claims before us. We do this by examining the two major issues raised by the parties' submissions:

- ▶ whether separate redress is due to Māori, additional to that made for historical land-loss grievances, for the loss of rights in the petroleum resource; and
- ▶ whether the Crown's policy of excluding petroleum assets from settlements is justified.

But, before doing so, we discuss generally the appropriate approach to redress in Treaty settlements.

6.2 FAIR AND REASONABLE RECOMPENSE FOR THE WRONG

Earlier Tribunals have concluded that the Crown's fiscal limitations dictate that it cannot, and so is not obliged to, provide full compensation to Māori for all the prejudices they have suffered as a result of Crown breaches of the Treaty.¹ What the Crown should do, however, is provide 'generous reparation . . . to restore the Crown's honour and re-establish sound

1. Waitangi Tribunal, *Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), pp 314–315

relations'.² Plainly, it will always be a challenge to find the right reparation package in particular cases. A vital factor in meeting that challenge is the utmost good faith which underpins the Treaty relationship. One result is that, just as the Crown must consider all the circumstances and resist any temptation to be miserly in its approach, so too must Māori resist any expectation of extravagant remedies.

The need for both parties to be aware of the broader context within which the settlement of long-standing Treaty grievances is made was explained by the Tribunal in the *Ngai Tahu Sea Fisheries Report 1992*:

there is a need for the Crown and Ngai Tahu to exercise the utmost good faith and good will in negotiating a compromise. A compromise does not always involve a settlement based solely on the issues. It may take into account a number of external circumstances such as the public conscience, the nation's ability to meet the costs and the desirability of a permanent solution. There are also to be measured the benefits that should flow from an agreed settlement and such intangibles as the satisfaction of a long outstanding grievance and the unity of people resulting therefrom. It must be an honourable settlement and the Crown, following the sad history of the loss of Ngai Tahu land and mahinga kai resource, has need to retrieve its honour.³

In the 1987 Court of Appeal *Lands* case, Justice Somers emphasised that the fundamental aim of the Treaty principle of redress is to right wrongs, even if strict 'eye for eye' remedies are unavailable:

As in the law of partnership a breach by one party of his duty to the other gives rise to a right of redress so I think a breach of the terms of the Treaty by one of its parties gives rise to a right of redress by the other – a fair and reasonable recognition of, and recompense for, the wrong that has occurred.⁴

This is the spirit in which the Crown must approach all settlements over Treaty grievances.

6.3 A SEPARATE REMEDY

The Crown argued forcefully that there was no obligation to provide a separate remedy in respect of the acquisition of petroleum. The first basis for this stance was that the expropriation of residual Māori petroleum rights in 1937 was not in breach of the Treaty. As we have indicated in chapter 5, we do not accept that. The second reason relates to the acquisition of

2. Waitangi Tribunal, *Taranaki Report*, p 314

3. Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend Ltd, 1992), pp 307–308

4. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 693 (CA)

Māori land prior to 1937. In respect of those lands, the Crown accepted that at least some titles had been acquired in breach of the Treaty, but it rejected any argument that the loss of petroleum rights associated with that wrongfully acquired land might give rise to a right to a remedy separate to that relating to the loss of the land itself. This conclusion is reflected in the Crown's Treaty settlement policy, which holds that, ordinarily, when Māori lose land by means that are in breach of the Crown's Treaty obligations, the Crown's duty to provide appropriate redress does not extend to any particular attributes of the land. Accordingly, it does not matter whether the land is near a city (creating enhanced land values) or whether it is rugged hill country or fertile alluvial plains: the remedy due to Māori will not reflect such matters. This is because the level of redress available in modern Treaty settlements comprises such a tiny proportion of the actual loss that little would be gained from such a close evaluation of the land lost.⁵

There can be no doubt about the sense of that general approach. However, we consider that there are circumstances where it would be quite inappropriate to adopt that otherwise sensible general approach. Those circumstances are where, in the period between the Māori loss of land through breaches of the Treaty and the provision of redress for those breaches, some attribute is found (inherent in the land rather than brought to it) which not only is able to be valued separately from the land but also is so disproportionately valuable as to make the application of the general approach grossly unfair. Most often, the attribute which is subsequently discovered will be mineral wealth. It may be that this mineral wealth was known of but only recently rendered extractable, but the principle is the same. Petroleum is one of a small number of examples which fit this exceptions category. For Māori to lose the entire benefit of such valuable resources without appropriate redress, and for the Crown to gain it, would serve to compound the original, and often already grievous, Treaty breach in relation to the acquisition of the land.

