

CHAPTER 5

THE LEGAL INTEREST OF MĀORI IN THE PETROLEUM RESOURCE

5.1 INTRODUCTION

In chapters 5 and 6, we distinguish between two kinds of interest in the petroleum resource: a legal interest and what we refer to as a Treaty interest. This chapter focuses on legal interests, which comprise rights recognised and enforceable by the law of the day. In New Zealand, since the passing of the Petroleum Act 1937 the Crown has generally been recognised as being the legal owner of petroleum because the Act extinguished the private ownership rights in the resource that had previously been recognised by the law.¹ At the hearing of the present claims, Crown counsel accepted that, before 1937, Māori customary law and English common law provided that the ownership of land carried with it the ownership of whatever was in the land, including petroleum.

The lawfulness of the Petroleum Act 1937, and its profound impact on the private ownership of petroleum, is beyond question. The Waitangi Tribunal's jurisdiction, however, requires us to measure Crown conduct and Acts of Parliament against the standard provided by the principles of the Treaty of Waitangi. If we were to find that the Petroleum Act was inconsistent with those principles, the result would be that in 1937 the Act lawfully, but in breach of the Treaty, expropriated the legal ownership interest of Māori in petroleum contained within the land that they owned at that time. But, as is well known, Māori had lost ownership of the great majority of their lands by 1937 – mostly long before 1937 – and often by means that the Waitangi Tribunal has found to be inconsistent with Treaty principles. For its part, the Crown has acknowledged that a number of the ways by which Māori land was acquired since 1840 were inconsistent with its Treaty obligations to Māori.

The question before us is whether, if Māori no longer have any subsisting legal ownership interest in the petroleum resource, an interest of any other sort remains.

In this chapter and the next, we see that the expropriation of the pre-existing Māori rights to petroleum arose from a context that is riddled with breaches of the Treaty. We are satisfied that, in this situation, where legal rights to an important and valuable resource were lost or

1. Claimant counsel argued before us that, although section 3 of the Petroleum Act 1937 purported to arrogate to the Crown full legal title to the petroleum resource, it was not effective in doing so. This argument is founded in the common law doctrine of aboriginal title, and it is for the courts to respond to it. We express no view on the matter, and in this report we speak of the Petroleum Act as if it did effect the extinguishment of all private rights to petroleum. Our doing so should not, however, be taken as a dismissal of the aboriginal title arguments.

extinguished as a direct result of a Treaty breach, an interest of another kind is generated. We call this a ‘Treaty interest’.

A Treaty interest arises whenever legal rights are lost by means that are inconsistent with Treaty principles. It carries with it a right to a remedy and a corresponding obligation on the Crown to negotiate redress for the wrongful loss of the legal right. Perhaps most importantly, the Treaty interest creates an entitlement to a remedy for that loss additional to any other entitlement to redress.

5.2 MĀORI CUSTOMARY LAW

It is not disputed that there was a Māori customary interest in petroleum. At the hearing, the Crown accepted at the outset that such an interest existed as a corollary of Māori customary ownership of land containing petroleum:

There is a good argument for a collective Māori interest (hapu/iwi) in petroleum prior to the confiscations of the 1860s, Crown purchases and the granting of land titles through the Native Land Court and subsequent alienations commencing in the 19th Century.²

The Crown also accepted that the Māori customary interest in petroleum included a right to exploit the resource for economic gain: ‘It is accepted that had ownership of land by iwi and hapu persisted it is difficult to see why pre 1937 there would not have been a right to benefit from exploitation of the petroleum resource.’³

Thus, the Crown accepted that there was no need for Māori to prove that they actually used petroleum before or after the time of the Treaty, either for commercial or for non-commercial purposes: it was sufficient that Māori could claim customary title to the surface of the land above the resource.

Clearly, these acknowledgements by the Crown were properly made. The approach accords with customary rights jurisprudence developed in Canada; for example, in the landmark case of *Delgamuukw v British Columbia*.⁴ There, Chief Justice Lamer of the Canadian Supreme Court applied the following principle:

The exclusive right to use the land is not restricted to the right to engage in activities which are aspects of aboriginal practices, customs and traditions integral to the claimant group’s distinctive aboriginal culture. Canadian jurisprudence on aboriginal title frames the ‘right to occupy and possess’ in broad terms and, significantly, is not qualified by the restriction that use be tied to practice, custom or tradition. The nature of the Indian

2. Document A35, para 16

3. Ibid, para 42

4. *Delgamuukw v British Columbia* [1997] 3 SCR 1010

interest in reserve land which has been found to be the same as the interest in tribal lands is very broad and incorporates present-day needs. Finally, aboriginal title encompasses mineral rights and lands held pursuant to aboriginal title should be capable of exploitation. Such a use is certainly not a traditional one.⁵

The Australian jurisprudence is far more conservative on these questions. In the High Court of Australia's recent decision in *Western Australia v Ward*, it was held (by Justices Beaumont and Vondoussa) that, since there was no evidence of any traditional aboriginal law, custom, or use relating to petroleum either in the state or (formerly) the territory, no relevant title right or interest to petroleum could be established.⁶ For our part, we prefer the Canadian approach; it is the approach that better accords with Treaty principle in New Zealand. In particular, it gives substance to the guarantee of equality in article 3, as we discuss in section 5.4.

While they agreed that a substantive Māori interest in petroleum did exist prior to 1937, the claimants and the Crown disagreed on most other aspects of the claim. They disagreed on whether petroleum is separately protected by article 2 as a taonga or whether it is protected as part of the guarantee of te tino rangatiratanga over land. They disagreed on whether and in what circumstances the alienation of land extinguishes all Māori interests in petroleum, and they disagreed on whether the general expropriation of petroleum in 1937 breached the Treaty in so far as it affected Māori. We deal with these issues in turn.

5.3 PETROLEUM – PART OF THE LAND OR SEPARATE TAONGA?

The essence of the Crown's argument was that any Māori legal rights in petroleum existed only by virtue of Māori title to the surface of the land that contained the resource. The Māori interest in this respect was no different to the interest of any other landowner, as provided by the applicable principles of English, and later New Zealand, common law. Therefore, in the Crown's submission, the Māori interest in petroleum remained for as long as Māori held title to the land in which it was contained. Once Māori title was transferred to the Crown or to private parties, the petroleum interest that went along with it was also transferred. It followed that, unless rights to petroleum were expressly or by necessary implication reserved from sale or acquisition, the Māori interest in the petroleum was extinguished upon the transfer. By this reasoning, our focus, according to the Crown, should not be the Petroleum Act 1937 and the nationalisation of petroleum rights; rather, it should be the various acquisitions and transactions by which the Crown and private parties acquired title to the vast bulk of what were formerly the Taranaki and Ngāti Kahungunu tribal estates.

5. Ibid, see paras 117–119, 121–122, 127

6. *Western Australia v Ward* [2002] HCA 28 (8 August 2002)

In light of the Crown's acknowledgement that, before 1937, rights to petroleum within land accompanied title to the land itself, counsel for Ngā Ruahine did not pursue the contention that petroleum was itself a taonga protected directly by article 2 of the Treaty.⁷ That stance would have opened up for argument the possibility that petroleum rights could be retained by Māori notwithstanding the transfer of surface title into non-Māori hands – a kind of non-territorial aboriginal right to petroleum.⁸ However, counsel for Ngāti Kahungunu did pursue the taonga argument.

