

## CHAPTER 1

# INTRODUCTION

### **1.1 THE *TURANGI TOWNSHIP REPORT 1995***

In September 1995, the Tribunal presented to the Minister of Maori Affairs its report on the Turangi township claim. The claim was brought by the Ngati Turangitukua people, a hapu of Ngati Tuwharetoa.

The claim concerned the taking by the Crown of an extensive area of ancestral land of Ngati Turangitukua under the compulsory acquisition provisions of the Public Works Act 1928 and the Turangi Township Act 1964. By late 1963, it had become clear that the Government intended to proceed with the Tongariro power project. Four possible sites were identified by Crown officials for a construction town to house the many workers who were to be involved in the project. The Crown owned two sites that would have been suitable. In particular, either a permanent or a temporary township could have been built at Turangi East (where there was plenty of Crown land available) or a temporary township at Rangipo. The Crown also considered two other sites owned by Maori. One, at Lake Rotoaira, was the least favoured site of the four. The fourth site was papakainga land of Ngati Turangitukua at Turangi West. This, like the Crown's Turangi East site, was considered suitable for either a temporary or a permanent township. The Crown decided it would prefer to build a permanent township and elected to take the Ngati Turangitukua land under the Public Works Act 1928 in preference to building on its own land, which was nearby.

The Crown approached the Ngati Turangitukua people in April 1964 to seek their approval for the Crown's establishment of a township on their land. On the basis of numerous assurances and undertakings given to them by Crown officials, the people present approved in principle the construction of the proposed township at Turangi. Subsequently, this approval was undermined and negated by the failure of the Crown, in whole or in part, to honour many of these undertakings on which the people had relied in approving in principle the Crown proposal.

Of critical concern to the Turangitukua people was that the Crown compulsorily acquired the freehold of some 1665 acres of the claimants' ancestral land, despite having promised to take no more than 800 to 1000 acres freehold. The Crown, in effect, took between two-thirds and twice as much land as it had assured the owners it would take. In addition, repeated assurances by Crown officials that the land required for industrial purposes (papakainga land of great significance to Ngati Turangitukua) would be leased and returned after 10 to 12 years were not honoured by

the Crown. The freehold of some 186 acres was compulsorily taken and the land occupied for the Industrial Area. It has never been returned to Ngati Turangitukua.

Other failures by the Crown to honour undertakings to Ngati Turangitukua, in whole or in part, included the failure in numerous instances to protect the wahi tapu of the people (sacred taonga were desecrated or destroyed) and the failure to ensure that waterways and fisheries were not degraded and that increased flooding did not occur. Other major grievances included the Crown's failure to respect the mana of Ngati Turangitukua and to preserve an economic base for them.

The result was that the Crown acted inconsistently with the principles of the Treaty of Waitangi, and the Tribunal found that the claimants have been prejudicially affected by the various Crown policies, acts, and omissions.

The Tribunal also found that the provisions of the Public Works Act 1928 and the Turangi Township Act 1964 relied on by the Crown in entering upon and taking the claimants' land were fundamentally inconsistent with the basic guarantee in article 2 of the Treaty of Waitangi.

In our report, the *Turangi Township Report 1995*, we gave an overview of the claim.<sup>1</sup> We concluded that the claimants were entitled to be compensated for the losses and injury they have suffered. We noted that the return of land would no doubt be a central element in such compensation. In addition, we recorded that, on 24 August 1994, the claimants gave notice of their application for the resumption under the Treaty of Waitangi Act 1975 of land covered by the claim and vested in or transferred to a State-owned enterprise under the State-Owned Enterprises Act 1986. In the report, we set out 13 findings of Treaty breaches by the Crown.<sup>2</sup> These are considered in chapter 3 of this report.

The only recommendations made in our 1995 report related to amendments we proposed should be made to the Public Works Act 1981 to better secure the protection of Maori Treaty rights in relation to the proposed acquisition of their land.

## 1.2 A NEGOTIATED SETTLEMENT

In the final section of our overview in chapter 21, we noted that, prior to the final submissions of the parties in October 1994, the Tribunal advised them that the claimants' application for the resumption of land vested in State-owned enterprises in the claim area and the question of remedies generally would need to await the Tribunal's report.<sup>3</sup> Accordingly, no submissions were made by counsel on the question of remedies.

