

## CHAPTER 17

# CROWN TREATY BREACHES

### 17.1 INTRODUCTION

**In this chapter, we consider whether the Crown was under a Treaty obligation:**

- **before deciding to take the claimant owners' land to ensure first that no other land, in particular, the Crown-owned Turangi East site, was available as an alternative;**
- **to give adequate consideration to the desirability of acquiring the leasehold instead of the freehold of the land compulsorily taken for the township and the water supply reserve; and**
- **to ensure that provision existed for land, when it was no longer required for the public work for which it was taken, to be returned at the earliest possible opportunity and with the least cost and inconvenience to the Maori owners.**

### 17.2 CLAIMANTS' ALLEGATIONS

#### 17.2.1 Statement of claim

**In paragraph 5(2)(a) and (b) of their statement of claim (see app I), the claimants allege that they have been prejudicially affected by the following policies and practices adopted by the Crown:**

- (a) the policy of taking Maori land for the establishment of public works, and in particular the policy of taking such land without first ensuring**
  - (i) that no non-Maori land was available as an alternative;**

**(ii) that all practicable alternatives to purchasing the land, including the alternative of taking a leasehold interest in the land required, had been exhausted; and**

**(iii) that provision existed for the land, when no longer required for the public work for which it was taken, to be returned to its Maori ownership at the earliest possible opportunity and with least cost and inconvenience to those Maori owners; and**

**(b) the policy decision to site the Tongariro Power Project ('the Project') and the Turangi Township ('the Town') in their current location when other locations were available which did not involve the wholesale taking of Maori land.**

**We consider each of the allegations in paragraph (5)(2)(a)(i), (ii), and (iii) in turn.**

**As to sub-subparagraph (b), we do not discuss the policy decision to site the Tongariro power project in its current location, because urgency was granted in respect of claims relating only to the Turangi township, not to the project. The remainder of sub-subparagraph (b) relates to matters encompassed in our consideration of sub-subparagraph (a)(i).**

#### **17.2.2 The choice of the township site**

**The Crown's choice of the township site has already been discussed in some detail (see para 2.4). We here note the salient points to emerge from that discussion.**

**(a) The first recommendation of a suitable site was made by A W Gibson, then the project engineer at Mangakino and later the project engineer for the Tongariro project. On 29 November 1963, he recommended to the Commissioner of Works that a single central township, to become permanent, should be built at Turangi West. He saw it as the easiest site to develop. Possible sites at Lake Rotoaira and Rangipo were rejected as unsuitable for permanent towns. A fourth location, and the nearest to Turangi West, was at Turangi East, just over the Tongariro River, which it was said was generally similar to Turangi West. The river would need to be bridged and it was slightly more expensive for transport costs than Turangi West. It was considered not to be as attractive as Turangi West, which was**

**favoured largely because it would be possible to build the nucleus of a permanent township at the outset by enlarging the existing Turangi village.**

- (b) In April 1964, discussions were held between senior officials of the Ministry of Works and the Department of Justice. The department, while not keen on any use of its land, agreed, in view of the national interest, that it would fit into a compromise site. It was advised that the Ministry's first choice would be Turangi Maori land, but the Ministry 'needed to look at alternatives both to assist bargaining with the Maori and to satisfy government [the] right choice had been made' (B2(a):52).**
  
- (c) The Turangi East site does not appear to have been seriously considered (see para 2.4.4). Physically and climatically, this site, on the east bank of the Tongariro River and on Crown land opposite the existing Turangi village, was potentially as good as the chosen Turangi West site. Indeed, it had some advantages in that there was more room for expansion than at the Turangi West site, which was constrained by the Tongariro River and swamp lands to the north and steep hill slopes to the south. The Turangi East site did, however, need a new bridge over the river.**
  
- (d) The Crown did not produce any evidence to the Tribunal to indicate that any serious consideration was given to the Turangi East site, although it was on Crown-owned land, which, as subsequent events disclosed, was not required for prison purposes.**
  
- (e) The Department of Justice supplied information to the Tribunal about the subsequent use of the lands included in the Turangi East site. An area of 647.3 hectares (1599.5 acres) known as Mangamawhitiwhiti Farm was sold by the Treasury to Landcorp on 1 April 1987. It appears that the Department of Justice was not advised of the sale, nor did it receive any revenue from it. Apparently, the land, the major part of which was flat, was being managed and farmed by the Department of Lands and Survey from April 1967, not by the prison (see para 2.4).**
  
- (f) When the Department of Lands and Survey was restructured in the mid-1980s, the Turangi East site, as part of Mangamawhitiwhiti, was transferred to Landcorp. The Land Transfer Office title to the land carries a memorial under section 27B of the State-Owned Enterprises Act 1986.**
  
- (g) If it was possible to transfer the management in 1967 and, in 1987, the ownership of this part of the prison farm to the Department of Lands and Survey, it seems difficult to believe that the land was essential for prison farm purposes and was therefore not available as a township site. Indeed, no such contention was advanced by the Crown before us. Under cross-examination, Crown consultant David Alexander stated that the Crown's second choice was across the river at the Hautu Prison property (5.1:3).**