The Court of Appeal's decision in the 1989 *Coal* case is of assistance here. The issue in that case, which arose from the Crown's proposed sale of the State-owned enterprise Coalcorp, was whether the protective scheme of the Treaty of Waitangi (State Enterprises) Act 1988 safeguarded Tainui's Treaty claims to two particular kinds of property that were proposed to be sold: Coalcorp mining rights and Crown surplus properties. The court upheld the Māori claimants' position, with the president of the court providing this overview of the situation:

It is obvious that, from the point of view of the future of our country, non-Maori have to adjust to an understanding that does not come easily to all: reparation has to be made to the Maori people for past and continuing breaches of the Treaty by which they agreed to yield government. Lip service disclaimers and token acknowledgements that the Treaty has not been honoured cannot be enough. An obligation has to be seen to be honoured . . .⁶

5. Document A30, para 12

6. *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513, 530 (CA)

For the Crown's fiduciary obligation to be seen to be honoured in the context of its enormously valuable rights in petroleum, the Crown must not give the appearance of mean-spiritedness. A broad, unquibbling, and generous approach is required.⁷ To pretend that sub-surface minerals can properly be treated in the same way as urban versus rural land valuations for the purpose of Treaty settlement quantum is mean spirited in our view. Petroleum is clearly a separate category of loss deserving of separate consideration for remedy on a broad, unquibbling, and generous approach. That is the correct approach.

We would add that, in order to be fair, the cost of settlement of any petroleum claim would have to be additional to whatever relativity calculations the Crown has already arrived at in respect of claimant groups. It would be grossly unfair if the Crown accepted our reasoning and then came to conclude the settlement of petroleum claims within relativity quantum calculated before that acceptance. That would see Māori giving up more Treaty interests for the same quantum. It is difficult to see how that outcome could be consistent with a reasonable or good-faith settlement process. In this regard, we note that Crown settlement policy since 2000 is consistent with the provision of additional compensation for new heads of claim: 'while maintaining a fiscally prudent approach, each claim is treated on its merits and does not have to be fitted under a predetermined fiscal cap.'⁸

Of course, the value and nature of any such additional redress must be a matter for agreement between the negotiating parties. The same broad considerations of affordability for the nation on the one hand, and sufficiency to restore the relationship on the other, will fall to be applied by the parties to those negotiations. All that we require is that the matter be on the table.

6.4 PETROLEUM INTERESTS OR ASSETS AS A POSSIBLE REMEDY

Having found that there must be a separate or additional remedy for the loss of legal rights in petroleum in breach of Treaty principles, we turn now to address the next question: whether modern-day petroleum assets or interests ought to be made available for the purpose. We approach the question in three steps. First, we identify the key Crown interests. Secondly, we discuss in broad terms the value of those interests. Thirdly, we address the arguments of the parties and reach our own conclusions.

7. *New Zealand Maori Council v Attorney-General*, p 655

8. Office of Treaty Settlements, *Ka Tika ā Muri, Ka Tika ā Mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 2nd ed (Wellington: Office of Treaty Settlements, [2002]), p 88

6.4.1 The nature of the Crown interest in petroleum

The Crown's legal ownership and regulatory control of the petroleum resource entitles it to the following benefits:

- ▶ control of the exploration and development of the resource (including the right to impose fees to cover the administrative costs involved);
- ▶ taxation revenue from successful exploration and production ventures;
- ▶ the imposition and receipt of royalties from the production of petroleum; and
- ▶ ownership of an 11 per cent non-contributory interest in the Kupe petroleum mining licence.

Our focus in this report is on the royalties and the Kupe licence interest, both of which have been identified by the claimants as assets that they might want to be included in the settlement of their Treaty grievances.