On our view of the matter, it is unnecessary to resolve this issue, and we think it wise not to venture our own view in any final way. But we can indicate that we found the argument advanced to be unpersuasive. The evidential basis for the proposition that petroleum is a taonga showed that it was known in pre-colonial times and used for lighting, as a beacon, and for dyeing. The name for surface seepages was korohū, a dialect word for steam.⁹ The evidence of Takirirangi Smith identified certain Wairarapa traditions about gas seepages referred to as Te Ahi o Taiwhetuki.¹⁰ Mr Smith said:

Any emission which comes from the ground through any aperture, fissure, hole or opening is a taonga. This is because our tipuna defined the earth as papatuanuku and the place within the earth as Rarohenga. The presence of emissions at surface level were/are regarded culturally as tapu having come from Rarohenga, also named by our tipuna as an area of Te Pō.¹¹

There is no question that these traditions are of long standing. Surface manifestations described as Te Ahi o Taiwhetuki are in a sense tapu – probably in the same sense that Papatuanuku or whenua may be said to be tapu. Indeed, the evidence was that emissions are taonga because they are identified with Papatuanuku – that is, they carry the same tapu as the land itself. Does that make petroleum or oil and gas in situ a taonga within the meaning of article 2 of the Treaty? Is that underlying resource something 'highly prized' by the ancestors, to use the formulation adopted by this Tribunal in the Te Reo Māori claim?¹² Though the term has a number of other more mundane meanings, successive carefully reasoned reports of the Tribunal over many years now have come to treat 'taonga', as used in the Treaty, as a tangible or intangible item or matter of special cultural significance. We adopt the same approach here.

Although in cases such as the present there is always a balance to be struck, we have some difficulty accepting that the relatively generalised traditions in respect of surface

7. Document A48, para 48

8. P McHugh, *The Māori Magna Carta* (Oxford: Oxford University Press, 1991), pp 132–133

9. Document A25, paras 16, 20

10. Document A23, para 8

11. *Ibid*, para 5

12. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 3rd ed (Wellington: Brooker's Ltd, 1993), p 7

manifestations of oil and gas are sufficient to show that oil and gas are themselves taonga within the contemplation of the Treaty, separate from the land as a taonga. It seems to us that this leap should not be made without the backing of stronger and more detailed kōrero or traditions about the separate nature of these resources and their place in the histories and tikanga of these iwi. We tend, albeit tentatively, to the view that the evidence we had was insufficient to justify that leap. And, rather more importantly, we think that the answer to the case is to be found elsewhere.

5.4 RIGHTS TO PETROLEUM AN INCIDENT OF TITLE TO LAND

We prefer to treat the Māori customary interest in petroleum as an incident of the ownership of the land surface. Apart from the relative lack of detailed evidence to support the alternative taonga-based approach, there are other good grounds for our preference.

First, the approach is consistent with the equality guarantee in article 3. That is, if the common law of New Zealand recognised that non-Māori landowners had an interest in sub-surface petroleum as an incident of their title to land – and it appears that it did¹³ – then Māori landowners were entitled at least to equal treatment under the law. We note that this point applies whether the Māori title was customary or had been converted to a Māori freehold title under the Native Lands Acts.

5.5 A RIGHT TO DEVELOPMENT

Alternatively, the Māori interest in petroleum may be conceptualised as a development right – a right to exploit a resource not extensively used in traditional times for new purposes not contemplated in those times.

The Waitangi Tribunal found that a right to development existed in both the *Ngai Tahu Sea Fisheries Report 1992* and the *Report on the Muriwhenua Fishing Claim*. The Ngai Tahu Tribunal said: ‘It is common ground between the claimants, the Crown and the fishing industry that inherent in the Treaty of Waitangi is a right to development.’¹⁴

The Muriwhenua Tribunal put the matter this way:

An opinion that Maori fishing rights must be limited to the use of the canoes and fibres of yesteryear ignores that the Treaty was also a bargain.

It leads to the rejoinder that if settlement was agreed to on the basis of what was known, non-Maori also must be limited to their catch capabilities at 1840.

13. Document A12, p 32

14. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 253

Maori no longer fish from canoes but nor do non-Maori use wooden sailing boats. Nylon lines and nets, radar and echo sounders were unknown to either party at the time. Both had the right to acquire new gear, to adopt technologies developed in other countries and to learn from each other.

The Treaty offered a better life for both parties. A rule that limits Maori to their old skills forecloses upon their future. That is inconsistent with the Treaty.¹⁵

Sir Apirana Ngata captured the essential element of fairness inherent in the right to development when addressing the 1937 Bill in Parliament. The question was asked whether Māori knew that there was oil under their lands when they signed the Treaty. The answer, said Ngata, was:

No. Nor did they know that there was gold or coal under their land, or that the timber which grew on their lands had a greater value than for making canoes and carvings for their houses, and so on. Is the argument now, that, because the poor savage was ignorant in 1840 of the things that have been made possible by the pakeha, he is to have no benefit or advantage from them to-day? If so, it will not hold water.¹⁶

The argument did not hold water in 1937, and it does not fare better now.

5.6 WHAT IF LAND TITLE HAD BEEN LOST?

We therefore find, as accepted by the Crown, that, prior to the nationalisation of petroleum by the 1937 Act, there was a Māori legal interest in petroleum inherent in land ownership, whether it was Māori customary land or Māori freehold land.

However, as we have observed already, by 1937 very little land remained in Māori ownership; most of the lands of the Taranaki peoples and of Ngāti Kahungunu had been acquired by the Crown or by private parties. The exception according to counsel for Ngāti Kahungunu was the Wairoa district, where land in Māori title remained a relatively significant proportion of landholdings in the district at the time.¹⁷

We move now to focus on the various means by which Māori lost their land prior to 1937. That is because, without a specific reservation of petroleum or mineral rights, any Māori interest in those resources was lost when the land was sold or otherwise alienated. In most cases, there was no such reservation, and Māori legal rights in petroleum went with the land when it was taken or sold. Our next question is, therefore, whether those alienations were consistent with the principles of the Treaty.

15. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 234

16. Sir Apirana Ngata, 6 December 1937, NZPD, 1937, vol 249, p 1044

17. Document A22, paras 11–25

5.7 PETROLEUM AND THE ACQUISITION OF TITLE TO LAND

Most alienations of land from Māori owners fall into one or other of the following categories:

- ▶ pre-Treaty transactions;
- ▶ pre-1865 Crown purchases;
- ▶ raupatu;
- ▶ Crown acquisitions facilitated by Native Land Court processes;
- ▶ takings under public works legislation; and
- ▶ takings for survey liens.

The Tribunal has considered these categories of land loss in a number of reports, and the Crown and claimants have negotiated settlements in most categories. These settlements have contained acknowledgements by the Crown of Treaty breaches.