In the interest of facilitating an early settlement of remedies, we proposed that it would be appropriate for the claimants and the Crown to enter into direct negotiations. These would need to encompass outstanding ancillary claims (brought

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1. Waitangi Tribunal, *Turangi Township Report 1995*, Wellington, Brooker's Ltd, 1995, ch 21

2. Ibid, secs 22.2.1–22.2.13

3. Ibid, sec 21.8

by individuals), as well as the wider claims, and should include the application in respect of land vested in State-owned enterprises in the area.

In conclusion, we noted that, if at any stage the parties were unable to reach agreement on the whole or any part of the matters in issue, the Tribunal would be amenable, on the application of the claimants, to set a date for hearing the parties on the question of remedies and for making appropriate recommendations.

Ngati Turangitukua and the Crown agreed to enter into negotiations. These took place during 1995 and 1996. By July 1996, however, they had come to a standstill.

### 1.3 NEGOTIATIONS BREAK DOWN

On 16 July 1996, claimant counsel advised the Tribunal that the claimants' discussions with the Crown had not led to a settlement. The Tribunal was advised that the claimants had formally withdrawn from negotiations. They sought a reconvening of the Tribunal for a remedies hearing. Counsel indicated that their application in respect of remedies would include the return of land bearing section 27B memorials on State-owned enterprise land.

These memorials relate to Crown land transferred to or vested in a State enterprise pursuant to the State-Owned Enterprises Act 1986. Section 27A of that Act provides that the district land registrar is to note on the certificate of title for any such land the words:

Subject to section 27B of the State-Owned Enterprises Act 1986 (which provides for the resumption of land on the recommendation of the Waitangi Tribunal and which does not provide for third parties, such as the owner of the land, to be heard in relation to the making of any such recommendation).

Section 27B provides for the resumption by the Crown of land that has been transferred to or vested in a State enterprise under the 1986 Act and that the Waitangi Tribunal has, under sections 6(3) and 8A(2)(a) of the Treaty of Waitangi Act 1975, recommended should be returned to Maori ownership, where such recommendation has been confirmed under section 8B of the 1975 Act.

After hearing the parties on 2 August 1996, the Tribunal directed the registrar to arrange a suitable date for hearing the remedies application at Hirangi Marae in Turangi.

In September 1996, the Crown submitted that a higher standard of proof may be required if a mandatory recommendation is sought under section 8A of the Treaty of Waitangi Act in respect of Crown land transferred to or vested in a State enterprise. It asked for a ruling on the question by the Tribunal.

#### 1.4 TRIBUNAL DECISION ON STANDARD OF PROOF

On 27 and 28 February 1997, the Tribunal heard detailed submissions by counsel for the Crown and claimants. It also had before it a written submission by counsel assisting the Tribunal, John Fogarty QC, which was by agreement received by the Tribunal and taken into account along with the submissions of counsel for the parties.

The Tribunal delivered its decision on the issues raised by the Crown on 25 March 1995.<sup>4</sup> In essence, as we noted in the decision:

This decision concerns the power of the Waitangi Tribunal to make binding recommendations in terms of the Treaty of Waitangi Act 1975 (1975 Act) in respect of land transferred to or vested in a State Enterprise. This power is contained in ss 8A and 8B of the 1975 Act which along with other provisions was made part of the 1975 Act by s 4 of the Treaty of Waitangi (State Enterprises) Act 1988. In short, the Crown has submitted that the Tribunal is legally obliged to adopt a higher standard of proof and stricter procedures when exercising its power to make binding recommendations than it is required to adopt when deciding to make non-binding recommendations.

The Crown contends that the requisite standard of proof is at the higher end of the civil standard of proof, namely the balance of probabilities – ie, a reasonably high degree of probability is required. The Crown says that the material facts relied upon as a basis for a binding recommendation must be established to this standard.<sup>5</sup>

We will be referring later to various matters raised by counsel and considered in our decision. At this point, it is convenient to state the conclusions we reached:

There is a danger in dealing with the lengthy and detailed submissions of the Crown of losing sight of the wood for the trees. Little reference was made by Crown counsel to the Tribunal's *Turangi Township Report* or to the seriousness of the Crown's Treaty breaches. It is apparent that the Crown regards with some concern the possibility that the Tribunal might, when it has heard the parties, decide to make a binding recommendation. It is also apparent to the Tribunal, that the claimants entertain very real concern that the agreement between Maori and the Crown following the *Lands* decision [*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA)], and the statutory provisions which were intended to give effect to it, may be diluted as a result of the Crown's attempt to assimilate to some degree the legal processes of the Tribunal with the judicial processes of a court of law, which plainly it is not.

