

CHAPTER 22

FINDINGS AND RECOMMENDATIONS

22.1 INTRODUCTION

The Tribunal's findings of Treaty breaches by the Crown are contained in chapters 4 and 16 to 20. For ease of reference, they are listed here under appropriate headings. We would stress that for a full understanding they need to be read in the context of the chapters in which they appear. A number are interrelated.

The claimants filed a detailed statement of claim in which they alleged that certain legislation, the Public Works Act 1928 and the Turangi Township Act 1964, was inconsistent with article 2 of the Treaty of Waitangi. They further alleged that certain policies and practices adopted by the Crown and various acts and omissions on the part of the Crown were inconsistent with Treaty principles. Not all of these claims have been upheld by the Tribunal. We list those which the Tribunal considers are well-founded. The appropriate chapter reference is indicated after each.

22.2 THE TRIBUNAL'S FINDINGS

22.2.1 The Public Works Act 1928 and the Turangi Township Act 1964

The Tribunal finds that:

- (a) the claimants have been prejudicially affected by the provisions of the Public Works Act 1928 and the Turangi Township Act 1964, in that both Acts were and are fundamentally inconsistent with the basic guarantee given in article 2 of the Treaty of Waitangi that Maori could keep their land until such time as they wished to sell it at a price agreed with the Crown;
- (b) the Turangi Township Act 1964 permitted the Crown to acquire land compulsorily without direct consultation with the Maori landowners, thus contravening the Crown's duty to act in good faith and consult with the Treaty partner in respect of matters affecting Maori; and

- (c) the Turangi Township Act 1964 further breached the principles of the Treaty by excusing the Crown from the notice requirements of sections 22 and 23 of the Public Works Act 1928 (see para 16.7).**

22.2.2 Legislative provision for the return of surplus land

The Tribunal finds that the claimants have been prejudicially affected by the omission of the Crown to make provision, when exercising its powers of compulsory acquisition under the Public Works Act 1928 and the Turangi Township Act 1964 over the claimants' land, for any such land no longer required for the public work for which it was taken to be returned to Maori ownership at the earliest possible opportunity and with the least cost and inconvenience to those Maori owners and that such omission was inconsistent with the Crown's Treaty obligation under article 2 actively to protect Maori rangatiratanga over their ancestral land (see para 17.6).

22.2.3 Compensation provisions in the Public Works Act 1928

The Tribunal finds that the Public Works Act 1928 failed adequately to recognise the relationship of Ngati Turangitukua to their ancestral land and to provide for adequate compensation for their loss of land and that such failure is in breach of the Treaty obligation of the Crown adequately to recognise and protect the rangatiratanga of the claimants, who have thereby been prejudicially affected (see para 19.7).

22.2.4 Offer back provisions of the Public Works Act 1981

The Tribunal finds that the claimants have been prejudicially affected by the offer back provisions of sections 40, 41, and 42 of the Public Works Act 1981, which:

- (a) permit the Crown, in certain circumstances, without consultation with former Maori landowners or their successors, not to offer surplus land back to such former owners;**
- (b) permit the Crown to retain the whole of the profit from the sale of such surplus land at current market value, whether sold back to the former Maori owners from whom the land was compulsorily taken or on-sold to a third party;**
- (c) fail to require the Crown to make allowances for the circumstances surrounding the compulsory acquisition of the land from former Maori owners, including the need for the compulsory acquisition of the land or, if the use of the land was essential, whether it was necessary to acquire the freehold of the land;**

- (d) permit the Crown to offer to sell such surplus land at a price or on conditions which are manifestly in excess of the ability of the former Maori owners or their successors to meet;**

- (e) fail to require the Crown to have regard to the special circumstances of multiple Maori owners of such land and to seek to accommodate such circumstances; and**

- (f) fail to permit the Crown to offer to sell the land to the wider hapu or tribal group to which the former Maori owners belong, if such owners are unable or unwilling to purchase surplus land offered to them by the Crown.**

The Tribunal further finds that the offer back provisions of the Public Works Act 1981 are inconsistent with the Treaty obligation of the Crown to act reasonably and in good faith towards its Treaty partner and actively to protect the rangatiratanga of Ngati Turangitukua over their ancestral land (see para 17.8).

22.2.5 Crown's choice of township site

The Tribunal finds that the Crown's policy decision to take the Maori-owned land at Turangi West for public works without first ensuring that no other land, in particular the Crown-owned Turangi East site, was available as an alternative was inconsistent with its Treaty obligation under article 2 actively to protect Maori rangatiratanga and that the claimants were thereby prejudicially affected (see para 17.2.4).

22.2.6 Crown's failure to consider acquiring a leasehold interest in the township site

The Tribunal finds that the Crown failed to give adequate consideration to the desirability, in the interest of protecting the rangatiratanga of Ngati Turangitukua owners over their land, of acquiring the leasehold instead of the freehold of the land taken for the township and the water supply reserve, that such failure was inconsistent with its Treaty obligation under article 2 actively to protect Maori rangatiratanga, and that the claimants were thereby prejudicially affected (see para 17.3.5).