This report is not the place to attempt to assess the consistency with Treaty principles of land acquisitions in the rohe of the claimants. In respect of the Taranaki peoples, the task has already been undertaken by another Tribunal and largely reported upon in the *Taranaki Report of 1996*.¹⁸

With respect to land acquisition in the rohe of Ngāti Kahungunu, the position is more complex, and no analysis could be attempted here. The Tribunal's reports in respect of the Mōhaka River and Whanganui-ā-Orotu inquiries address some of the issues.¹⁹ A comprehensive analysis of Māori land loss in northern Hawke's Bay (between the Mōhaka and Tūtaekuri Rivers) will be available by the end of this year in the report of the Tribunal inquiring into the Mōhaka ki Ahuriri district. Tribunals inquiring into the Wairarapa ki Tararua and Wairoa districts will also report within the next two or three years. It is not for us to preempt any of the findings of those Tribunals, whose work is in train.

Rather, what we seek to do is to set out in broad terms the categories into which most Māori land loss falls, recording in respect of each category the findings of the Tribunal and what is known about the position of the Crown.

We do this for two reasons: first, to support our conclusion that it is likely that the reasons for most of the claimants' land loss implicate the Crown in breaches of the Treaty and, secondly, to establish a Treaty principle framework for considering how Māori interests in petroleum ought to be factored into the inquiries and negotiations surrounding land loss in the claimants' rohe. We think that it will be possible to predict with reasonable accuracy the circumstances in which the loss by Māori of title to land gives rise to an ongoing Māori Treaty interest in the petroleum lying beneath.

18. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996)

19. Waitangi Tribunal, *The Mohaka River Report 1992* (Wellington: Brooker and Friend Ltd, 1992); Waitangi Tribunal, *Tē Whanganui-a-Orotu Report 1995* (Wellington: Brooker's Ltd, 1995)

5.7.1 Crown acknowledgements

The Crown's most recent formal articulation of its policy relating to the negotiation and settlement of Treaty of Waitangi claims is a comprehensive guide put out by the Office of Treaty Settlements. It is entitled *Ka Tika ā Muri, Ka Tika ā Mua – Healing the Past, Building a Future*.²⁰ The 'key settlement policies' are set out in part 1. The second key settlement policy is as follows:

The Crown is ready to negotiate most claims involving raupatu, pre-1865 Crown purchases, subsequent Crown purchases and/or breaches arising from the operations and impact of the Native land laws.²¹

The position is amplified in part 2 in these terms:

Crown readiness to negotiate

Because the Crown acknowledges that widespread breaches of the Treaty and its principles are likely to have occurred, it is willing, if claimant groups wish, to negotiate settlements of claims that include purchases before 1865, confiscation, and the operation and impact of the Native land laws after 1865. Claimants who want to negotiate to settle such claims do not need to go through Waitangi Tribunal hearings or provide detailed research on each and every Crown action or omission that they consider breached the Treaty and its principles. However, they do need to show the link between the Crown's acts or omissions and the harm to their tūpuna (ancestors).²²

These statements show an acceptance by the Crown that acquisition of land by the stated means – purchases before 1865, confiscation, and by the operation of Native Land Court processes after 1865 – is likely to have occurred in breach of the principles of the Treaty. The Crown's specific response in settlement terms will depend on the individual circumstances of settling parties.

Less clear is the Crown's position on whether it accepts liability for Treaty breaches in respect of land loss through pre-Treaty negotiations, takings under public works legislation, and takings for survey liens. No acknowledgements in respect of these categories are contained in *Ka Tika ā Muri*, but that is not a complete answer. In respect of survey liens, for example, the Crown acknowledged in its settlement deed with Ngāti Awa that survey liens had contributed to land loss.²³ Likewise, in its settlement deed with Te Uri o Hau, there is an

20. 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]). The references in the text of this report are to the second edition of the guide, which came out in 2002 (the first edition was published in 1999).

21. *Ka Tika ā Muri*, p 32

22. *Ibid*, p 42

23. *Deed of Settlement to Settle Ngāti Awa Historical Claims* (Wellington: Office of Treaty Settlements, 2003), cl 3.2E(a)(i)

acceptance of liability in relation to land sold prior to the Treaty.²⁴ The situation appears to be that the Crown is reserving its position on these matters, prefers not to set that out as a matter of policy, and in practice determines its stance on a case-by-case basis in negotiation with claimants.

5.7.2 Pre-Treaty transactions

There were well over a thousand transactions in Māori land by private individuals and companies before 1840. Many of them were in the Far North, and the Tribunal addressed the issues comprehensively in the *Muriwhenua Land Report 1997*.

In general, the European settlers considered they were buying freehold title. The Māori view of the transactions commonly had more to do with admitting Pākehā into their communities in the expectation of ongoing benefits and in a sense of joint-venture partnership in the development of the land. It is doubtful whether there was understanding or acceptance that sale meant the permanent relinquishment of rights in the land. For these early sales, therefore, there is a real issue as to whether there was a meeting of the minds between the parties as to what was being transacted. Without that common understanding, no valid sale can have taken place:

we find that the pre-Treaty transactions did not effect, and could not have effected, binding sales, and that the parties were not of sufficiently common mind for valid contracts to have formed. Maori contracted with Europeans on the basis of Maori law, which was the only law known to them and the only cognisable law in New Zealand before 1840. As a consequence, the pre-Treaty land transactions were not sales but at best conferred a personal right of occupation conditional upon acceptance of the norms and authority of the local Maori community as represented in the rangatira. The transactions imposed obligations on the settlers, of which the settlers ought reasonably to have been aware but which they did not generally fulfil.²⁵

The Muriwhenua land Tribunal also found that the Crown breached the Treaty in later confirming pre-Treaty transactions as though they were valid purchases. The Government of the day made insufficient inquiry into the pre-Treaty transactions to justify its treatment of them as sales: they were simply presumed to be, or were treated as, sales, without adequate inquiry into the Māori intent.²⁶ This was notwithstanding the undertakings that had been given in the Treaty debate at Waitangi in 1840 to investigate the preceding transactions and to return lands unjustly held.²⁷

24. Waitangi Tribunal, *The Kaipara Interim Report* (Wellington: Legislation Direct, 2002), p 4

25. Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), p 392

26. *Ibid*, pp 109–110, 167, 173

27. *Ibid*, p 167

The Crown has yet to accept the invalidity of pre-1840 land sales. Even so, the Crown accepts that it had a Treaty responsibility at the time to protect for iwi and hapū a sufficient land base for their foreseeable needs.

5.7.3 Crown purchases pre-1865

Governor Grey's land-purchasing policy exploited the complexity of Māori land tenure whereby various hapū could have ownership rights in the same land.

There was much confusion over whether lesser resident 'chiefs' were bound by the transactional consent of 'overlord chiefs' in many regions. The Crown was able to buy large tracts of land by negotiating and making advance payments to certain chiefs, who sometimes represented wider community opinion but very often did not. Although Māori began to resist the sellers by setting up tribal rūnanga to stall the process, Crown purchasers never conceded that a deal had not occurred once one section of the owners had taken payment and signed a deed.

This process generated strong tensions within Māori society. Outbreaks of fighting resistance sometimes resulted; in particular, in Hawke's Bay and Taranaki in the 1850s. The land purchasers at this time would sometimes leave highly sensitive areas for a period, but they would keep negotiating in other areas, quite explicitly hoping that pressure and working through acquiescent chiefs would cause the resistance to crumble. Once they were confident that they had a deal with some influential leaders, they would try to push through a survey or make an announcement of the deal as a completed purchase, immediately putting the still resisting groups at a disadvantage. The resisters then felt obliged to participate for fear the land would be sold from under them.