The Tribunal's mandate, if after its inquiry into a claim is completed, it finds well-founded breaches by the Crown of its Treaty obligations, is to make appropriate recommendations under s 6(3). In considering what recommendations it should make in any given case, the Tribunal should have regard to all relevant circumstances. These will include the nature, extent and effect of the Treaty breaches which it finds to be well-founded, and additional evidence and submissions received during the hearing on remedies. The Tribunal will then decide on the most appropriate action it considers the Crown should take to compensate for, or remove, the prejudice to the claimants, or to prevent other persons from being similarly affected in the future. The last-mentioned

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4. Paper 2.57

5. Ibid, p 2

matter is not relevant if the Tribunal is considering whether or not to make a binding recommendation in respect of memorialised land.

We have considered at some length the Crown's detailed submissions on the legislative scheme which now governs the Tribunal's jurisdiction to make recommendations to the Crown. We are unable, for the reasons we have given, to find in the Crown submissions on the legislative scheme, support for the necessity to adopt a higher standard of proof for which they contend when the Tribunal is considering whether or not to make a recommendation under s 6 of the Act for the return of memorialised land in contrast to any other recommendations.

The Crown submitted four reasons in support of its contention that the material facts relied on by the Tribunal as a basis for the resumption of memorialised land, must be established to a reasonably high degree of probability. For the reasons we have given, the Tribunal does not accept this submission of the Crown.

In our opinion the Tribunal, when considering whether or not to make a binding recommendation for the return of memorialised land, should comply with the directions of the Court of Appeal in *T v M* (1984) 2 NZFLR 462. Although we are not a court of law and are not bound by evidential or other rules applicable to civil proceedings in a court, we have found it appropriate to adopt the standard of proof customarily applied in civil proceedings, viz the balance of probabilities. This was the test in issue in *T v M*.

After emphasising that the required *standard* of proof is a constant, Woodhouse P said that in any evidential context it is logically right for conclusions in the area of inference and judgment to be influenced both by the purpose to which they are directed and the significance of the assessment being made. We pause here to note that in the context of whether or not the Tribunal, in any given instance, should make a binding recommendation for the return of memorialised land, it will be right for it to take into account the purpose, viz to compensate for or remove prejudice to Maori arising from well-founded Treaty breaches. As Woodhouse P states, it would also be right for the Tribunal to be influenced by the significance of the assessment being made. Thus, the Tribunal should take into account the greater consequences that a binding recommendation for the return of memorialised land would have for the Crown than would a non-binding recommendation for the return of other land.

In referring to the various ways in which the matter has been expressed in the case law, Woodhouse P referred (among others) to the New Zealand case of *Hall v Hall* (like *T v M*, a paternity case) in which Sir Richard Wild CJ referred to 'giving due weight' to the gravity of the allegation. He also referred to Lord Justice Morris, who, in *Hornal v Neuberger Products Ltd*, stated that the very element of gravity becomes a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities.

When the Tribunal is considering whether or not, as part of its recommendation under s 6, to make a binding recommendation for the return to Maori of memorialised land, it will be concerned with 'a whole range of circumstances' which it will need to weigh. Clearly the consequences of such a recommendation would need to be given serious consideration given its effect on the Crown.

In deciding whether or not to make a binding recommendation for the return of land the Tribunal considers it should be guided by the judgment of the Court of Appeal in *T v M* delivered by Woodhouse P when he says, 'It is the principle of good common sense that the more serious the issue the greater should be the care used in assessing it'.

We believe that if the Tribunal follows this principle of good common sense in assessing the relevant evidence and the submissions of counsel, it will be acting fairly to the parties and in accordance with its statutory obligations.<sup>6</sup>

Following this preliminary decision, the Tribunal heard evidence from the claimants and the Crown and lengthy submissions concerning the exercise by the Tribunal of its power to make binding recommendations in terms of sections 6(3) and 8A(2) of the Treaty of Waitangi Act 1975. This hearing took place at Hirangi Marae on 16 and 17 July 1997.

Leave was reserved to the parties to adduce further evidence and for claimant counsel to make written submissions by way of reply. These were received by January 1998. Issues arising from submissions of counsel are considered in chapter 2.

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6. Paper 2.57, pp 41-44