- (h) The choice of a permanent township site was between Turangi East, being Crown land which could have been made available, and Turangi West, being Maori land, which, from the outset, it was intended to take under the compulsory acquisition provisions of the Public Works Act 1928.**
- (i) There is no evidence before us that, at any stage in the consideration of the site to be developed for the township, the Treaty rights of the Maori owners of the Turangi West site were adverted to or taken into consideration by the Crown.**
- (j) The Crown accepted that the tangata whenua had ‘minor input’ into the decision of where to site the town (5.1:3).**

**Claimant counsel submitted that there was a strong feeling among claimants that, even after the Turangi West site was identified, there was a preference in the Ministry of Works not to take or even affect European-owned land in the area (C2:33). She referred to the evidence of John Asher that:**

**the old part of Turangi, the houses along the Tongariro River which were in freehold title and owned by Europeans, were untouched. The main road was diverted to keep the European-owned part of Turangi in an exclusive and untouched area so that those owners were largely unaffected by the works. (A12(1):7)**

**The Turangi East ‘green-field’ site had obvious advantages:**

- it was already Crown land;**
- there was nobody living on it;**
- it would have avoided the enormous disruption caused to the existing Turangi community;**
- the Department of Justice did not oppose the use of the site;**
- the land was not essential to prison farm operations – the Department of Lands and Survey assumed the management of the Mangamawhitiwhiti block in 1967**

and the land was subsequently transferred by Treasury to Landcorp without reference to the Department of Justice; and

- Ngati Turangitukua claimants would have been left in possession of the lands taken for the township.

### **17.2.3 Tribunal's conclusion**

The Tribunal concludes that there was an inadequate investigation and no social or environmental impact assessments of the respective sites. Maori participation in the choice of the site was minimal, amounting to being informed at meetings in 1964 that Turangi West was the preferred site for the permanent town; the only alternative suggested was a temporary town at Rangipo, although the Crown's actual second preference was the Turangi East site.

The Crown failed to take into account its Treaty obligation actively to protect the claimants' rangatiratanga over their lands, nor did it consider the social impact on Maori landowners or on the Ngati Turangitukua community.

### **17.2.4 Tribunal's finding**

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.

## **17.3 PRACTICABLE ALTERNATIVES TO PURCHASING THE SITE**

### **17.3.1 Review of the evidence**

We now consider the claim in paragraph 5(2)(a)(ii) of the statement of claim that the Crown failed first to ensure that 'all practicable alternatives to purchasing the land, including the alternative of taking a leasehold interest in the land required, had been exhausted'.

The Crown made clear to the owners its conviction that the freehold of all the land required for the township would have to be acquired, apart from a leasehold area of some 200 acres.

As was noted in chapter 3:

- (a) At a meeting with a few owners and others on 15 April 1964, it was indicated that the Crown sought 600 to 800 acres of freehold land and about 100 to 200 acres of leasehold land for a heavy industrial area (see para 3.2).
- (b) After a later meeting on 7 May 1964, in a letter dated 8 May 1964 from Gibson and Jack Asher to Maori owners of the land affected by the Turangi township, the Crown proposals for a permanent town were said to require 800 acres of freehold land and some 200 to 300 acres for a temporary industrial area (see para 3.6).
- (c) At a meeting with Maori landowners on 24 May 1964, John Bennion, a Crown representative, reiterated a statement by Gibson that, in view of the Crown's expenditure of an estimated £4 million and the need for the Crown to ensure a permanent return for this expenditure, the township had to be built on freehold land. Bennion advised that the Crown would not consider building to the standard envisaged on leasehold land. He added that it was hoped that private capital would be attracted to the town.

Bennion further advised that an industrial area on leasehold land would be required for workshops, stores, and the like, and the area shown on the plan would revert to owners when the Ministry's work finished. Private industrial development on this area would be a matter for regulation between the individuals, the owners, and the Taupo County Council (see para 3.4).

- (d) At a lengthy meeting with Maori owners on 20 September 1964 (the day before Cabinet approved the proposals for the Turangi township), Gibson advised that there would be no change of location and he was about to reveal to the people present 'for the first time' the final plan for the Turangi township. The lengthy minutes of the meeting make no express reference to the fact that the Crown would be acquiring the freehold of much of the land required, but this may reasonably be inferred. Express reference was, however, made to the area of 200 acres which would be taken on temporary lease for the industrial area. The private industrial developers, Gibson said, could either accept a limited temporary lease or negotiate something more permanent with the Maori owners. R E Tripe, the Tuwharetoa Maori Trust Board's solicitor, said the industrial area would be leased for 10 years and would then revert to the owners. Subsequently, the Crown resiled from its undertaking to lease the industrial area and took the freehold by proclamation.