The Crown's purchases between 1840 and 1865 were addressed comprehensively by the Tribunal in its *Ngai Tahu Report 1991*. In that report, the Tribunal said:

In their single-minded commitment to the purchase of Ngai Tahu's vast estate, the respective Crown purchase agents, with the connivance or clear endorsement of the various governors of the day, very largely ignored Ngai Tahu's rights as a Treaty partner. It is abundantly clear the odds were weighed so heavily against Ngai Tahu that, in the absence of a competent and committed officer appointed to advise and assist them, they stood no real chance of avoiding tribal disintegration, serious impoverishment and virtual landlessness.²⁸

In like vein, in the *Taranaki Report*, the Tribunal said, by way of summary:

28. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), p 838

The failure to negotiate with the Te Atiawa leadership for a settlement policy and land sharing process was denigrating of Te Atiawa tribal authority and contrary to the principles of the Treaty of Waitangi, by which that authority was to be respected. The prejudice to Te Atiawa was the loss of most of their land by processes that were not agreed on and over which they had no control and the relegation of Te Atiawa status from that of equals to that of supplicants. As a result, none of the acquisitions of land in north Taranaki can be seen as having been acquired consistently with the Treaty.

As sales, each of the transactions failed to satisfy one or more of certain minimum criteria relating to the prior determination of ownership, the determination of Maori consensus by Maori process, fairness of terms, certainty of subject-matter and consideration, and mutuality of understanding.²⁹

The Ngāi Tahu, Taranaki, and Muriwhenua land Tribunals all found fault with the Crown's failure to create sufficient reserves from the land sales transacted. In Taranaki:

Contrary to Treaty principles and the promises of governors, no or inadequate reserves were set aside for the support and future development of hapu. There is evidence that the Crown was aware of, but was not disposed to heed, the warnings of its own officials that, if proper allowance were made for all hapu, there would be little land left to buy, except in the bush, and that large block purchases of the type in fact effected would threaten the facility of Maori to maintain themselves and their institutions.³⁰

It was the same story in the north:

Where Maori expected their authority to continue as before, the Government, in asserting British rule, assumed that Maori authority, law, and land tenure should be replaced. Further, while both sides assumed that Maori should benefit from European settlement, there was no drive to reserve the land that Maori needed for that purpose. The result was the virtual exclusion of Maori from the central Muriwhenua bowl, and their marginalisation on the rims – politically, socially, and economically.³¹

In its settlement deed with Ngāi Tahu, the Crown acknowledged that its dealings with that iwi had fallen short of the Treaty standard, and it gave apologies in these terms:

The Crown acknowledges that it acted unconscionably and in repeated breach of the principles of the Treaty of Waitangi in its dealings with Ngāi Tahu in the purchases of Ngāi Tahu land.

29. Waitangi Tribunal, *The Taranaki Report*, pp 53, 54

30. Ibid

31. Waitangi Tribunal, *Muriwhenua Land Report*, p 205

The Crown acknowledges that, in breach of Article Two of the Treaty, it failed to preserve and protect Ngāi Tahu's use and ownership of . . . their land and valued possessions . . .

The Crown . . . apologises unreservedly . . . for the suffering and hardship caused to Ngāi Tahu, and . . . acknowledges that such suffering, hardship and harmful effects resulted from its failures to honour its obligations to Ngāi Tahu under the deeds of purchase whereby it acquired Ngai Tahu lands.³²

It follows that the Crown has acknowledged that there were serious shortcomings both in the policies underlying land purchasing in this period and in their implementation.

5.7.4 Raupatu

Following the land wars, the Government introduced the New Zealand Settlements Act 1863 authorising the confiscation of large areas of land where the Governor in Council was satisfied that any native tribe – or a considerable number of a section thereof – had been engaged in rebellion against Her Majesty's authority.³³ Confiscation was advocated as a way of punishing rebellion, of ensuring peace and security by military settlement, and of paying for the war by the selling off of surplus confiscated land.

Māori were divided into either loyal or rebel categories at the Government's discretion. In effect, 'rebels' were those who could not prove to the Crown's satisfaction that they were loyal. The label not only incorporated those tribes that had simply resisted the Crown's aggressive and illegal acts or had become involved more actively in engaging Crown forces but also included the relatives, hapū, or tribe of anyone who was not loyal, and people who owned land that the Government wanted.³⁴

The confiscations came with an undertaking that lands necessary for hapū survival would be returned without delay, but this promise was not always maintained.³⁵

Land that was passed back was returned under individualised Crown grants in place of customary tribal titles. The subsequent fragmentation of title and ownership made alienations more likely, undermined social order, jeopardised Māori authority and leadership, denigrated Māori autonomy or self-government, and expropriated the endowments to which hapū, as distinct from individuals, were entitled.³⁶

The Tribunal's main inquiry into raupatu was in Taranaki. In the preface to the *Taranaki Report*, the Tribunal quoted from a paper filed by the Crown, which recorded its view in these terms:

32. *Deed of Settlement: Te Rūnanga o Ngāi Tahu and Her Majesty the Queen* (Wellington: Office of Treaty Settlements, 1999), cl 2.1

33. See the New Zealand Settlements Act 1863, s 2

34. Alan Ward, *National Overview*, 3 vols (Wellington: GP Publications, 1997), vol 1, p 61

35. Waitangi Tribunal, *The Taranaki Report*, p 2

36. *Ibid*, p 3

- ▶ the Waitara purchase and the wars constituted an injustice and were therefore in breach of the principles of the Treaty of Waitangi;
- ▶ the confiscation of land, as it occurred in Taranaki, also constituted an injustice and was therefore in breach of the principles of the Treaty of Waitangi;
- ▶ confiscation had a severe impact upon the welfare, economy, and development of Taranaki iwi;
- ▶ in general terms, the delays in setting aside reserves contributed to the adverse effects of the confiscations; and
- ▶ events relating to the implementation of the confiscations leading to the invasion of Parihaka in 1881, the invasion itself, and its aftermath constituted a breach of the principles of the Treaty of Waitangi.³⁷

The Waitangi Tribunal also found that the confiscations did not conform to the requirements set out in the Settlements Act, and were thus unlawful, as well as being in breach of the Treaty.³⁸

Generally speaking, *raupatu* is accepted as the most flagrant kind of Treaty breach, and it raises a *prima facie* duty on the part of the Crown to provide redress. The breaches in respect of Taranaki were particularly grievous because of the quantity of land expropriated; the fact that conflict with the use of arms was spread not over a few months but over a staggering 40 years; and because the return of lands necessary for hapū survival was much longer delayed than in other districts.³⁹ The Tribunal in its introductory overview chapter simply concluded:

In effect, the whole of the Taranaki land was affected by processes prejudicial to Maori and inconsistent with the principles of the Treaty, and the tribal rights in respect of the whole of that land were wrongly taken away.⁴⁰

The Crown's acknowledgements and apologies in the Ngāti Tama and Ngāti Ruanui deeds of settlement described the Crown's acts as 'wrongful' (Ngāti Tama) and 'unconscionable' (Ngāti Ruanui). The Crown accepted that the consequences of those wrongful acts were profound and destructive, and included virtual landlessness and the undermining of society and economy.