6.4.2 Royalties

Royalties are payments made to the owner of a resource for extraction or use rights. The Crown Minerals Act 1991 authorises the Minister of Energy to impose royalties (s34) and requires that policies be established to provide for 'the obtaining by the Crown of a fair financial return from its minerals' (s12). Previously, the Petroleum Act 1937 authorised the imposition of royalties (s18). Mining licences granted under that Act, and the royalties imposed, continue in force today (Crown Minerals Act 1991, s107).

The royalties currently applying in New Zealand are the the *ad valorem* royalty and the hybrid *ad valorem* or accounting profits royalty. For the *ad valorem* royalty, the rates are:

- ▶ for licences issued before 1975, 5 per cent of the value of petroleum at the wellhead;
- ▶ for licences issued between 1975 and 1985, 10 per cent, and later 12.5 per cent, of the value of petroleum at a specified point and with certain costs deducted;
- ▶ for licences issued between 1986 and 1995, 12.5 per cent; and
- ▶ for exploration permits issued after 1995, and where there is a successful discovery and production to test its extent, 5 per cent of the sales price received or, if there has been no arm's length transaction, 5 per cent of the deemed sales price.⁹

For the hybrid *ad valorem* or accounting profits royalty, for mining licences issued since 1995, the royalty is the higher of a 5 per cent *ad valorem* royalty or a 20 per cent accounting profits royalty (based on defined accounting conventions).¹⁰

9. Document A29, paras 193, 203–210, 222

10. Ibid, paras 197–198, 223

6.4.3 The Kupe licence interest

The Crown's interest in the Kupe petroleum mining licence is a remnant from the licensing regime that was in force from the late 1970s to the mid-1980s. At that time, if the applicant for a prospecting licence wanted Government funding assistance, the Crown could agree to contribute up to 40 per cent of the exploration costs in return for the Minister of Energy having a 51 per cent share in the licence. The difference of 11 per cent was known as a non-contributory (or non-participatory, or carried) interest, because the Crown was not required to contribute that proportion of the exploration costs unless and until the licence owners discovered petroleum and decided to develop the field.

The Kupe prospecting licence was granted in 1981 and, originally, the Crown's interest in it was managed by the State-owned enterprise Petrocorp, which owned the other 49 per cent of the licence. By 1985, all the interests of Petrocorp and the Minister had been sold to New Zealand Oil and Gas Limited (an exploration company) except for the Minister's 11 per cent non-contributory interest. That interest remained, despite various other sales, through to the time of the discovery of the Kupe petroleum field in 1991. The licence interest holders then formed a joint venture and applied for a mining licence, which, with extensions, has been in force since 1992. The Crown's 11 per cent non-contributory interest has been transferred to the mining licence, which is for a term of 25 years from 1996.¹¹

Since April 2002, the Kupe mining licence has been owned 70 per cent by Genesis Power Limited (a State-owned enterprise which generates and retails electricity), 19 per cent by New Zealand Oil and Gas, and 11 per cent by the Crown.¹²

In the past year, there have been reports of plans by Genesis to develop the Kupe field by 2005 and of talks it has held with oil companies which could take over as Kupe's operator.¹³ A November 2002 news item stated that OMV Petroleum Proprietary Limited had confirmed its interest in taking over from Genesis as the operator of the Kupe field. That company is a subsidiary of the Austrian-based oil and gas group, which is the 'leading group in Central and Eastern Europe'.

The continuation of the Crown's 11 per cent interest in the Kupe field is now unique among current exploration and mining licences. Crown witness Evelyn Cole informed the Tribunal that, in 1986, the Government decided to sell all its interests in petroleum licences, both contributory and non-contributory. The existence of the latter interests, and the idea of their sale, was unpopular with the industry, and it transpired that there were no sales of the 11 per cent non-contributory interest alone. By 1988, the Crown decided not to sell the 11 per cent interest where it had been taken under the 1986 royalty regime – a decision that did not affect

11. Document A29, para 206; doc A10(1)

12. 'Genesis Takes Stake in Offshore Kupe Field to 70% with Shell Purchase', 24 April 2002 (http://www.med.govt.nz/crown_minerals/news/news.asp?newsID=-764524658)