### **17.3.2 Maori owners given no choice**

**It is clear that, from the inception, the Crown was committed to the compulsory acquisition of the freehold of all the land required for the Turangi township other than the industrial area. The proposals were presented on that basis and it is a reasonable inference that they were non-negotiable. The available evidence indicates that the Maori owners were given no choice in the matter, nor, indeed, asked whether they would prefer the leasehold only to be acquired by the Crown for the township land. An important, perhaps the dominant, consideration appears to have been that the acquisition of the freehold was seen as necessary to ensure a permanent return for the Crown's expenditure.**

**There is no evidence that the Crown considered what form of tenure would be in the best interests of the Maori owners and would best protect their rangatiratanga over their ancestral lands.**

### **17.3.3 W A Cleghorn's evidence**

**Claimant counsel contended before the Tribunal that leasing ought to have been regarded as viable for the whole of the township (C2:34). In support, evidence was adduced from W A Cleghorn, a registered valuer and the vice-president of the New Zealand Institute of Valuers. Claimant counsel put to Mr Cleghorn various statements made by Crown representatives at the meeting on 24 May 1964 referred to earlier (see para 17.3.1(c)). Cleghorn was asked to comment on the proposition that the Ministry of Works was initially proceeding on the premise that a leasehold was suitable for the industrial block but was wholly unsuitable for residential or commercial purposes in the village, and he was asked whether he would agree with that premise. Cleghorn replied:**

**There is an instinctive reluctance I suppose for people to take on leasehold land for a type of occupation. But provided the terms of the lease are fair to both sides and are quite clear leasehold tenure can be a very satisfactory form of occupation. There are a number of examples where substantial residential, commercial, industrial and rural areas of land are occupied under leasehold tenure and have been for a long time. Perhaps by way of example, approximately  $\frac{1}{5}$  of the central business district of Rotorua**

city is occupied under 21 year leases. That area contains multi-story office blocks, shops, large hotels and motels. A further quite substantial area slightly to the south of the central business district is similarly occupied under leasehold tenure. The land used here is warehousing, retail warehousing and recreational. We've got, of course, the two well known examples of residential tenure on a large scale in the church leasehold lands in the eastern suburbs of Auckland city, Melanesian Trust and St John's College. We have also got examples of leasehold tenure in Motueka and in Greymouth, where a large area of Greymouth township itself is leasehold tenure. We have the Porirua city centre which is all leasehold land, and, perhaps a little closer to home, we have the Mangakino township and area surrounding it, which was land vested by the Crown in the ownership of the Wairarapa Maori people in compensation for the bed of Lake Wairarapa. Mangakino being a hydroelectric town, the whole town is leasehold and a large area of farm land around it is similarly leasehold. Those, perhaps, are clear examples of how it does work under a leasehold tenure. (5.2:3)

Mr Cleghorn was asked by Crown counsel whether it would be reasonable to assume that if the Crown had not had freehold tenure for the commercial and residential sections of Turangi it would have had to take the same steps it took for Mangakino and not put in what it considered to be a permanent hydro village (5.2:7).

Mr Cleghorn did not accept Crown counsel's suggestion. He pointed out that Turangi:

has an infrastructure of its own in tourism of quite a variety.

It was being regarded as having the tourism activity as long as I can remember with its thermal, its access to the National Park, to the mountains and to rivers and the trout fishing and the like. So it is an established tourist area . . . Quite different from Mangakino which is on, certainly, a State Highway, but serves the local forestry industry and the local farming community. (5.2:7-8)

The Crown did not call any evidence in rebuttal of Mr Cleghorn's view that, provided the terms of the lease are fair to both sides and are quite clear, leasehold terms can be a very satisfactory form of occupation. Mr Cleghorn clearly regarded leasehold as a viable option for the whole town. Had the respective options of leasehold or freehold tenure been thoroughly investigated at the time, the Crown would no doubt have produced evidence of this. The conclusion appears inescapable that, given the Crown's failure to advert to its Treaty responsibilities in relation to the Ngati Turangitukua land, it simply did not have regard to the claimants' rights under

article 2. The early decision that the freehold should be taken for all but the industrial area of 200 acres or so was, it appears, made on the basis of what, in the view of Crown officials, best suited Crown interests, including obtaining a return on its investment. It seems that the Crown thought a return would be better secured if the freehold were taken. Of course, the problem would not have arisen had the Crown elected to develop the new township just across the river, on the Crown-owned Turangi East land.

Claimant counsel also submitted that ‘leasehold was an obvious option for the land designated for the rubbish tip and for the water supply reserve’ (C2:35). The two matters are interrelated; the land proposed for the rubbish tip was adjacent to that to be taken for the water supply reserve. A detailed account is given in chapter 7 and need not be repeated here. We note only the salient facts:

- Because parts of the water supply reserve and rubbish tip were outside the boundaries of the land authorised to be taken under the Turangi Township Act 1964, the Crown had to comply with the notification and objection provisions in the Public Works Act 1928 (see para 7.1.3).
- It was originally proposed to take 349 acres for the water supply reserve and the rubbish tip.
- Debate between representatives of the Maori owners and the Crown centred on whether adequate protection could be maintained on leasehold tenure (which the Maori owners sought) or whether the Crown should take the freehold. It was suggested by the Tuwharetoa Maori Trust Board representatives that a controlled afforestation programme in the catchment area should be implemented and the land retained in Maori ownership.