22.2.7 Crown's failure to consult fully with owners before deciding to take land

The Tribunal finds that between March 1964, when the proposal to develop a township at Turangi was first mooted, and 21 September 1964, when the final plan was approved by Cabinet, the Crown failed in its obligation actively to protect the rights of Ngati Turangitukua under article 2 of the Treaty. In particular, it finds that the Crown failed to consult fully with the Maori owners of the land proposed to be taken before deciding to take the land for a township and, as a consequence, the owners were thereby prejudicially affected (see para 18.10).

22.2.8 Crown's failure to consult fully with owners during township construction

The Tribunal finds that the claimants were prejudicially affected by the failure of the Crown to keep Ngati Turangitukua people properly informed of its actions and intentions and by its failure to consult fully and effectively with those having mana whenua in the Turangi lands during the construction and development of the Turangi township. As a consequence, the Crown acted inconsistently with its Treaty obligation to act reasonably towards its Treaty partner (see para 19.3.2).

22.2.9 Undertakings of the Crown

The Tribunal finds that:

- (a) The Crown failed by a wide margin to honour its undertaking as to the amount of land to be taken for the township and it resiled from its undertaking that the industrial area would be leased and returned to its owners after 10 years.**
- (b) The Crown signally failed in numerous instances to honour its undertaking to protect the wahi tapu of Ngati Turangitukua.**
- (c) The Crown failed in significant ways to act upon the high importance which it assured owners it placed on conservation values. As a consequence, the waterways and fishing are degraded and increased flooding has occurred.**
- (d) The Crown failed to honour adequately its undertaking to work in a cooperative and friendly manner with owners affected by the Ministry's works and to negotiate and consult with individual owners on important issues.**
- (e) The Crown failed in some cases to honour its undertaking that, if owners had to move, advance warning would be given and they would be fully compensated. In a few cases, the Crown failed to meet its undertaking to give owners a prior right of purchase when selling sections or to make sections available to returning members of Ngati Turangitukua. In a number of cases, the Crown failed to meet its undertaking that owners affected by the works would be left as well off as before.**
- (f) The Crown failed to make provision for water to be reticulated to Ngati Turangitukua residents in Hirangi Road and later excluded such residents from within the Turangi township boundary without consultation or their consent, thereby making it more difficult for such residents to be supplied with water.**
- (g) As a result of the foregoing, the Crown failed to act reasonably and in good faith towards its Treaty partner and, further, failed actively to protect the rights of Ngati Turangitukua under article 2 of the Treaty, and the claimants have been prejudicially affected thereby (see para 4.11).**

22.2.10 Crown's failure to honour its undertakings and owners' lack of informed consent

The Tribunal finds that the taking of land for the Turangi township under the Public Works Act 1928 and the Turangi Township Act 1964 was, both in fact and in law, a compulsory acquisition. In particular, it finds that:

- (a) the Crown failed in whole or in part to honour many of the undertakings that it gave to the Ngati Turangitukua owners, in reliance on the fulfilment of which the owners approved the Turangi township being developed on their ancestral land;**
- (b) as a consequence, the owners' approval was undermined and negated; and**
- (c) the owners did not give their informed consent or agreement to such non-fulfilment of the Crown's undertakings or to the subsequent taking of their land by the Crown pursuant to the said Acts.**

As a result, the Crown failed to act reasonably and in good faith towards its Treaty partner and, further, failed actively to protect the rights of Ngati Turangitukua under article 2 of the Treaty, and the owners have been prejudicially affected thereby (see para 20.2.6).

22.2.11 Crown's failure to respect the mana of Ngati Turangitukua as tangata whenua

The Tribunal finds that the claimants were prejudicially affected by the failure of the Ministry of Works, acting on behalf of the Crown, to deal with Ngati Turangitukua people during the construction of the Turangi township in a manner that paid them the respect due to their mana as tangata whenua. In particular, the Ministry failed to recognise and protect the sensibilities of kaumatua. As a consequence, the Crown acted inconsistently with its Treaty obligation to act reasonably towards its Treaty partner (see para 19.2.3).

22.2.12 Crown's failure to mitigate the trauma and adverse social repercussions experienced by Ngati Turangitukua

The Tribunal finds that the claimants were prejudicially affected by the failure of the Crown, as a result of inadequate consultation with Ngati Turangitukua people, to mitigate the trauma and adverse social repercussions which resulted from their activities in Turangi, and, as a consequence, the Crown failed actively to protect the rangatiratanga of its Treaty partner under article 2 of the Treaty (see para 19.3.6).