13. 'NZOG Welcomes Renewed Interest in Kupe', 15 August 2002 (http://www.med.govt.nz/crown_minerals/news/news.asp?newsID=-1118040915); 'OMV Confirms Interest in Operating Kupe Field', 25 November 2002 (http://www.med.govt.nz/crown_minerals/news/news.asp?newsID=969197187)

the Kupe licence, which was issued in 1981. In 1995, licences with the 11 per cent carried interest were given the choice to transfer to the new hybrid petroleum royalty regime outlined above. All did. Meanwhile, the Crown progressively sold its commercial interests in licences (namely, the contributory plus non-contributory interests), and some licences with Crown interests were surrendered, to the point where the sole remaining Crown interest is that in the Kupe mining licence.¹⁴

The joint-venture agreement between the mining licence holders contains terms that allow the other partners to give the Minister of Energy 90 days within which to elect to join in a programme of development of the Kupe field. Should that occur, the Minister would be obliged to do one of three things:

- ▶ agree to participate, thereby activating the 11 per cent interest to a contributory interest and so obliging the Minister to contribute 11 per cent of past and future capital expenditure and development costs in order to receive 11 per cent of the production revenues from the field;
- ▶ sell or assign the 11 per cent interest to another party (who would then take on the obligations outlined in the previous paragraph); or
- ▶ withdraw from the licence by assigning the 11 per cent interest to the other licence holders for no consideration.¹⁵

With regard to the first of those options, it was estimated in 1998 that the cost to the Crown of activating its 11 per cent interest would be around \$30 million. That estimate was made because the Government of the day was contemplating the sale of the interest – a matter which prompted meetings in Wellington, Hawera, and Manaia between Crown officials and representatives of south Taranaki Māori. Crown witness Andrew Hampton told the Tribunal that, at those meetings, officials outlined not only the estimated cost of converting the Crown's 11 per cent interest but also the rights of the other partners under the Kupe joint-venture agreement should the Crown seek to transfer its interest to an outside party. The key rights described were:

- ▶ the right of first refusal (namely, to match the price offered and be secured as the purchaser) should the Crown propose to transfer its interest to any other than a Government-owned entity;
- ▶ the right to be satisfied as to a potential joint-venture partner's financial ability to contribute to the cost of the joint venture before the Crown's interest can be transferred to that potential partner.¹⁶

We noted in chapter 1 that the prospect of the Crown selling its Kupe interest has now arisen again. It has been publicised that the potential purchaser is State-owned enterprise Genesis Power Limited. As noted above, such a transfer would not trigger the first right of refusal held by the other partner.

14. Document A29, para 208

15. Document A10(1)

16. Document A30, para 14

6.4.4 Crown expenditure on and revenue from petroleum

In response to the Tribunal's request at the hearing, Ms Cole provided information from the Government's and Petrocorp's annual reports about the value to the Crown of its ownership of the petroleum resource. There are gaps in the information because of different accounting reporting practices in some years and because some reports were not able to be accessed by Ms Cole.¹⁷ Despite the gaps, it is evident from her explanation of Government expenditure on petroleum exploration and production since the late 1960s that the Crown has invested several billions of dollars in the following endeavours:

- ▶ the purchase of Kapuni natural gas by means of a 25 year 'take or pay contract' with the Government, which underwrote the development of the field and which, between 1968 and 1976 alone, required Crown loans to the Natural Gas Corporation of some \$58 million;
- ▶ the development of the Maui gas field in the 1970s, which has included an initial \$30 million licence purchase price, plus the purchase of over \$300 million of gas not yet taken, and \$56 million reimbursement of the other Maui joint-venture parties after the completion of the second platform;
- ▶ the establishment of Petrocorp in 1977 and, in 1986, the payment of \$800 million to pay that amount of debt;
- ▶ the provision of exploration cost assistance (by means of the Crown's 40 per cent contributory interest, plus 11 per cent non-contributory interest regime), which involved payments of some \$400 million between 1977 and 1997;
- ▶ the provision of assistance to promote gas use, involving millions of dollars of loans or grants to maintain and upgrade pipelines; and
- ▶ the provision in the early 1980s of \$120 million to the Synfuels project and, in 1990, the payment of \$174 million to the company paid to take over the Crown's shareholding.¹⁸

On the revenue side, Ms Cole's evidence, albeit incomplete, indicates that the Crown has received several billion dollars from its ownership of petroleum. This includes:

