CHAPTER 20

TREATY CONSTRAINTS ON THE CROWN'S POWER TO TAKE MAORI LAND

20.1 INTRODUCTION

20.1.1 Treaty principles

In our discussion of the relevant Treaty principles in chapter 15, we adopted the view of the Tribunal in the *Ngai Tahu Ancillary Claims Report 1995* that, if the Crown is ever to be justified in exercising its power to govern in a manner which is inconsistent with and overrides the fundamental rights guaranteed to Maori in article 2, it should be only in exceptional circumstances and as a last resort in the national interest. However, it is plain that even if exceptional circumstances justified the Crown's wish to utilise Maori land for the purposes of a public work this would not justify the use of the far-reaching powers in the Public Works Act 1928 and the Turangi Township Act 1964, which afford no recognition to the article 2 rights of the Maori owners. We accept claimant counsel's submission that if the Crown seeks to use Maori land for such purposes it must be able to show the minimum possible interference with the Treaty partner's rangatiratanga (C2:10).

20.1.2 Provisional view on public works takings by the Ngai Tahu Tribunal

In the *Ngai Tahu Ancillary Claims Report 1995*, the Tribunal, in the absence of in-depth argument by counsel, expressed the provisional view that:

> **Given the clear and unequivocal terms of article 2, however, it would seem that:**
>
> - **if the Crown wishes to acquire Maori land for a public work or purpose, it should first give the owners notice and seek to obtain their consent at an agreed price;**

- **if the Maori 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; and**

- **if the Crown does so 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 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.[1]**

20.1.3 Consideration of the Ngai Tahu Tribunal's proposals

In this claim, the Tribunal has had the advantage of much fuller argument from counsel on the relevant provisions of the Public Works Act 1928. While the Public Works Act 1981 now in force has modified some of the more objectionable features of the 1928 Act, we consider that the Ngai Tahu Tribunal's proposals are relevant to both Acts. We have not, however, attempted an exhaustive examination of the 1981 Act. The claim before us relates to the 1928 Act and the Turangi Township Act 1964 then in force. We now consider each of the three Ngai Tahu Tribunal proposals in the light of the evidence. We also consider whether and to what extent the Crown may have complied with them in relation to the Ngati Turangitukua people.

20.2 PROPOSAL 1: NOTICE, CONSULTATION, AND CONSENT

20.2.1 The proposal

The first of the propositions in the *Ngai Tahu Ancillary Claims Report 1995* is:

> **if the Crown 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.**

We have added the words in brackets. We now discuss the various elements of this proposal.

20.2.2 Notice to owners

The exemption of the Crown from the notice requirements in sections 22 and 23 of the Public Works Act 1928 has been noted earlier (see para 13.2.2).

The question of whether notice of entry on the claimants' land was required was considered in paragraph 13.4. The Ministry of Works took the view that there was no legal requirement to give notice, but that courtesy notice should be given. For some time, the Ministry relied on verbal notification only but, in practice, for some owners, their first knowledge of the Ministry's entry was when a bulldozer arrived. It was not until April 1966, when much of the bulldozing was over, that notification procedures were improved, although the Crown remained under no legal obligation to comply with these voluntary procedures.

20.2.3 Crown submissions

Crown counsel submitted that:

- **the discussions the Crown conducted with the Ngati Turangitukua owners constituted consultation (see para 18.1);**

- **the process enabled the Crown to proceed with the acquisitions on the basis of agreement, informed consent, and consensus (see para 18.1); and**

- **the process enabled the Maori owners to proceed on the basis of undertakings by the Crown that full compensation, as allowed for by the statutory regime of the Public Works Act 1928, would in fact be fair compensation (C3:26).**

Claimant counsel contested these claims.

20.2.4 Full consultation

The question of whether, as it claims, the Crown consulted fully with the Ngati Turangitukua owners is discussed in considerable detail in chapter 18. The first finding of the Tribunal on the question of consultation reads (see para 18.10):

> **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.**

The second finding, which relates to consultation during the construction period, reads (see para 19.3.2):

> **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.**

20.2.5 Agreement, informed consent, and consensus

In chapter 4, the Tribunal gave detailed consideration to the numerous undertakings which the Crown gave to the Ngati Turangitukua owners and on which they relied when giving their approval to the Turangi township being developed on their ancestral land. The Tribunal has concluded that the Crown failed in whole or in part to honour many of these undertakings.

Crown counsel submitted that the Ngati Turangitukua landowners exercised their right to sell on the basis of informed consent and that they were willing sellers (C3:13).