22.2.13 Crown's failure to preserve an economic base for Ngati Turangitukua

The Tribunal finds that the Crown, when deciding where the TPD construction town should be sited, failed to give adequate consideration to the need to ensure that the Ngati Turangitukua hapu as a whole, and each whanau individually, was left in possession of as much of its land as possible. The Tribunal further finds that, in deciding to construct a permanent township at Turangi, the Crown failed to ensure that it did so in such a way as would best preserve an economic base for Ngati Turangitukua and maintain their lifestyle and community. As a consequence, the Crown failed in its obligation actively to protect the rangatiratanga rights of Ngati Turangitukua under article 2 of the Treaty, and the owners were prejudicially affected thereby (see para 19.9).

22.3 PROPOSED LEGISLATIVE AMENDMENTS

As indicated in chapter 21 (see para 21.8), at this stage the Tribunal does not propose to make any recommendations as to remedies by way of compensation to the claimants for Treaty breaches by the Crown. But it is appropriate that we make certain recommendations concerning amendments which the Tribunal considers should be made to the Public Works Act 1981 in relation to the compulsory acquisition of Maori land for public works, the compensation payable for the compulsory acquisition of such land, and the provisions relating to the offering back of surplus land. These do not purport to be exhaustive. The Tribunal is aware that the Crown is presently considering its policy on public works legislation in so far as it affects Maori land. We have had the advantage of perusing the report 'Public Works Takings of Maori Land, 1840–1981', which was prepared for the then Treaty of Waitangi Policy Unit by Cathy Marr in December 1994 (D9). Clearly, wide consultation with Maori is called for on this topic before any policy decisions are taken by the Crown. The Tribunal believes that it is essential, if Maori Treaty interests in their land are to be appropriately protected, to ensure that the Crown and local authorities exercising powers of compulsory acquisition of land are required to give effect to Treaty principles. Our recommendation below endorses a similar recommendation made by the Tribunal in chapter 9 of the *Ngai Tahu Ancillary Claims Report 1995* (para 9.4.6). Other of our recommendations adopt or enlarge upon views expressed in that report, which we have discussed in chapter 20.

22.4 RECOMMENDATIONS

22.4.1 First recommendation

Firstly, the Tribunal recommends that Part II of the Public Works Act 1981 should be amended to provide that:

- (a) The Crown or a local authority should not seek to acquire Maori land without first ensuring that no other suitable land is available as an alternative.**
- (b) If the Crown or a local authority wishes to acquire Maori land for a public work or purpose, it should first give the owners adequate notice and, by full consultation, seek to obtain their informed consent at an agreed price.**

- (c) If the owners are unwilling to agree, the power of compulsory acquisition for a public work or purpose should be exercised only in exceptional circumstances and as a last resort in the national interest.**

- (d) If the Crown or a local authority does seek to acquire the use of Maori land for a public work, it should do so by acquiring a lease, licence, or easement, as appropriate, on terms agreed upon with the Maori owners or, failing agreement, by appropriate arbitration. Should there be exceptional circumstances where the acquisition of the freehold by the Crown or a local authority is considered to be essential, Maori should have the right to have that question determined by an appropriate person or body, independent of the Crown or local authority, as the case may be.**

22.4.2 Second recommendation

Secondly, the Tribunal recommends that the offer back provisions in Part III of the Public Works Act 1981 should be amended:

(1) To require the Crown or local authority, as the case may be:

- (a) to consult with former Maori owners or their successors before deciding not to offer surplus land back to such owners; and**

- (b) to offer to return surplus land to Maori ownership at the earliest possible opportunity with the least cost and inconvenience to the former Maori owners; and**

in determining the price at which the land is offered back to the former Maori owners, the Crown or local authority is to:

- (c) share with such owners the increased value in the land arising from the use and development of their land;**

- (d) have regard to the means of such former Maori owners;**

- (e) have regard to the circumstances surrounding the compulsory acquisition of such land; and**

(f) have regard to the special circumstances of multiple Maori owners and to seek to accommodate such circumstances.

(2) To permit the Crown or local authority, as the case may be, to offer back the land to the wider hapu or tribal group to which the former Maori owners belong, if such owners are unable or unwilling to purchase surplus land offered to them by the Crown or local authority.

22.4.3 Third recommendation

Thirdly, the Tribunal recommends that the Public Works Act 1981 should be amended to provide that it should so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.

Findings and Recommendations

In accordance with section 6(5) of the Treaty of Waitangi Act 1975, the registrar is directed to serve a sealed copy of this report on:

(a) The claimant, Mahlon Kaira Nepia

(b) The Minister of Maori Affairs

The Minister of Justice

The Minister in Charge of Treaty Negotiations

The Minister of Lands

The Minister of Conservation

The Minister for the Environment

The Minister for State-Owned Enterprises

The Solicitor General

DATED at Wellington this day of 1995

G S Orr, presiding officer

I H Kawharu, member

H R Young, member

E M Stokes, member