- **The Taupo County Council, which was to take over the control of the water supply scheme, was opposed to any afforestation schemes (for public health reasons) and also to any form of leasehold tenure. It advised the Ministry of Works in October 1969 that:**

**Although it is technically possible to protect this area by the acquisition of a lease in perpetuity, or even a perpetually renewable lease, the Maori owners must realise that the land is lost to them for all time and that for them to retain ownership of the freehold would be of no practical significance. From an administrative viewpoint acquisition of the freehold is the only common-sense thing to do ... In my opinion ... formal acquisition of the freehold should proceed. (B4(a):48)**

- **The Crown later decided it needed a larger area for the water supply reserve and an access road, and notice to take some 539 acres for this purpose was given in December 1971 (see para 7.1.3).**

- **Several objections were lodged, including one from Hepi Te Heuheu and Pat Hura, who had been appointed by the Maori Land Court as trustees of the Waipapa blocks covered by the notice. The trustees and the Tuwharetoa Maori Trust Board met the Prime Minister in January 1972, having earlier expressed to him their concern over the additional land required for Turangi, and suggested that the taking of such a large area for the water supply along with the industrial area was contrary to the original undertaking given in 1964. It was recorded that at this meeting the ‘owners reluctantly accept decision to take [the water supply] catchment area’ (A10:37).**

- **A proclamation taking 539 acres for the water supply reserve and road was issued on 2 October 1974 (see para 7.1.4).**

- **The owners made it clear that they were prepared to lease the tip site but would not agree to its sale. In November 1972, an agreement was reached**

with the Crown to lease the 34 acres of the tip for as long as the land was required for rubbish disposal, at a rent of 10 cents per annum if demanded. On termination of the lease, the land was to be restored to a reasonable contour and sown in grass, without cost to the owners. For the reasons given in chapter 8 relating to the sacred wahi tapu Nga Tuahu on adjoining land, the Taupo County Council ceased use of the tip in 1977. The land remains in Maori ownership (see para 7.2).

#### **17.3.4 Maori values, attitudes, and concepts not considered**

There is no indication in the voluminous Ministry of Works files made available to us that Maori values, attitudes towards wahi tapu in this area, or concepts of mana and rangatiratanga were considered important in the lengthy negotiations over the water supply scheme. Probably, Maori willingness to allow the county to utilise the 34 acres for the rubbish tip for a nominal rental of 10 cents saved that land from being compulsorily acquired and permanently lost, but no compensation for the use of or damage to the land or for the pumice extracted has ever been paid (see para 7.2).

#### **17.3.5 Tribunal's finding**

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.

### **17.4 OFFER BACK PROVISIONS**

#### **17.4.1 The claimants' allegations**

**We turn now to consider two further claims by the Ngati Turangitukua claimants. They allege that they have been prejudicially affected by:**

- the Crown policy of taking Maori land for public works purposes without first ensuring that provision existed for the land, when it was 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 (app I, para 5(2)(a)(iii)); and**
- the failure on the part of the Crown to offer land taken compulsorily back to the original landowners once it had served the immediate purpose for which it was taken (app I, para 5(3)(l)).**

**The first grievance relates to a deficiency in the legislation in force at the time. The second relates to the failure of the Crown, until relatively recently, to offer to return any such land.**

#### **17.4.2 No offer back provisions in the Public Works Act 1928 or the Turangi Township Act 1964**

**Neither the Public Works Act 1928 nor the Turangi Township Act 1964 contained any provision obliging the Crown to offer to return compulsorily acquired land which it no longer required.**

**Section 4(1) of the Turangi Township Act 1964 did, however, provide that any land acquired under the Act might be declared Crown land subject to the Land Act 1948 or be dealt with in accordance with the provisions of the Public Works Act 1928. Land so declared Crown land could be alienated by the Crown pursuant to the Land Act. There was no provision in the Land Act requiring the Crown to offer back to the former owner land it no longer required. However, a mechanism existed in section 436 of the Maori Affairs Act 1953 whereby Crown land could be revested in Maori by the Maori Land Court if the Crown should choose to apply for a revesting order.**

#### **17.4.3 Provision for and aspects of returning land compulsorily acquired**

**Claimant counsel submitted that, whenever Maori land is compulsorily acquired in the public interest, the strongest possible imperative exists for the land to be returned to the Maori owners at the earliest opportunity (C2:11). She contended that appropriate mechanisms to ensure that such returns take place with minimal delay and inconvenience to the former owners or their successors is a necessary incident to this imperative.**

Ms Wainwright argued that an important aspect of any return mechanism is affordability and that it was inappropriate for the Crown to demand from Maori owners a market price for land compulsorily taken (C2:12). She invoked certain comments by Judge Carter of the Maori Land Court, which were cited with approval in the *Te Maunga Railways Land Report* at page 79. Judge Carter observed that where land becomes surplus to requirements the Crown has a duty to its Treaty partner to return it on reasonable terms and conditions and for a reasonable price, having regard to the cost of acquisition and to a reasonable return on that cost. He also thought that the Crown should endeavour to come to arrangements which might facilitate the owners in being able to take up the offer made to them.

#### 17.4.4 Public Works Act 1981 offer back regime

Claimant counsel was also critical of the offer back regime in the Public Works Act 1981 (C2:14). We note here the main provisions of sections 40, 41, and 42 of the Act, as subsequently amended. Section 40 reads:

(1) Where any land held under this or any other Act or in any other manner for any public work—

(a) Is no longer required for that public work; and

(b) Is no longer required for any other public work; and

(c) Is not required for any exchange under section 105 of this Act—

the chief executive of the Department of Survey and Land Information or local authority, as the case may be, shall endeavour to sell the land in accordance with subsection (2) of this section, if that subsection is applicable to that land.