- ▶ royalties from 1970 to June 2000 totalling more than half a billion dollars (namely, \$509,341,434);
- ▶ energy resource levies (a type of tax) totalling more than \$1.5 billion (\$1,589,686,025);
- ▶ income of some \$75 million from crude oil sales plus a \$14 million dividend paid by Petrocorp to the Crown in 1983 and 1984 relating to profits from the McKee mining licence;
- ▶ income of some \$120 million from the sale of mining licence interests (excluding the \$140 million from the sale of the McKee and Kaimiro licences to Petrocorp, which, it seems, was funded by a Crown grant);

17. Document A29(a), p 1

18. *Ibid*, pp 1–3

- ▶ income of some \$800 million from the sale of Petrocorp (although that amount was offset by restructuring costs and liabilities at the time of the sale); and
- ▶ sales of pre-paid Maui gas, which, in 1990, resulted in a payment of \$254 million to the Government.¹⁹

Ms Cole's evidence left it uncertain whether overall the Crown has yet to make a profit from its involvement with the petroleum resource. Certainly, its earlier involvement as a funder of exploration and development left it with a substantial debit to be offset by future successes. However, now that the Crown has removed itself from active involvement in the petroleum industry (except for the potential of the Kupe licence), its position with regard to the resource is solely that of a revenue gatherer. While more recent figures would be most useful, we observe that the royalties in each of the last four full years accounted for by Ms Cole – from 1996 to 1999 – ranged between \$26 million and \$36 million and, in the same four-year period, gas energy resource levies earned the Crown between \$81 million and \$97 million annually.²⁰

The expert witness commissioned by the Tribunal, Geoffrey Logan, provided an estimate of \$13 billion as being the amount of gross revenue from New Zealand petroleum in the years 1970 to 1999. Of that estimated gross amount, Mr Logan assessed the Crown's 'take' at 46 per cent, or \$6 billion. It must be noted that the following caveats apply to Mr Logan's estimates:

- ▶ the dollar figures are nominal figures, not inflation adjusted (which would increase the figures by some 150 to 250 per cent);
- ▶ the assessed level of the Government's take of 44 to 46 per cent relates specifically to the Government's current petroleum programme, which has been in place only since 1995;
- ▶ the numbers are accurate to about plus or minus 5 per cent, and are rounded to the nearest billion dollars; and
- ▶ the \$13 billion and \$6 billion are gross revenue figures (including royalties), with no deductions for costs of any sort.²¹

6.4.5 Crown and claimant submissions

The Crown's view is that petroleum assets are particularly unsuitable for use in the settlement of historical Treaty grievances. Andrew Hampton explained that this view is based on an incompatibility between the characteristics of petroleum interests and the overall aims of the Treaty settlement process. The features of petroleum interests that the Crown considers to be problematic are:

19. Ibid, pp 4–5, 6, 7. The revenue sources and figures exclude the permit and annual fees that are imposed and collected in order to recoup the Crown's costs of administering its minerals exploration and mining regime: see doc A29(a), p 8.

20. Document A29(a), pp 6, 7

21. Document A46

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- ▶ the considerable uncertainties and difficulties in ascertaining the value of petroleum deposits;
- ▶ the high costs involved in the exploration and exploitation of the resource; and
- ▶ the considerable risks involved in proceeding to commercial development even once a discovery has been made and assessed.

As a result of those factors, the Crown maintains that it is not possible to be sure of the value to be attributed to any petroleum interest that might be included in a Treaty settlement. Consequently, there is a high risk that the interest would turn out to be worth much less or much more than its estimated value. That, in turn, means that the Crown's objective of durable settlements that are fair between claimant groups would be jeopardised.

As for the possible use in Treaty settlements of revenue streams from petroleum development, the Crown contends that this too would pose problems because:

- ▶ returns are uncertain and will fluctuate depending on the success over time of the petroleum exploration or extraction venture; and
- ▶ as a result, a similar risk arises to that outlined above, in that the possibility of a claimant group receiving varying amounts each year, or a total amount that differs from the original estimate of what is due to them, threatens the durability of the particular settlement and its fairness relative to settlements made with others.²²

When concluding the Crown's argument about the unsuitability for use in Treaty settlements of royalties and other sources of revenue, Crown counsel Virginia Hardy submitted that, once the real opportunity for redress is reduced to the Crown's income stream, 'there is little reason to link that to income from petroleum as opposed to money from other sources which the Crown garners'.²³ This statement is particularly applicable to Taranaki Māori, whose lands were taken so comprehensively by raupatu and for whom there is very little, if any, Crown land in their rohe that can be returned.