Claimant counsel invoked a passage from the *Te Maunga Railways Land Report* in which the Tribunal said at page 74 that 'the test of "willing sellers" is not whether they engaged in negotiation, but whether they concluded a legal contract in circumstances free of duress, fraud or misrepresentation' (C2:20). Counsel contended that this test was applicable to the present case and that the owners were the victims of a series of key misrepresentations.

We do not believe that it was in the contemplation of either the Crown or the Maori owners that, as a result of the discussions at the two meetings, the owners were entering into a legal contract to sell their land. The Crown was anxious to find out whether the Ngati Turangitukua owners would be prepared to approve the Crown's building of a township on their land. The officials gave various undertakings as to what the Crown would or would not do should the owners give their approval. The owners at the 24 May 1964 meeting approved in principle the proposal for the establishment of a town at Turangi 'along the lines outlined to the meeting'. They also

accepted the assurance given that they would be reasonably and fairly compensated (see para 3.4).

It is clear that the owners approved the proposal conditionally, that is, the town would be established along the lines outlined by the Crown representatives. Claimant counsel Ms Wainwright, after submitting that the Crown made a series of misrepresentations, put the matter another way. She submitted that the owners agreed to the deal conditionally, and the conditions were not fulfilled. In either case, she argued, what they agreed to was not what they got and the taking of the land at Turangi was in every sense a compulsory acquisition (C2:20).

The Tribunal accepts Ms Wainwright's submission. The evidence discussed in chapter 4 establishes that various important conditions, that is to say, undertakings or assurances, which the Crown represented would be fulfilled were not fulfilled. As a consequence, the Crown proceeded, not, as its counsel submitted, on the basis of 'agreement, informed consent and consensus', but on a basis which differed in many very material respects from that on which it had undertaken to the owners it would proceed. Far from agreeing, the claimants protested vigorously at the failure of the Crown to honour its undertakings, on which they had relied, and of which many were important inducements to the claimants' approval of the establishment of a town at Turangi. In such circumstances, it cannot be held that the owners were 'willing sellers' or that they gave informed consent to what the Crown actually did, as contrasted with what it had undertaken it would do.

20.2.6 Tribunal's finding

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 also our earlier, more detailed findings concerning undertakings and assurances (see para 4.11).

20.3 PROPOSAL 2: COMPULSORY ACQUISITION

20.3.1 The proposal

We now consider the second Ngai Tahu Tribunal proposal. It is:

> if the Maori 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.

20.3.2 In the national interest

We should state at once that the Tongariro power project as such was clearly in the national interest. There was an established need for the early generation of more electricity to serve the country's growing needs. Given the large workforce involved, it was necessary to build a construction town to house the workers over the quite lengthy construction period. But, as we have pointed out, it was not necessary for a permanent town to be erected to generate electricity (see para 17.7). A temporary construction town would have sufficed to service the power project. It could have been built on Crown land at either Rangipo or Hautu (Turangi East). No evidence was placed before the Tribunal that it was essential in the national interest for a

permanent town to be built on the claimants' land. If, for its own reasons, the Crown preferred to build a permanent town, it could have done this on its own land at Hautu.

20.3.3 Urgency

Crown counsel stressed that there was an urgent need to proceed with the Tongariro power project and the construction of a town to service it. David Alexander stated that the Ministry of Works and its client, the Electricity Department, were working under tight deadlines set by the power planning committee and the future employment needs of the Waikato Dam's workforce, whose work was winding down. The overwhelming feature of 1964, he said, 'was that planning was being done "on the run" ' (B2:119). Claimant counsel referred to the evidence showing that the Ministry of Works, on receiving a feasibility study on hydroelectric power in the Tongariro area in 1963, concluded that it was 'unlikely to fit into the projected design and construction programmes for at least the next five years' (B2(a):10; C2:26). But four months later, the Crown changed its mind in the light of another report showing an increasing demand for electricity. In September 1963, the power planning committee recommended that discussions with the various authorities should take place forthwith (B2:6).

Given the sudden change of mind and the perceived need for urgency, it is surprising that the Crown elected not to build the township on its own land at Turangi East. Mr Alexander told us that the Ministry of Works, while having a preference for Turangi West, 'were always keeping at the back of their minds the fact that they might have to go for their second choice which was across the river at the Hautu Prison property' (5.1:2–3). The Turangi East site was bare land and, apart from the need for a bridge, could have been readily and speedily developed as a township without any obvious complications.