(2) Except as provided in subsection (4) of this section, the chief executive of the Department of Survey and Land Information or local authority, unless—

(a) He or it considers that it would be impracticable, unreasonable, or unfair to do so; or

**(b) There has been a significant change in the character of the land for the purposes of, or in connection with, the public work for which it was acquired or is held—**

**shall offer to sell the land by private contract to the person from whom it was acquired or to the successor of that person—**

**(c) At the current market value of the land as determined by a valuation carried out by a registered valuer; or**

**(d) If the chief executive of the Department of Survey and Land Information or local authority considers it reasonable to do so, at any lesser price.<sup>1</sup>**

**Section 41 relates to the disposal of former Maori land no longer required. It concerns Maori freehold land or general land owned by Maori (as defined in section 4 of Te Ture Whenua Maori Act 1993) and beneficially owned by more than four persons and not vested in any trustee. The chief executive of the Department of Survey and Land Information or the local authority must, in respect of such land, comply with the requirements of section 40 of the Public Works Act or apply to the Maori Land Court for an order under section 134 of Te Ture Whenua Maori Act.<sup>2</sup>**

**Section 42 provides that where an offer to sell land under section 40(2) has not been accepted within 40 days, or such further period as the chief executive considers reasonable, or where any land is no longer required and subsections (2) and (4) of section 40 do not apply, the chief executive may offer to sell the land to an adjacent owner or offer it for sale by public auction or public tender or by public application at a specified price.<sup>3</sup>**

#### **17.4.5 Difficulties for multiple owners**

**Claimant counsel referred to the difficulties multiple owners of land experienced in raising money to purchase land (C2:14). Ms Wainwright contended that special time provisions and payment terms should be available. She further submitted that the overriding tribal interest in Maori land should be acknowledged by providing for the offer back right to pass to wider tribal interest groups in the event that the original owners or their direct descendants were unable to effect the purchase. In short, she urged the Crown to facilitate, by whatever means possible, the return to Maori ownership of compulsorily taken land.**

#### **17.4.6 ‘Loopholes’**

**Claimant counsel next referred to the absence of any offer back procedures of any kind before the Public Works Act 1981 was passed. She characterised as ‘loopholes’ certain provisions in section 40(2)(a) and (b) which exempted the Crown from the obligation to offer land back (C2:14). These exemptions are when the chief executive considers it impracticable, unreasonable, or unfair to offer land back or where there has been a significant change in the character of the land arising from the public work or purpose for which the land was acquired.**

#### **17.4.7 Sales of surplus land without offers back**

**It is not known in how many instances the Crown has relied on section 40(2)(b) of the Public Works Act 1981 as justification for not making an offer back to former claimant owners. Mahlon Nepia gave evidence of some instances of which he was aware when the Crown, in reliance on section 40(2)(b), had bypassed the Maori owners and sold land directly to third parties. He cited some nine properties, mostly vacant sections, which were sold as surplus properties without any offers back to former Maori owners. These sales took place from 1984 to 1986 (A21(3):23).**

**Mr Nepia also produced evidence of some 15 surplus Department of Education properties which were sold off by the Crown. The Office of Crown Lands advised Mr Nepia that these sales, some of which dated back to February 1989, were not offered back to former owners because the Crown was exempt under the provisions of section 40(2)(b) of the Public Works Act 1981 (A21(3):24, app 43). The Office of Crown Lands claimed in a letter to Mr Nepia on 15 March 1994 that there had been correspondence between the Crown and him and his solicitors late in 1993. Mr Nepia told the Tribunal that he knew of no such correspondence, nor**

did he understand how these properties had been 'cleared for disposal' by the Crown (A21(3):23).

#### **17.4.8 Recreation reserve land**

Other claimants gave evidence about land that was compulsorily acquired for the township but has not been offered back. Eileen Duff and Tuatea Smallman referred to the Crescent Recreation Reserve, which is made up of their respective families' land. The efforts of the former owners to secure the return of this land have included protracted negotiations involving several Cabinet Ministers (A22(2):8–10). On 17 July 1987, the Taupo district conservator advised the Taupo County Council that the Department of Conservation would 'concede the land is not fully serving its intended purpose and on reassessment accepts the bulk of the land is not required' (A22(2):L). The department stated that it would be receptive to an application for the return of this land to the former owners under the conditions set out in the Public Works Act 1981. However, the Tribunal has been told nothing has happened. The department still has this land, which it does not require for the purpose for which it was taken from the owners. The least the Crown can do is offer it back to the former owners, who have a special attachment to it.

#### **17.4.9 Te Rangi whanau struggle**

Other instances were cited to us of land lying idle for many years and the long struggle of the Te Rangi family to get some of their land back. Ultimately, the intervention of the Chief Ombudsman was obtained to overcome the sustained objection of the Crown to the return to the Te Rangi family of any part of the surplus land. As Crown consultant David Alexander noted, the Chief Ombudsman found that continued possession of the land by the Crown was not justified and he recommended that the Department of Lands and Survey should return the land to the descendants of Sonny Te Rangi, the original owner (B7:20).

#### **17.4.10 Pony club land**

The problems arising from the failure of the Crown to act promptly in offering to return land no longer required is well illustrated by the retention of an area of some 120 acres, part of which was commonly known as the pony club land. This land fronted on the former SH1. Evidence concerning this land was given by Arthur Grace (A21(1):15–17), Mahlon Nepia (A21(3):20–21), and David Alexander. The following account is drawn principally from the evidence of Mr Alexander (B7:21–23).