5.7.5 Crown acquisition facilitated by Native Land Court processes

The purpose of the Native Lands Acts of 1862, 1865, and 1873 was to convert Māori customary rights in land into a form of title understood by and convenient to the settlers, and to

37. *Ibid*, p xi

38. *Ibid*, pp 126–127, 130, 133–134

39. *Ibid*, p 2

40. *Ibid*, p 15

authorise direct dealing between settlers and Māori for the land. The period 1865 to 1899 saw the transfer from Māori to Pākehā hands of the ownership and control of most of the land in the North Island. During that period, about 11 million acres were transferred to Pākehā ownership under the Native Land Court, two-thirds by Crown purchases and one-third by private purchases.⁴¹

Engaging with the Native Land Court processes was necessary for Māori in order to protect their interests. But the costs of doing so were high. Expenses associated with surveys, legal fees, court expenses, and with travelling to and living near the court, sometimes for long periods, became direct and indirect charges on the land. The debt traps associated with claiming or defending rights to land in this increasingly complex and confusing system contributed to the land's rapid alienation.⁴²

There is no doubt whatever that many Māori were willing sellers, engaging eagerly in the land trade and living well for short periods. Others were less willing and became caught in a sequence of debts. The habits and necessities of consumer spending and the cultural imperatives of hospitality caused many to grow dependent on advances on land sales, resulting in a steady erosion of the tribal patrimony.⁴³

In its 1987 *Report on the Orakei Claim*, the Tribunal commented extensively on legislation and policy pertaining to the Native Land Court. The Tribunal noted that, by 1890, the Legislature had passed a bewildering array of Acts:

From this legislative profusion five main policies emerge. Maori lands were to be 'individualised' by being vested in individuals. They could be divided (partitioned) amongst them. They could be freely alienated to anyone. Only land with particular significance could be made inalienable but any restrictions on alienation could be removed. Finally, as first provided for in 1870, no alienation was to be valid if it was contrary to equity and good conscience or if the alienor did not have sufficient other lands for his support.⁴⁴

The *Te Roroa Report 1992* discussed the role of the Native Land Court in destroying tribal structure:

'Native custom' as to land tenure is described by Professor IH Kawharu whereby 'The chief naturally *represents* and defends the rights of his people' (emphasis added). But the court's order vested the interests as tenants-in-common which conferred absolute title upon the named individuals. By ordering a memorial of ownership to ten persons in this manner the court released them from the necessity to perform their chiefly obligations. Yet in custom, these obligations were still recognised. The chief's customary obligations to his people were finally extinguished when the court made succession orders vesting his

41. Ward, p 67

42. Ibid, p 68

43. Ibid, p 72

44. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker and Friend Ltd, 1991), p 44

land interests in all his children equally. The social structure of the hapu was buried with the chief. As Dr David Williams said, the court ‘was in the business of eradicating Maori customary land title rather than ascertaining it’. There is no doubt that this was understood by the court, and by the Crown who were aware of the court’s practices.⁴⁵

The negative consequences of the era ushered in by the Native Land Court practices in Hawke’s Bay were documented by the Tribunal in its *Te Whanganui-a-Orotu Report 1995*:

The [Native Land] court’s function was to investigate customary title, award certificates of title to not more than 10 named ‘owners’, and issue Crown grants. Direct purchasing by private individuals was re-instituted, and a new phase of extensive land purchases by private individuals as well as the Crown began in Hawke’s Bay.⁴⁶

The *Taranaki*, *Muriwhenua Land*, *Ngawha*, *Pouakani*, and *Mohaka River* reports noted the same adverse effects on landholdings and tribal structures in those districts.⁴⁷

In its deed of settlement with Ngāti Awa, the Crown acknowledged that the operation and impact of the native land laws, in particular the awarding of land to individual Māori rather than to iwi or hapū, made those lands more susceptible to partition, fragmentation, and alienation. This contributed to the further erosion of the traditional tribal structures based on the collective tribal custodianship of land. The Crown failed to take steps to protect those structures adequately, and this had a prejudicial effect on Māori and was a breach of the Treaty.⁴⁸

5.7.6 Takings under public works legislation

The Public Works Acts of 1864, 1870, 1876, 1882, 1894, and 1928 gave the Government legislative authority in war times to take both customary and Crown-granted Māori land for public works, often with minimal or no compensation.

In his Rangahaua Whānui report, Professor Alan Ward stated that it was widely understood, and freely admitted in Parliament by the Minister for Public Works in 1888, that Māori land was generally taken in preference to European land for public works, and for lesser rates of compensation.⁴⁹

45. Waitangi Tribunal, *The Te Roroa Report 1992* (Wellington: Brooker and Friend Ltd, 1992), pp105–106. Professor Kawharu’s description of native custom is in his *Māori Land Tenure: Studies of a Changing Institution* (Oxford: Clarendon Press, 1977).

46. Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, p 84

47. Waitangi Tribunal, *Taranaki Report*, pp182–183, 277–286; Waitangi Tribunal, *Muriwhenua Land Report*, pp 275–276; Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), p 22; Waitangi Tribunal, *The Pouakani Report 1993* (Wellington: Brooker’s Ltd, 1993), pp 63–67, 110, 183, 242; Waitangi Tribunal, *The Mohaka River Report 1992*, p 48

48. *Deed of Settlement to Settle Ngāti Awa Historical Claims*, cl 3.2E(b)

49. Ward, p 87; Edwin Mitchelson, 10 July 1888, NZPD, 1888, vol 61, p 609. The Public Works Act 1928 had weaker provisions for paying compensation for Māori land than for general land.

In the *Te Maunga Railways Report* of 1994 and the *Turangi Township Report 1995*, the Waitangi Tribunal found that the compulsory acquisition of Māori land cuts across the guarantee of tino rangatiratanga in article 2 of the Treaty. This means that the compulsory acquisition of Māori land should be a last resort: ‘the only justification for taking land over the objections of the owners would be if the national interest were of such magnitude that the Crown would be justified in overriding its Treaty guarantees to Maori.’⁵⁰

Besides, in most cases, outright purchase is not required:

We also emphasise that we do not believe that the Crown needs to acquire the freehold in order to carry out public works on any land . . . there is no need to take the freehold by proclamation because there are alternative arrangements that can be negotiated. When land is no longer required for a public work then the lease, licence or other arrangement with the owners of the land can be terminated, and the return . . . can be more easily negotiated.⁵¹

The Public Works Act 1981 required the Crown for the first time to offer land back to its original owners once it was no longer required for the purpose for which it was taken. The reference in the quotation to the return being more easily negotiated if the freehold has not been acquired acknowledges the fact that, for many Māori, the current market price of land taken long ago precludes their buying the land back.

The Crown has not acknowledged that the taking of lands for public works is in itself a breach of the Treaty except in exceptional circumstances.

While redress was offered and accepted to settle both the Te Maunga and the Tūrangi claims, which concerned public works takings, in both cases it was circumstances attendant upon the Crown’s acquisition rather than the compulsory acquisition of the land per se that the Crown considered justified the settlements.