With regard to the claimants' submissions on remedies, it needs to be recalled that this report does not deal with the claims that focus on Māori participation in the management of the petroleum resource. They will be the subject of a separate report, to be issued in the near future. In fact, the claimants placed significant emphasis on the need for enhanced Māori involvement in the management of the environmental effects of petroleum exploration.

The nature of the prejudice caused by the loss of legal rights in petroleum was not the subject of detailed submissions from the claimants. Ngā Hapū o Ngā Ruahine's statement of claim contended that their prejudice included the denial of 'the right to use petroleum to create an economic base' for their people after the loss of most of their land through raupatu and various Crown 'purchases' and the failure to be compensated for the Crown's assumption of the control of petroleum.²⁴

22. Document A30, paras 4–12

23. Document A35, para 120

24. Claim 1.1(a), paras 4.2(i), (j)

On the matter of an appropriate remedy for that prejudice, Ngā Hapū o Ngā Ruahine claimed that the strength of their customary rights to petroleum warranted a Tribunal finding and recommendation that the ownership of the resource within the rohe of the hapū should be vested in them. Further, the claimant hapū said that compensation should be provided for the loss of benefit from the resources that they have suffered. As to the nature of that compensation, the claimants sought a specific finding and recommendation that the Crown should not only offer its interest in the Kupe licence to Ngā Hapū o Ngā Ruahine but also offer to provide the financial resources necessary to enable the hapū to contribute to the development of the field on an ongoing basis.²⁵

Andrew Erueti's submissions on behalf of Ngā Hapū o Ngā Ruahine at the Tribunal hearing provided some context for their stance on appropriate remedies. First, he noted that settlements with aboriginal peoples in Canada, the United States of America, and Australia, and the settlements concerning pounamu and coal in New Zealand, show that various remedy options exist that 'can recognise the claimant's Treaty rights whilst not interfering with existing permit holders or future development of the resource'.²⁶

Next, Mr Erueti emphasised the importance to the claimants of the Crown being open to negotiating with them on the use of petroleum as a means of redress. It was said that this was important for two reasons. First, if the Crown showed that it would 'seriously consider' that possibility, it would demonstrate its good faith towards the claimants:

it is not enough for the Crown to reject out of hand any one or more remedies without further discussion with the claimants. Remedies should be discussed in detail and in the spirit of partnership and good faith between the Crown and Maori.²⁷

Secondly, the use of petroleum as a means of redress is particularly important to Ngā Ruahine, for there is little Crown land available for settlement:

Petroleum is the only natural resource within the claimant's tribal rohe of real economic value and an interest in petroleum would greatly assist in the restoration of Nga Ruahine's tribal mana.²⁸

The Wai 852 claimants contended that they had suffered the effects of 'past, present and future prospecting, exploration and mining of petroleum resources within the Ngati Kahungunu rohe' and had been denied the 'exercise of development rights' in respect of those resources.²⁹ They sought findings and recommendations that would allow Ngāti Kahungunu to exercise tino rangatiratanga and kaitiakitanga in respect of petroleum resources within their rohe and recognise their customary rights in respect of those resources. As well, they

25. Ibid, paras 5.1(d)–(f)

26. Document A13, para 175

27. Ibid; doc A48, para 88

28. Document A13, para 176

29. Claim 1.2(a), paras 8.3, 8.4

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sought compensation for the losses they had suffered as a result of Crown Treaty breaches concerning the petroleum resource.³⁰ Counsel Grant Powell contended that the Māori interest in petroleum required the Crown to ensure that ‘a significant share’ of the Crown’s present interest in the resource within the Ngāti Kahungunu rohe be transferred to Ngāti Kahungunu. The task of quantifying that share and articulating exactly how its transfer might be achieved, Mr Powell submitted, was one for the Crown and Ngāti Kahungunu to negotiate on the basis of good faith and goodwill.³¹