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The land in question is at the southern end of old Turangi and consists of a large area of paddocks between Taupahi Road and the realigned SH1. Most of the land was taken in 1965 and over three years later, in 1968, the owners of the 120 acres were paid \$21,965 (\$183 per acre) (A21(1):C). The land was not immediately required and was zoned deferred residential. A planning report in February 1967 noted that it was acquired by the Crown to hold in reserve until the number of residential sections needed was known more exactly. It was envisaged that if the area were to be used for residential purposes in connection with the power scheme only temporary accommodation would be erected for the duration of the scheme, after which the land would revert to non-urban use (B7:21). Some 82 acres of the land were leased out for grazing purposes and the Turangi Pony Club had a sublease on part of it.

In March 1973, the pony club sought a lease of part of the land comprising 26.5 acres. The roll value of the land as at 1 April 1967 was \$1250 an acre, but the Crown's assessment of the value for grazing and farming purposes was \$100 per acre. In June 1973, 55.5 acres of adjoining land was leased by the Crown to J Thorby for grazing purposes, the respective roll values and Crown assessment for grazing and farming purposes being the same as noted for the pony club leasehold land (B7(a):145–148).

By August 1973, the 82 acres had been declared surplus to TPD requirements by the project engineer. While it was thought that the land might still be needed for the future development of the town, it was considered more appropriate to transfer it to the Department of Lands and Survey for future control. It was proposed by the district land purchase officer that the 82 acres be transferred to the department for \$39,000, less 6 percent for administration. The price reflected a special Government valuation of 16 July 1973, of which the unimproved value was \$37,500 (\$457.30 per acre) (B7(a):149–151). A recommendation from the Ministry of Works' Wanganui office that the land would have to be held by Lands and Survey for the purpose for which it had been acquired, that is, the development and establishment of the Turangi township, was not thought necessary by the Ministry's head office. However, Mr Alexander notes that this question held up the transfer of the land. The block did not become Crown land under the Land Act 1948 until 1979. The land was transferred to Landcorp in 1987 (B7:23, B7(a):153–155).

The Crown, and from 1987, Landcorp, continued to hold the land until 1994, when, very belatedly, an offer was made by Landcorp to Arthur Grace and two others in terms of section 40 of the Public Works Act 1981. The total area offered was 25.29 hectares (approximately 62 acres). The purchase price was \$258,000, plus GST of \$32,250, a total of \$290,250 (A21(3): app 34). This offer was received by the former owners during our

first hearing in March 1994. Although the land, apart from some fencing, was basically in the same condition as when it was entered by the Crown in 1964, its value had increased enormously. As noted earlier, the owners were paid \$21,965 for 120 acres. They were invited in 1994 to pay \$290,250 for 62 acres, being land which was not necessary for the township development. The Tribunal believes the land should have been offered back in 1973 when the Ministry of Works no longer required it in connection with the Tongariro power project. At that time, the 82 acres was valued at \$39,000. The increase in value over the 21-year period, to which inflation no doubt contributed, was \$251,250. The real increase is even greater because the Crown offer was for 62 acres and the 1973 valuation was for 82 acres. It is difficult to accept that the Crown, by deliberately delaying any offer to return the land for a further 21 years, is in good faith entitled to reap the reward of its failure to meet its Treaty obligation to protect Maori rights to their land.

#### **17.4.11 Turangitukua House**

Considerable evidence was given by Mahlon Nepia concerning the sale of a 2.9827-hectare property, being part of Ohuanga North 5B2C2, on which stood Turangitukua House. It was erected to house the project office of the Ministry of Works during the construction period. It is important to record briefly the background to the sale of this property because it was news of its impending sale which triggered an application to the Tribunal for an urgent hearing. That application was granted on 20 August 1993 (2.10). The following account, unless otherwise indicated, is taken from the evidence of Mr Nepia, who produced considerable documentation in support (A21(3):3–8, 14–17, 19–20).

- Turangitukua House is located at the intersections of SH1 and SH41. The three-hectare site was part of the industrial area which the Crown had undertaken it would lease and later return to the Ngati Turangitukua owners. As we saw in chapter 6, the Crown failed to honour this undertaking and took the land compulsorily by proclamation.

- On 20 May 1985, the Minister of Works, pursuant to section 52 of the Public Works Act 1981, declared the three-hectare site to be set apart for ‘Government Office Accommodation’. A certificate of title was issued on 7 April 1989 in the name of the Queen and, on 16 August 1989, Government Property Services Ltd was registered as the owner of the land. The title was noted as being subject to section 27B of the State-Owned Enterprises Act 1986 (A21(3): app 25).

- Government Property Services in or about November 1987 advertised the property for auction on 24 February 1990, but three days prior to this date cancelled the auction. This may have been as a result of

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representations made by Mr Nepia to the Ministers of Lands and Internal Affairs in the preceding November and later to the Minister for State-Owned Enterprises (A21(3):3–4).

- On 20 April 1990, the Minister of Justice advised Mr Nepia that the Turangitukua House site had been withdrawn from sale in order that the Commissioner of Crown Lands could carry out a review of section 40 of the Public Works Act 1981 (A21(3): app 3).