Similarly, in the Ngāti Awa deed of settlement, there is reference to the fact that land was compulsorily acquired under public works legislation when agreement between the tribes and the Crown could not be reached.⁵² However, there is no specific admission that this constituted a breach of the Treaty. The Crown’s apology to Ngāti Awa simply states that the cumulative effect of the Crown’s actions and omissions was such that the Crown failed to ensure sufficient land for the present and future needs of the tribe and that this was a breach of the Treaty.⁵³

We are somewhat surprised by the Crown’s unwillingness to accept that the compulsory acquisition of land for public works in most cases has been, and will be, in breach of the Treaty guarantee of te tino rangatiratanga. Given the extent of Māori land lost to public

50. Waitangi Tribunal, *The Ngai Tahu Ancillary Claims Report 1995* (Wellington: GP Publications, 1995), p 21

51. Waitangi Tribunal, *Te Maunga Railways Land Report* (Wellington: Brooker’s Ltd, 1994), p 81

52. *Deed of Settlement to Settle Ngāti Awa Historical Claims*, cl 3.2F(a)

53. *Ibid*, cl 3.2G(a)

works even in the twentieth century, when Māori landholdings had fallen to very low levels, and given the strength of Māori feeling on the issue, the Crown's approach seems ungenerous. It may be that the Crown wishes to preserve its ability to acquire Māori land compulsorily in the future unencumbered by an acceptance that to do so would breach the Treaty in all but exceptional circumstances. If that is indeed the Crown's position, it is greatly to be regretted.

5.7.7 Takings for survey liens

Surveys were part and parcel of land purchasing and the operation of the Native Lands Acts. Māori in general did not initiate surveys before 1865, but they were caught up with the expense and trouble if they wanted to assert or protect their interests in a land claim before the Native Land Court. Survey costs were usually a charge on the land, and all the owners had to bear their share, even if the survey had been initiated without their knowledge or consent.⁵⁴

Survey liens were the focus of the Waitangi Tribunal's *Pouakani Report 1993*:

The practice of charging Maori owners for all costs of survey, was established in Maori land legislation since the original Native Lands Acts of 1862 and 1865 which established the Native Land Court. Legislation in 1878 enabled the court to award land to surveyors in payment of survey costs, and legislation in 1880 enabled the court to order the sale of part of the land for payment of survey costs. The Native Land Court Act 1886 gave the court power to charge the land with money owing to the Crown or a private surveyor for survey costs.⁵⁵

Survey liens were inexorable. The costs of surveys were calculated and recalculated by the Survey Office. Then in due course they were granted as survey liens charged against the land by the Native Land Court, with apparently little consultation with the owners and little participation by the owners in the process.⁵⁶ Payment for surveys by these means contributed significantly to land loss in the late nineteenth century. As the Pouakani Tribunal said, 'We can only speculate on the frustration that tribal leaders felt at so much land slipping from their grasp to pay for surveys.'

In its settlement deed with Ngāti Awa, the Crown acknowledges that, following the vesting of title under native land laws, Māori land was further reduced by the taking of land for the payment of survey liens.⁵⁷

54. Ward, p 88

55. Waitangi Tribunal, *The Pouakani Report 1993*, pp 7–8

56. *Ibid*, p 215

57. *Deed of Settlement to Settle Ngāti Awa Historical Claims*, cl 3.2E(a)(i)

5.7.8 Conclusion

Thus, there were many circumstances in which the purchase of Māori title, or its acquisition by other means, breached the principles of the Treaty. Thousands of transactions by which Māori lost land fall into the categories listed above. The statistical data are not available to enable us to know for certain, of course, but we think it reasonable to posit that much, perhaps most, Māori land was lost in circumstances that were inconsistent with the principles of the Treaty. Certainly, the Tribunal's *Taranaki Report* is a basis for reaching such a conclusion in respect of that district. It is on these bases that we conclude that, prior to the passing of the Petroleum Act in 1937, a significant proportion of the petroleum interests that belonged to Māori were alienated in a manner that gives rise to a Māori Treaty interest.

We turn now to our consideration of the Petroleum Act, and how that Act impacted upon the legal and Treaty interest of Māori in the petroleum resource.

5.8 EXPROPRIATION PURSUANT TO THE PETROLEUM ACT 1937

As we have said, by 1937 most of the legal interests that Māori formerly had in petroleum had passed from them along with their land. With the legal rights gone, all that remained in most cases was a Treaty interest.

The Petroleum Act was enacted in 1937, as we have described. Section 3 provided:

(1) Notwithstanding anything to the contrary in any Act or in any Crown grant, certificate of title, lease, or other instrument of title, all petroleum existing in its natural condition on or below the surface of any land within the territorial limits of New Zealand, whether the land has been alienated from the Crown or not, is hereby declared to be the property of the Crown.

(2) All alienations of land from the Crown made after the commencement of this Act, whether by way of sale or lease or otherwise, shall be deemed to be made subject to the reservation of all petroleum existing in its natural condition on or below the surface of the land, and subject to the provisions of this Act.

The claimants argued that this provision did not necessarily completely extinguish Māori common law rights in petroleum.⁵⁸ They did accept, however, that the practical effect of section 3 has been to preclude both the exercise of right by Māori over that resource and the receipt of benefits from those rights.⁵⁹ The Crown argued that section 3 effected an extinguishment.⁶⁰ It is sufficient for our purposes to find, as all the parties accepted, that the

58. Document A22, paras 11–25

59. *Ibid*, para 34

60. Document A35, para 52

practical effect of the legislation has been at least to prevent the exercise of any petroleum rights by Māori. It is clear that, to that extent at least, section 3 was expropriatory in its effect.

5.9 WAS THE EXPROPRIATION CONSISTENT WITH TREATY PRINCIPLE?

Was this expropriation consistent with Treaty principle? The Crown argued that in the circumstances it was. The essence of the Crown's argument was that the expropriation of petroleum in the national interest was a valid exercise of the Crown's sovereignty under article 1 of the Treaty. It did not require Māori consent provided the expropriation was undertaken:

- ▶ in good faith;
- ▶ with an informed understanding of Māori Treaty and other private interests to be affected; and
- ▶ conscientiously weighing those interests against the wider national interest.⁶¹

Applying that test, the Crown's main arguments were these:

- ▶ the decision was taken in good faith;
- ▶ the issues raised by Sir Apirana Ngata (to which we have referred in chapter 4) meant that the matter of Māori Treaty rights was extensively traversed among officials, Ministers, and parliamentarians;
- ▶ the Crown properly concluded that, notwithstanding those rights, the national interest at a time of pre-war economic and political uncertainty favoured expropriation;
- ▶ the implication of article 3 of the Treaty was not just that Māori had equal rights – in those difficult times, it also demanded equal contribution; and
- ▶ the expropriation was non-discriminatory, affecting Māori and non-Māori the same way: 'In the case of nationalisation all citizens were required to forgo a perpetual right to exploit any petroleum which might be located under their land as a contribution to the economic and strategic benefit of the country as a whole.'⁶²

It was central to the Crown's case that the decision to prefer the national interest over that of landowners, including Māori landowners, was a political decision. It was an exercise of balancing high-level policy considerations, and there is no role for the Tribunal in reviewing the decisions made:

In the Crown's submission the Treaty is not a vehicle, which can be used to dictate those kinds of choices. The nationalisation of petroleum reflects an assessment by the Government of the day of complex economic and social questions. The Treaty does enable testing those actions as to their good faith but it is disputed that the Crown need demonstrate 'exceptional circumstances' or 'last resort' or even 'reasonable necessity'. With respect, the

61. Ibid, paras 52–53

62. Ibid

testing of Parliament's judgment that nationalisation was 'necessary' is not one which even a multi-disciplined Commission of Inquiry can readily make. The Tribunal is charged to assess Crown action vis a vis Treaty principles. It is not charged to determine which political ideology on a wide-ranging spectrum of ideologies was or would have been the 'correct' one.⁶³

For their part, the claimants emphasised the importance of the Māori rights guaranteed by article 2 and the Crown's obligation to exercise its authority in a manner that actively protected that Māori interest. This meant, according to the claimants' argument, that expropriation should be a matter of last resort, not a mere weighing of factors in good faith.