6.4.6 Petroleum-based remedies – our view

We have found above that the Treaty interest creates an entitlement to a remedy for the loss of legal rights to petroleum and that this remedy must be additional to any other entitlement to redress. It must follow from those conclusions that no relevant Crown asset capable of providing redress to the particular claimants should be excluded from the negotiations without a good reason. Indeed, the learned president of the Court of Appeal in the *Coal* case added a further requirement. He also required Māori agreement to any such exclusion:

what is clear in my opinion is that the attempt to shut out in advance any Tainui claim to be awarded some interest in the coal and surplus lands in issue in this case is not consistent with the Treaty. Unchallenged violations of the principles of the Treaty cannot be ignored. Available means of redress cannot be foreclosed without agreement.³²

In the case of petroleum, the Crown has made it clear that it has decided to exclude from settlements the Kupe licence and any royalties. It has done this unilaterally and in the face of strong claimant opposition. On its face, the Crown’s stance appears to be inconsistent with the dictum in the *Coal* case. However, the Crown contended that it was supported by good reasons.

The Crown said that it would destabilise the Crown’s overall Treaty settlements framework if assets of uncertain value and some degree of risk were included. It will be recalled that the Crown’s policy for resolving historical Treaty grievances is to achieve both fair and certain settlements with each claimant group and also fair and certain relativity as between the various groups’ settlements.

According to the Crown, the uncertainty relating to petroleum exploration could mean either that the asset to be transferred may be valueless or that its value may far exceed the appropriate redress for the grievances of the claimant group. All of this would depend on whether exploration was successful, and there is no way of knowing that at the time of the settlement. Either way, the Crown said, relativity between claimants would be undermined.

30. Claim 1.2(a), p 6

31. Document A22, para 102

32. *Tainui Maori Trust Board v Attorney-General*, p 530

We find it difficult to see why the Crown should be so concerned with relativities at the point of settlement when the day afterwards iwi are free to invest in whatever commercial ventures they choose. Experience has shown that some investments have been more successful than others, but that does not appear to have destabilised relativities in any way. The Crown acknowledged in hearings that, if the Taranaki tribes wish to utilise their settlement funds to invest in petroleum exploration after the settlement, it could not stop them. That, it seemed to us, undermined the logic of the Crown's argument.

It may be that the Crown sees its stance as consistent with the Treaty principle of active protection. In our view, however, active protection does not mean that the Crown can usurp decisions properly for the partnership. The content of the active protection duty in the settlement phase is not to take away decision-making from Māori in order to save them from their own folly. The duty of the more powerful partner, acting in good faith and in the spirit of mutual respect, must properly be to inform the Māori partner of the risks involved in any proposed component of the settlement package and then to encourage its partner to make a carefully reasoned business and Treaty decision.³³ The claimants have indicated that they are prepared to proceed in this way. Such a process would promote te tino rangatiratanga of Māori communities who are seeking to settle their Treaty grievances and plan their future paths. It would also promote principled and transparent kawanatanga.

There is one further point. While we do not wish to diminish the case of other claimants, we do have the advantage of the assessment of Taranaki grievances in the Tribunal's *Taranaki Report* on raupatu. It is difficult to think of a more deserving case for the provision of adequate petroleum-based assets. Few Crown assets remain within the region, and petroleum assets must be among the most valuable of them. What is more, there is an undeniable nexus between the horrendous land loss suffered by the Taranaki people and the petroleum assets now owned by the Crown. This makes those assets a suitable remedy should the claimants, after considering the risks, wish it.

The result of our reasoning is that the critical issues for negotiation at the time of settlement are how much additional value the Crown will put on the table in recognition of the petroleum grievance and what the net present value of any petroleum-based remedy is. As we have said, all that we require is that the issues and the assets be on the table.

In the final chapter of this report, we present a summary of our findings and make recommendations to the Minister of Māori Affairs, in accordance with section 6(3) of the Treaty of Waitangi Act 1975.

33. See, for example, *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, 304 (CA), per Cooke P (summarising the view of the five Court of Appeal judges in the 1987 case *New Zealand Maori Council v Attorney-General*).