- On 25 October 1990, Valuation New Zealand sent a valuation of the property to the Department of Survey and Land Information. Details were (A21(3): app 6):

Value of improvements	\$175,000
Land value	\$275,000
Capital value	\$450,000

- On 14 March 1991, the Crown made an application to the Maori Land Court under section 436 of the Maori Affairs Act 1953. It asked the Court to identify the persons in whom the land should be vested and to stipulate the price to be paid for the land and the terms and conditions of the sale to the former owners (A21(3):6).

- On 15 October 1991, a meeting took place between Mr Nepia, representing the former owners, and Jennifer Desborough, a property officer in the Office of Crown Lands. Subsequently, on 7 November 1991, Ms Desborough sent Mr Nepia a letter intended for circulation to the Maori owners. In this letter, she advised that the three-hectare site under offer was part of Ohuanga North 5B2C2, which had an area of 67 acres at the time it

was taken by the Crown. Compensation paid for this particular block was \$9543, or approximately \$140 an acre. She asked whether the owners were agreed on the price of \$450,000. As noted above, the then land value was \$275,000 for three hectares (approximately 7.5 acres). The price had increased from the \$150 per acre paid by the Crown in 1965 to \$36,667 per acre in 1991. Not surprisingly, the claimants preferred to persist with their claim to this Tribunal, particularly as this was part of the industrial land which the Crown had categorically assured the then owners in 1964 would be returned to them after being leased for some 10 to 12 years (A21(3):7, app 9).

- On 23 September 1992, the Maori Land Court at Turangi determined that the owners entitled, should the land be returned, were the previous owners of Ohuanga North 5B2C2 and adjourned the application sine die, pending a determination of the claim before the Waitangi Tribunal (A21(3): app 31).

- On 4 May 1993, the Office of Crown Lands wrote to R Downs, K M Grace, and Arthur L Grace, as trustees of Ohuanga 5B2C2. The letter contained a formal offer in terms of section 40 of the Public Works Act 1981 to sell the three-hectare site for the sum of \$300,000 plus GST, a total of \$337,500. At that time, the application under section 436 of the Maori Affairs Act 1953 was still before the Maori Land Court. However, the deputy chief judge of that court had ruled that it would be in order for the land to be offered to the trustees under section 40 and then on the open market if this offer were not accepted (A21(3):16–17, apps 25, 31).

- On 8 June 1993, the Office of Crown Lands applied to the Maori Land Court for leave to withdraw its section 436 application (A21(3): app 31).

- In March 1994, the claimants learned that Landcorp had sold Turangitukua House in January of that year. The title to the property has endorsed on it a memorial pursuant to section 27B of the State-Owned Enterprises Act 1986, making it amenable to an application for a resumption order under the Treaty of Waitangi Act 1975 (A21(3):20).

## **17.5 CONCLUSIONS RELATING TO THE OFFER BACK PROCEDURE**

**In 1981 belated recognition was given by the Crown to the desirability of compulsorily acquired land being returned to its former owners when it was no longer required by the Crown. While much of the Turangi township land would be on-sold by the Crown for commercial or residential use or for the provision of public amenities, it is apparent that significant quantities of land were not so needed. Given the high value placed by the Ngati Turangitukua claimants on their ancestral land and the desirability of surplus land being returned to the owners from whom it had been compulsorily taken, the Tribunal considers that the Crown should have made provision for such returns to Maori ownership. In the present case, it was particularly important that such provision should have been in place because:**

- the claimants lost an appreciable part of their ancestral land to the Crown;**
  
- their economic base was seriously eroded;**
  
- their traditional way of life was seriously disturbed;**

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- **the Crown was under a Treaty obligation actively to protect the claimants' rangatiratanga over their land;**

- **appropriate provisions for the prompt return to claimants of land no longer required were essential to meet the Crown's Treaty obligation to Ngati Turangitukua owners; and**

- **the absence of such provisions prejudicially affected the claimants in that many such properties were sold to third parties and were not first offered back to the former Maori owners or their successors.**

## **17.6 TRIBUNAL'S FINDING**

**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.**

## **17.7 DEFICIENCIES IN SECTIONS 40, 41, AND 42 OF THE PUBLIC WORKS ACT 1981**

**The Crown, to its credit, finally made provisions in sections 40, 41, and 42 of the Public Works Act 1981 for surplus compulsorily acquired land to be offered back to former owners in certain circumstances. But these provisions are deficient in a number of respects.**

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- **The requirement to offer back surplus land need not be met if the chief executive of the Department of Survey and Land Information considers it impracticable, unreasonable, or unfair to do so. The chief executive appears to be the sole judge of these criteria and former Maori owners need not be consulted.**

- **The chief executive need not offer the land back if there has been a significant change in the character of the land. Why this should be so is not readily apparent. Again, the decision appears to rest solely with the chief executive. There is no provision for consultation with former Maori owners.**

- **Various instances of Maori owners being bypassed and surplus land being sold directly to third parties have been given in evidence.**

- **The chief executive is to offer to sell the land to the previous owners or their successors at its current market value or, if he or she considers it reasonable to do so, at any lesser price.**

- **The evidence as to the pony club land and Turangitukua House graphically illustrates the problems facing former Maori owners when land is**

offered back at current market prices. In the case of the pony club land discussed earlier (see para 17.4.10), the Maori owners were paid \$21,965 for 120 acres, or \$183 per acre. In August 1973, 82 acres were declared surplus to the TPD's requirements. It was proposed to transfer the 82 acres to the Department of Lands and Survey for \$39,000, or \$457.30 per acre, for the unimproved value. Instead of offering the land back, it was retained and transferred by the Crown to Landcorp in 1987. In 1994 Landcorp offered to sell to the former owners some 62 acres for \$290,250, or \$4681.40 per acre. This compares with the \$183 per acre paid by the Crown to the Ngati Turangitukua owners in 1968.