We have carefully considered these arguments. The starting point in our view is the essential exchange in the Treaty. By its terms, Māori agreed to give up sufficient authority to enable the Crown to establish and operate a system of central government based on the English Westminster model. The Crown accepted that new authority and promised to exercise it so as to protect both the traditional authority of iwi and hapū – their tino rangatiratanga – and the resource rights of those communities. As this Tribunal said in the *Report on the Muriwhenua Fishing Claim*:

The cession of sovereignty or kawanatanga gives power to the Crown to legislate for all matters relating to 'peace and good order'; and that includes the right to make laws for conservation control. Resource protection is in the interests of all persons. Those laws may need to apply to all persons alike. The right so given however is not an authority to disregard or diminish the principles in article the second, or the authority of the tribes to exercise a control. Sovereignty is limited by the rights reserved in article the second.⁶⁴

The Crown and claimants agreed in submissions before us that petroleum is one of the resources that the Crown solemnly promised to protect in exchange for the cession of governmental power.

A decision to override a guarantee in article 2 is a grave decision indeed. It is a decision to override fundamental rights guaranteed in the country's constituting document. It cannot be sufficient for the Crown merely to inform itself of the effect of that decision and proceed in good faith, as the Crown argued before us. That would reduce the effect of the Treaty to a mere procedural safeguard. The plain fact is that the Treaty is not a mere procedural safeguard – it guarantees substantive rights as well.

The Crown exercises its governmental power – its kawanatanga – as a partner and as a fiduciary. It follows that this power must be used to make good on article 2 and article 3 promises except in exceptional and clearly justifiable circumstances. To take any other approach would require us to conclude that the Crown is not a partner nor a fiduciary obliged by the

63. Document A35, para 67

64. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, p 232

terms of the Treaty to protect the interests of its Treaty partner to the fullest extent reasonably practicable. If this Tribunal were excluded from closely reviewing a Government decision to abrogate a Treaty guarantee, as the Crown argued, the Treaty would become little more than a dead letter.

5.10 THE COURTS' AND THE TRIBUNAL'S ROLE

It is true of course that the Government of the day is entitled to govern, and this involves pursuing legitimate policies in accordance with democratic principles. In the ordinary courts, this is an overriding principle – as it must be, for any other approach would challenge the sovereignty of Parliament itself. This Tribunal must also recognise the importance of the principle and accord it weight.

But our task is not the same as that of the courts. Our task is to interpret the principles of the Treaty for the purposes of our Act. We are not constrained in the way that the courts are when it comes to the practical application of Treaty principle. Section 6 of our Act specifically empowers us to review legislation validly enacted by New Zealand's Parliament. While the mainstream courts must necessarily be preoccupied with process, we are able to focus both on the quality of the process by which the rights were affected and on whether the process delivers the guarantees in the Treaty. A sound process that delivers outcomes inconsistent with Treaty guarantees may properly be challenged in our jurisdiction.

While the Treaty guarantees were not absolute, they were fundamental. Fundamental guarantees cannot be overridden, even by an informed government acting in good faith, except in exceptional circumstances.

5.11 AN ANALOGY WITH THE COURTS' JURISDICTION UNDER THE BILL OF RIGHTS ACT

The approach suggested here is analogous to that adopted with respect to the equally fundamental rights and freedoms provided for in the New Zealand Bill of Rights Act 1990.

According to section 5 of that Act, the rights and freedoms protected by it may be subject 'only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. In *Moonen v Film and Literature Board of Review*, a full court of the New Zealand Court of Appeal addressed the question of limitations on the freedom of expression guaranteed in section 14.⁶⁵ The court established a four-stage test:

In determining whether an abrogation or limitation of a right or freedom can be justified in terms of s 5, it is desirable first to identify the objective which the legislature was

65. *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 9 (CA)

endeavouring to achieve by the provision in question. The importance and significance of that objective must then be assessed. The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective. A sledgehammer should not be used to crack a nut. The means used must also have a rational relationship with the objective, and in achieving the objective there must be as little interference as possible with the right or freedom affected. Furthermore the limitation involved must be justifiable in light of the objective.⁶⁶

That is, the statutory objective must be sound; the interference in the fundamental right must be proportionate to the objective; there must be a proper connection between the interference and the objective; and the limitation must be no more than is absolutely necessary.

These ideas are broadly familiar in Treaty jurisprudence. When faced with an expropriatory statute, the question for this Tribunal reduces to whether the expropriation was reasonably necessary or whether there was a reasonable alternative available which could have achieved the statutory objective without overriding the fundamental Treaty right. If some form of expropriation can be reasonably justified, the next question is what is the least interference necessary to achieve the policy objective of the statute. The cases around the New Zealand Bill of Rights Act demonstrate that these assessments are not an unwarranted interference in the right of the Government of the day to govern. Rather, they show that there are some rights and freedoms so fundamental to the wellbeing of a modern democracy that Parliament invites courts and tribunals of competent jurisdiction to review interference with them, even when that interference is statutory. Thus, as Justice Tipping stressed in *Moonen*: ‘The judiciary has not only the power but on occasion the duty to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights.’⁶⁷

We think it is now beyond argument that the Treaty of Waitangi also guarantees fundamental rights. It is the task of this Tribunal to review Government actions, including legislative actions, which may breach those fundamental rights. The Crown is incorrect when it says that the Tribunal lacks the expertise to deal with these matters. Like the courts in respect of guarantees of rights in the New Zealand Bill of Rights Act, the Waitangi Tribunal is specifically required to analyse Acts and actions of the Crown in relation to the Treaty guarantees, and for a broadly similar reason. In this country, a proper process of review of the Government’s compliance with the fundamental rights and interests contained in the Treaty of Waitangi is seen as crucial to the wellbeing of our particular brand of democracy.

66. *Moonen v Film and Literature Board of Review*, p 18

67. *Ibid*, p 17

5.12 WHAT WAS REASONABLY NECESSARY?

It follows that we do not shy away from inquiring into whether the Crown's decision to pass legislation expropriating Māori rights to petroleum was founded in reasoning that justified the abrogation of fundamental Treaty guarantees. And so we ask, Was the expropriation of petroleum rights justified in the circumstances and were the exigencies such that there were no reasonable alternatives?