20.4 TRIBUNAL'S CONCLUSION REGARDING URGENCY AND CHOICE OF SITE

The Tribunal considers that if the Crown deliberately chose to develop ancestral land occupied by the Ngati Turangitukua people, notwithstanding the availability of the Turangi East site, it should have been mindful of its Treaty obligations and been prepared to have regard to them. Urgency could not serve as a valid reason for disregarding its obligations to Maori under the Treaty, particularly given the fact that an alternative site was available to the Crown. We believe an important factor in deciding to acquire the Ngati Turangitukua land was that the Crown considered it could invoke the unfettered power of the Public Works Act 1928, enabling it to enter and acquire the land without notice or objection and compulsorily take the land by Order in Council. In other words, it had statutory authority to disregard its Treaty obligations. In all the circumstances, we are not satisfied, given the availability of an alternative site which it owned, that the Crown's decision to take the Ngati Turangitukua land was justified by exceptional circumstances as a last resort. Had it been so disposed, the Crown could have used its own land for the construction of the township, which need not have been permanent. If, nevertheless, the Crown preferred the Turangi West site, it should have proceeded only after full consultation with the Ngati Turangitukua owners was held, their full and informed consent was obtained, and a price was mutually agreed upon. This, the Crown failed to do. Instead, it persuaded the Maori owners to approve in principle the construction of a permanent township on their land without full consultation and on the basis of assurances and undertakings, many of which, in varying degrees, were not honoured – contrary to the requirement of good faith in a Treaty partner. In this, the Crown had the full weight of the Public Works Act 1928 behind it, the exercise of which effectively rendered the Ngati Turangitukua owners powerless. Their rangatiratanga over their land was largely ignored.

20.5 PROPOSAL 3: FREEHOLD AND INDEPENDENT ASSESSMENT

The third of the Ngai Tahu Tribunal's proposals states that:

> **if the Crown does so 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 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.**

We have earlier upheld the claimants' contention that the Crown failed to ensure that all practicable alternatives to purchasing the land, including taking a leasehold interest in the land required, had been exhausted (see para 17.3.5).

The proposal that the right of the Crown to acquire Maori land compulsorily as a last resort should be referred to an appropriate person or body independent of the Crown avoids the Crown being a judge in its own cause and should ensure an outcome consistent with the Treaty.

20.6 A FURTHUR PROPOSAL

In addition to the three requirements proposed in the *Ngai Tahu Ancillary Claims Report 1995*, which we endorse, we would propose a fourth requirement which logically should precede the first of the Ngai Tahu Tribunal's requirements. It is that:

> **The Crown should not seek to acquire Maori land without first ensuring that no other suitable land is available as an alternative.**

The choice of the Turangi township site has earlier been discussed in some detail, and the salient points summarised (see paras 2.4, 17.2.2). The Tribunal's finding is recorded as follows (see para 17.2.4):

> **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.**

The Tribunal considers that compliance by the Crown with the requirement to ensure that no other suitable land is available before seeking to acquire Maori land is consistent with its Treaty obligation actively to protect Maori rangatiratanga and should be followed as a matter of course.

20.7 TRIBUNAL'S FINDING REGARDING THE PUBLIC WORKS ACT 1981

While the Tribunal considers that the three requirements proposed by the Ngai Tahu Tribunal and the further requirement considered above should be adhered to by the Crown, the better to ensure compliance with its Treaty obligations when seeking to acquire the use of Maori land for public works, they are not necessarily sufficient in themselves.

Earlier we referred to the *Te Maunga Railways Land Report* (see para 16.4.5). There, the Tribunal, after reviewing the provisions of the Public Works Act 1981 (including subsequent amendments), stated that the most significant omission from that Act was the failure to acknowledge in any way the Crown's obligations and responsibilities toward Maori as a partner under the Treaty of Waitangi.

Not only the Crown but also local authorities exercising statutory powers of compulsory acquisition of land should be obliged to conform with Treaty principles. This Tribunal endorses the Tribunal recommendation in the *Ngai Tahu Ancillary Claims Report 1995* that the Public Works Act 1981 should be amended to provide that it should be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi.[2]

Our recommendations as to necessary amendments to the Public Works Act 1981 appear in chapter 22.

References

1. **Waitangi Tribunal, *Ngai Tahu Ancillary Claims Report 1995*, Wellington, Brooker's Ltd, 1995, pp 10–11**

2. **Ibid, p 366**