- The Turangitukua House property was three hectares (approximately 7.5 acres) in area. The Ministry of Works' project office was erected on this site, which was part of the Ohuanga North block of some 67 acres taken by the Crown in 1965. In November 1991, the Crown proposed to sell the three-hectare property to those thought by the Crown to be the previous owners or their representatives at the October 1990 Government valuation of \$450,000, of which \$275,000 was the land value. This amounted to \$36,666 per acre, which contrasts with the \$150 per acre paid to the owners by the Crown on the 1965 value. This was part of the industrial land which the Crown had undertaken to lease for 10 to 12 years and then return to the owners.

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- In May 1993, the Crown made a formal offer to the trustees of Ohuanga 5B2C2 to sell the site for \$337,500, including GST. It is not known what proportion of this sum was for the land only. While it represents a considerable reduction on the earlier proposal to sell at \$450,000, it was clearly a price beyond the capacity of Maori owners of modest means to pay. In effect, it was an offer incapable of acceptance, as was the offer in respect of the pony club land.

- The Public Works Act 1981 provisions are defective in that no allowance is made for the fact that, as in the case of the present claimants, much of the land compulsorily taken by the Crown was in multiple ownership. Nor, as claimant counsel submitted, is there any provision for the right of purchase extending to the wider tribal or hapu group in the event of the former owners not having the means to buy back the land. Such a provision might enable the wider group to secure the return of valued ancestral land.

- It appears from the evidence that, in a significant number of instances, surplus Crown properties were on-sold to third parties without first being offered back to the former owners or their successors. No evidence was called by the Crown as to the reasons for the former owners being bypassed.

• The claimants in this case agreed to the acquisition of their land by the Crown on the basis of a series of undertakings, many of which, in whole or in part, were not honoured by the Crown. On the basis of such undertakings, the claimants anticipated a very different outcome from that which eventuated. In the event, they lost much of their ancestral land. Since 1981, when surplus land has been offered back at the current market value, they have been faced with asking prices for the land vastly greater than the sums they were paid by the Crown. It is, of course, accepted that the Crown is entitled in normal circumstances to seek to recoup its reasonable development costs. But it appears that, in demanding the current market value, it is making no allowance at all for the fact that the claimants' land was compulsorily acquired to erect a permanent township at Turangi. It is clear, however, that it was not necessary for a permanent town to be erected to generate electricity. A temporary construction town would have sufficed to service the Tongariro power project. It could have been built at either Rangipo or Hautu (Turangi East), in either case on Crown land. No evidence was placed before us that it was essential in the national interest that a permanent town be built on Ngati Turangitukua land. The principal reason for preferring to build a permanent town on the claimants' land was that the Crown believed this would yield a better return on the funds invested in such a town.

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• **If, as a result of such compulsory acquisition of the claimants' ancestral land, the Crown obtained more land than it needed or now needs, the Tribunal considers that such land should be returned to the former Maori owners on terms and conditions which secure to such owners a generous share in the enhanced value of the surplus land and improvements.**

• **The price, if any, to be paid for the return of surplus Crown land to former Maori owners should be set with regard to the following:**

- **The national interest did not require the Crown to build a permanent township at Turangi West.**
- **If the Crown chose to acquire the freehold of the land and to build a permanent town to secure a better return on its investment, it should not seek to penalise the Ngati Turangitukua owners on that account.**
- **If a temporary township had been erected on Crown land, the Ngati Turangitukua owners would not have lost their land.**

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- **If a temporary township had been erected on the Ngati Turangitukua owners' land, there would have been no need for the Crown compulsorily to acquire the freehold of the Maori owners' land.**
  
- **It has not been established in evidence that it was essential for the Crown to acquire the freehold of the Ngati Turangitukua owners' land to build a permanent town.**
  
- **If no town had been built on the Turangi West site, over time the Turangi village would have expanded to meet the growth in population arising from the completion of the Tongariro power project and from tourism and related matters such as fishing.**

**17.8 TRIBUNAL'S FINDING RELATING TO 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.**

### **References**

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1. Section 40, as amended by section 2 of the Public Works Amendment Act 1982; section 2(7) and (8) of the Public Works Amendment Act (No 2) 1987; section 12 of the Public Works Amendment Act 1988; and section 9(3) of the Survey Amendment Act (No 3) 1989.
  2. Section 41(a) to (e), as amended by section 13 of the Public Works Amendment Act 1988; section 9(3) of the Survey Amendment Act (No 3) 1989; and section 362(1) of Te Ture Whenua Maori Land Act 1993.
  3. Section 42(1), as amended by section 14 of the Public Works Amendment Act 1988 and section 9(3) of the Survey Amendment Act (No 3) 1989.