The Crown advanced a number of policy reasons for the Government to have control of the petroleum supply. Professor Gary Hawke offered four reasons:

1. The need to secure and control oil for New Zealand's sea defence;
2. The contribution New Zealand felt it needed to make in the 1930s to fuel self sufficiency for Britain and the wider empire;
3. The need for a centrally rationalised system because of the strategic and economic importance of oil to New Zealand's domestic interests;
4. The cost of exploration and the risk involved were such that the regime had to be simple, accessible and attractive to the large international oil companies with sufficient capital to exploit the resource.⁶⁸

As Ngata conceded in debates in the House at the time, it was hard to oppose a central, rationalised system:

Sir, this is not an easy Bill to oppose. The Minister has appealed for the support of all the public men in New Zealand, and has advanced reasons which were advanced in the Old Country and in Australia for facilities to be provided which might lead to the discovery of this very essential commodity in the Empire. There are reasons with which no one can quarrel.⁶⁹

Ngata none the less bitterly opposed the complete expropriation of all rights and benefits from Māori owners, particularly access to royalties. However, Professor Hawke argued that there were sound reasons for the Crown not just to receive but to keep royalties:

It was perfectly possible for governments to distinguish the receipt of royalties and their final disposition. And it was only as the desire for oil intensified that the general conclusion was reached that governments would receive and keep any royalties. The same arguments as for nationalisation pointed to that conclusion:

- ▶ The government acted for the community as a whole, and it was the community which had an interest in uses of oil such as defence.
- ▶ The government would promote the welfare of the community against overseas interests.

68. Document A32, pp 3–8

69. Sir Apirana Ngata, 6 December 1937, NZPD, 1937, vol 249, p 1040

- ▶ There were genuine doubts about the law on ownership of oil resource.
- ▶ Given the way that oil flowed underground, there were genuine difficulties in allocating oil to particular landowners.
- ▶ Nationalisation was desirable to many politicians, especially nationalisation at the expense of landowners. However, the comparison of New Zealand and Britain again suggests that this was in fact a minor motive (even though it loomed large in the political of 1938).⁷⁰

We accept immediately that the policy reasons for preferring a centrally rationalised system of petroleum regulation were sound, reasonable, and properly within the Government's sphere. It was clearly important that the regime in place should be attractive to international investors. Equally, oil was crucial to New Zealand's economy, to its defence, and to its place within the wider British Empire at the time.

We think a case can be made out for reasonable necessity for complete Government control of the resource. But, equally, a single-desk resource-owner might have been appointed to act as a trustee for the beneficial owners of the resource (including Māori). Such a model would avoid the drastic step of outright expropriation by the State and would achieve the objective of central control – but not direct Government control. A model akin to the producer boards would also have achieved many of the desired objectives.

On balance, however, we consider that there is considerable force in the argument that petroleum was of such strategic importance at the time, and the control of it such a high policy issue, that a single independent trustee owner would have been unsuitable. We accept that some form of Government expropriation was reasonably necessary, and that no reasonable alternative was available.

5.13 WHAT WAS THE LEAST INTERFERENCE POSSIBLE WITH THE RIGHT OF MĀORI?

The next question is, What was the least interference possible with the Māori petroleum right? In our view, this is where the Crown's action fell short of the required standard. As Ngata and others argued so eloquently in the House in 1937, even if the Crown did take control of the asset through expropriation, there was no justification to withhold royalties from the true owners of the resource.

A minimum interference in the Māori petroleum right would have seen the Crown act as a trustee on behalf of the actual beneficial right-holder, at least in respect of the distribution of royalties. We accept that royalty distribution would have raised initial difficulties because of the need to establish to whom the distribution should be made. But such difficulties were not insurmountable, as Crown counsel accepted: 'identification of the landowner recipient is

70. Document A32, p 6

not straightforward though one might expect that a rough and ready formulation could be produced'.⁷¹

Arguments that somehow the Crown was entitled to act on behalf of the wider community as the recipient of petroleum revenues are unpersuasive. The Crown had a legitimate role on behalf of the nation to secure control of the resource for defence purposes and to nurture the development of a viable oil exploration industry. But where was the justification for the Crown keeping petroleum revenue in the face of the guarantee of fundamental rights under the Treaty? Professor Hawke argued that there were genuine doubts about the law and ownership of the oil resource. We do not accept that that was the case. As we have said, the operation of a private property regime did pose genuine difficulties, but we have not been pointed to any evidence of real doubt about the title to land and the petroleum rights that went with it.

We find therefore that the Crown established a sound basis in Treaty principle for the expropriation of the country's petroleum resource in 1937. But it fails in terms of minimum interference with Māori Treaty rights. The Crown could have achieved all its important objectives and also acted to minimise that interference by holding petroleum revenue as a trustee for the landowners who had petroleum rights. The distribution of the revenue should have been effected through the payment of royalties.

Crown counsel rightly submitted that this would have provided only residual comfort to Māori, since so little land remained in Māori ownership. This was so generally, and of course it was particularly so in Taranaki. It does not, however, make the Treaty right that remained any less fundamental or any less deserving of protection. On the contrary, the land loss meant that the Crown was under an even stronger duty to remedy the wrongs already committed. The Crown cannot use its own wrongdoing to support its failure to deliver even the residual comfort Ngata sought in 1937.

5.14 THE 'EQUAL TREATMENT' ARGUMENT

This point leads us to the final argument to be addressed, one advanced forcefully by the Crown in our hearings. The argument is that all New Zealanders had their rights expropriated in 1937, not just Māori – Māori were affected on an equal basis and to an equal extent.

Superficially, this argument is an attractive one. It makes clear at least that the Crown was not focused primarily on the defeat of Māori interests. But, when examined more closely, the argument loses its force.

Quite simply, the expropriatory effect of the Act was not the same for Māori as for other New Zealanders. This is because, as we have seen, as at 1937 Māori retained only a fraction of their former landholdings. In Taranaki, iwi and hapū had suffered the unjust confiscation of

71. Document A35, para 72

substantially their entire land base. This meant that, for people such as these, expropriation of an extremely valuable resource located beneath the remnant of these once-vast tribal estates hit much harder. Clearly, the smaller the land base, the greater the importance of the income-earning potential of any assets comprised within the land.

We think, therefore, that Taranaki Māori suffered disproportionately from the effect of section 3 of the Petroleum Act, and the same can be said for Ngāti Kahungunu. If there is a difference at all, it will be only a matter of degree. As the Privy Council said in the *Broadcasting Assets* case:

Again, if as is the case with the Maori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown's responsibility.⁷²

We apply this principle to the effect upon Māori of expropriation of their petroleum interests. Even if in theory the Petroleum Act was non-discriminatory, the circumstances of its practical application made it otherwise.

5.15 SUMMARY

To this point, we have concluded that the Government's policy to expropriate petroleum ownership in 1937 was reasonably necessary in all the circumstances. Those circumstances did not, however, justify the associated policy by which the Crown also took to itself the royalties paid by petroleum producers. With its adverse impact on all prior owners of the petroleum resource, both Maori and non-Maori, the royalty policy required independent sound reasons for its imposition. And if good reasons were lacking, as we have found they were, Maori could protest that their fundamental property rights, promised to be protected by article 2 of the Treaty of Waitangi, had been breached. Further, in the circumstances, neither the Crown's article 1 right to govern nor the article 3 guarantee of equality between Maori and non-Maori could justify the royalty policy.

72. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC)