

# Report of the Waitangi Tribunal on the Orakei Claim

## 01 Summary of Report

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#### PART I

#### BACKGROUND

#### Chapter 1

#### SUMMARY OF REPORT

Ngati Whatua have been told often enough why they lost their land. In official findings the winds of change, the growth of Auckland, modern technology and native inexperience have all been blamed. The people's dispossession has been rationalised. Ngati Whatua were conquerors too it has been said, and others have added they were recent immigrants to Auckland, they were a dying race, they wanted to sell and in any event they were better off in the country 'to live the free life they prefer'. In Parliament it was said the native people needed to 'divest themselves of their trappings', which included of course their land, in order to progress.

These things Ngati Whatua have been told, but they are not the tales of Ngati Whatua. They are the judgments of others, those who have assumed the prior rights of western development and have blamed the results on the inevitability of fate rather than admit to greed. It is time to hear the Ngati Whatua side of the story, to listen and to understand.

The story of Orakei is not a record of cultural misunderstanding at all. The wrongs that were done were not simply mistakes born of an early ignorance. They were breaches of a Treaty composed by the Europeans themselves. From reports to the House of Commons only shortly before settlement here began, Britain was well aware of the bad effects colonisation had had on native people elsewhere and had resolved that certain mistakes should not be repeated here.

They were, but in New Zealand we were forewarned, the caveat of our forebears' concern being formalised in the Treaty of Waitangi. If ignorance of the law is no excuse, is disregard of that Treaty any better? It might arguably be seen as the source of all New Zealand law. Little wonder, in the light of what happened, that not only was legal recognition of the Treaty denied, but it was ranked as unworthy of even mention in the many Orakei reports, save for one dissenting opinion.

In this report we have tried to balance a mass of official opinions and records with the story Ngati Whatua know. To capture the latter we spent time with the people, shared their meals, listened to them and discussed with them at their marae. The result we stress, is not a history of Ngati Whatua of Orakei, for we have limited our report to matters relevant to the issues on the claim brought to us.

From the evidence we have made some findings, and have found the need to dispel some myths. Ngati Whatua were dispossessed by people not by fate. They were not new-comers. Their roots to the land were planted before the Normans invaded Britain. They were not conquerors but victors in civil warfare - and peaceful nonetheless for they welcomed and supported the establishment of Auckland in their midst. As a tribe they did not willingly sell the Orakei block but fought for over a hundred years to keep it. Relocation was never in their best interests. Their spiritual links to the land make a mockery of that suggestion. Nor were the wrongs all committed in the days of blankets and beads when one race barely knew the other. They began much later and worse, they continued to modern times as though one race has yet to know the other today.

Certainly as the lines of historical perspective narrow to a distant past, people and events do assume new characters re-shaped by opinions now in vogue. But in this claim, many events complained of are well within living memory. The final expulsion of Ngati Whatua from their ancestral village did not occur until 1952. The event is too recent and too graphic to tax judgment, and the landlessness of Ngati Whatua that ensued is testimony in itself.

At Orakei the present makes its own judgment on the past. A proud and loyal tribe that supported Auckland and the Crown, was through the connivance of both made virtual refugees, a disillusioned, scattered and landless people. If we have any understanding of the Maori attachment to tribe, home and place, only the most insensitive could fail to appreciate the enormity of Ngati Whatua's loss, or the latent danger in the legacy of bitterness and anger that was theirs to inherit. For this is also a tribe that has refused to die.

In brief, Ngati Whatua held the mana of the central Auckland lands when Europeans arrived. They welcomed settlement and on the signing of the Treaty invited Governor Hobson to establish a township on their lands. Thousands of acres were made available for the purpose, the cost of Auckland's establishment being funded from vast profits on the resale of their lands to settlers. Ngati Whatua bargained for 10% of the resale profit after the first land deals but, it appears, the greater part of even that went to public roads, hospitals and schools.

Ngati Whatua backed Auckland when warring tribes threatened the fledgling town. When the main wars loomed in the 1860's, they hosted a two month conference of two hundred chiefs from throughout the country to secure their allegiance to the Crown. Later they called at Orakei the first Maori Parliaments.

Ngati Whatua were not only leaders in the Maori world, but were involved in business and in civic and national affairs too. Their chief, Te Kawau, was a confidant of Governor Grey; Tuhaere, his successor, an advisor to several Governors. They established the tribal policies for which Ngati Whatua became renowned, of allegiance to the Crown, support for the Europeans and commitment to "the necessary laws and institutions" that the Treaty referred to. They were proud of the fact that their hands never touched a gun after the Europeans came. But they were also strong supporters of the rights of tribes to manage their own affairs, as shows from the reports of the Maori Parliaments that Tuhaere arranged.

Ngati Whatua sold thousands of acres - indeed all but the 700 acres of Orakei that comprised the tribe's main base. Even from 1840 they had made it clear that that block was special. It was not for sale. They wanted it reserved to them forever, Te Kawau seeking from Governor Grey "a Deed to make it safe".

It is not at all that they wished to separate themselves from European contact. Part of the Orakei land they gifted to the Anglican Church to support a chapel and school, for they had a close association with the Church at that time. They had also an alliance with the Crown and in 1859, when it was thought the Russians were coming, gave a headland of Orakei for defence. They were gifts however and in the customary Maori way were meant to return if no longer required.

Similarly they had hopes of leasing parts of Orakei to Europeans for residential purposes, the rents to maintain tribal programmes. At Orakei, it was intended, the tribe would retain control and the land would be their endowment, the assurance of their continued existence as a people. It was important to Ngati Whatua that that land should remain in tribal ownership.

We find that the Treaty obliged the Crown to ensure each tribe retained a proper reserve. Orakei was Ngati Whatua's last land and we find that the whole of it should have been kept for them. We find also, in terms of the Treaty, that the Crown was obliged to uphold the tribal form of ownership that the people clearly preferred.

In fact, the laws that were to be made were not to permit of tribal ownership. Tribal authority had been the main bulwark to the Crown's land acquisitions and had been the cause of prolonged wars. In the course of those wars the Crown established a Native Land Court, and the Court was directed to award native lands to individuals. The troubles at Orakei all stem from that law. The Native Lands Acts that we refer to, we find, were contrary to the principles of the Treaty.

At Orakei, as in many other places, the problem was made even worse. In 1869 the Native Land Court awarded the whole block to only thirteen members of a tribe that evidence suggests numbered well over 300. With the stroke of a pen the majority of a large and compact tribe were disinherited.

At first it did not seem to matter. The tribe assumed that the owners were meant to be trustees (though the law said they were not). Tuhaere arranged a special Act of Parliament to enable him to complete a subdivision at Bastion Point on land opposite that earlier gifted. He sought to assure the maintenance of Ngati Whatua homes,, lands and programmes from the rents of long term residential leases to Europeans. In that respect he seems to have emulated the Anglican Church which was doing the same thing on its nearby lands to fund church work and St John's Theological College.

Two things put paid to Tuhaere's scheme. In 1886 the Crown took part of the land under the Public Works Act for more defence work. Then in 1898 the Native Land Court partitioned the whole of the rest of the block, dividing it between the thirteen owners or their successors. That ended any prospect of future tribal control and underlined the legal position that the thirteen original owners had not been mere trustees.

The law that enabled those partitions we find, was contrary to the Treaty.

Once it was apparent that the handful of owners were in law, owners not merely trustees, there were numerous protests from within Ngati Whatua. They took the form of Court actions and a Parliamentary petition seeking the restoration of tribal ownership or at very least the inclusion of everyone of the tribe on the title. It was all to no avail. Without tribal sanction, many individual owners effected leases of their lands.

Tuhaere passed on and Auckland grew. Building was going on an around Orakei by the 1890s, but not much within it. Most who lived in the village on the block had no titles to build on while many left to find homes elsewhere. But the land was desirable housing land. Orakei was the choice block in the area and from 1898 the Crown began investigations to buy the block for European settlement.

Meanwhile the Government was under immense pressure to buy more Maori land throughout the North Island and it appointed a Commission comprising Chief Justice Stout and A T Ngata (later Sir Apirana Ngata) to decide what land was excessive to Maori needs and should be sold and what parts the Maori should be allowed to keep. In 1908, when the Commission reached Orakei, it determined that none of that block should be sold. The whole should be kept, the Commission found, as a tribal reserve for it was the tribe's last land and the tribe was still living on it. That finding of the Commission, was entirely consistent with the Treaty. What was inconsistent was that shortly after, the Crown set about acquiring the block anyway.

It did so under some pressure. In 1910, the Orakei lessees lobbied Parliament for the right to buy the freehold to their lands. Because of the improvements put upon them, it would have been difficult in any event for the owners to recover the lands at the end of the lease terms. Soon after, the Auckland City Council, with the support of Auckland Members of Parliament, promoted a Bill for the compulsory acquisition of all but the native village.

Ngati Whatua reacted once more with a petition challenging the title of the handful of owners, warning off the would-be purchasers and seeking restoration of tribal ownership. That plea had previously failed before Parliament and the Courts, but the new petition received the support of the Native Affairs Committee of the House. After hearing lengthy evidence, the Committee recommended an inquiry into the title. The inquiry was never held.

Meanwhile the villagers were experiencing another foretaste of what compulsory acquisition meant. Under a special Act of Parliament a sewer pipe was laid across the beach in front of their village, despite their objections, and Auckland's raw sewage was discharged into 'their' bay. The large raised pipe also blocked their harbour access and caused the village to swamp. Many more left Orakei to find a place elsewhere and the tribe began to break up.

The Act, the taking of land and the discharge we find were all contrary to the Treaty.

The proposed compulsory acquisition of Orakei received wide publicity. Early in 1912, some of those who were owners sold to the lessees. We suspect they saw the writing on the wall. The Crown reacted promptly and noting the owners' wish to sell though they were but a few, announced its intention to buy the whole block. By Order in Council all private purchases were then forbidden.

The Crown's decision to buy we find, was contrary to the Treaty.

It was also taken four years after a Commission had recommended that the block be retained as a Native Reserve and while a petition challenging the ownership of those who were about to sell was before the House of Representatives with a favourable recommendation for an inquiry into the title.

Through successions there were by then many owners in several allotments on the block. The petition discloses that owners and non-owners were opposed to sales. In the year that buying began, in 1913, the Government changed the law to enable it to deal privately with individual owners and to buy their individual shares. Previously the Crown had been able to buy an allotment of Maori land only on the majority vote of owners assembled at a meeting. We know that the owners were not all agreed on selling. It may be that even the majority were not in favour. The law change, we find, was contrary to the Treaty. It was the final denial of any tribal or group right, yet group identity is at the heart of Maori society.

Crown buying began in 1913. Many claimed to have sold on a promise that the village would be spared. In fact, nothing was spared. Several sold, they said, on undertakings that house sites would be reserved for them. None were. House sites were reserved only for the European lessees. Others simply gave up and sold once the Crown had acquired several shares in the blocks in which they had interests.

There is quite a deal of evidence to support the allegations that were made. We are satisfied however that many of Ngati Whatua wanted to retain the native village and house sites and that the Crown took no sufficient steps to guarantee either, as it was required to do by the Treaty of Waitangi. The documentary evidence discloses that the Crown intended to acquire the whole block, without the reservation of any parts for Ngati Whatua. In the reports of Crown purchasing officers we have also discovered recommendations that compulsory acquisition be used to dislodge unwilling sellers and there is some evidence to suggest that owners were threatened with that prospect.

Nonetheless resistance to sales hardened and buying dragged over many years.

The non-owners of course had nothing to either sell or to try to secure. Many left but some stayed on as squatters. Some shifted to the sanctuary of the land given to the church and built upon it, for a church had not been there for many years. In 1926 the church sold that land to the Crown. Some still stayed on and would not be moved until 1935, when after a Supreme Court action had failed, the remnant of twelve adults and ten children were evicted. A special Act was necessary to enable the sale of the church land. That Act we find was contrary to the Treaty. That land should have returned to Ngati Whatua.

The acquisition of interests took thirty-seven years from 1913 to 1950 the process being slowed by intervening events like World War II. In the 1930s, after the greater part of the land had been purchased, a model suburb was laid out and development began. The Auckland City Council exerted considerable pressure on Government to acquire the remaining Ngati Whatua interests and to relocate those who continued to cling to their ancestral village, to other parts of New Zealand.

Buying was also slowed by the people's resistance to sales. Throughout the whole period Ngati Whatua people maintained a constant plea to stop the buying and to keep the Crown out. We have not unearthed a complete record of the people's complaints and actions in their endeavours to save their land, village and homes, but have counted eight actions in the Maori Land Court, four in the Supreme Court, two in the Court of Appeal, two in the Compensation Court, six appearances before Commissions or Committees of Inquiry and fifteen Parliamentary Petitions. Those were the efforts of a people whom the Crown was to brand as "willing sellers".

The evidence, as we have said, suggests that many who sold, sold under duress or in the hope that by selling part the village would be saved and house sites would be secured to them. The evidence is clear that several were opposed to any sales. No doubt some sold willingly, but it is obvious Ngati Whatua did not sell for Ngati Whatua as a tribe were denied the title and that was the nub of the tribe's complaint. Those given an interest were but a small minority.

In this claim however we are mainly concerned with the propriety of the Crown in buying. The Crown's purchase of Orakei we find, was contrary to the Treaty of Waitangi.

As it turned out, compulsory acquisitions were made in any event. In 1950 the Crown used the Public Works Act to take the interests of those who still held out. The takings were contrary to the Treaty of Waitangi.

The village, where a large number continued to live, with or without title, was required for a park. Many families nonetheless continued to reside upon the land. In 1952 they were evicted and relocated as tenants of 35 state homes on another part of the block.

The final eviction was a most traumatic experience for those who had fought so long, their petitions to Parliament still continuing at the time. Homes and buildings were pulled down and burnt by the Crown. Many of the elders involved died within a year of relocation.

The removal of the people and the destruction of their marae and homes, we find, was contrary to the Treaty of Waitangi.

Other land was set aside for a Ngati Whatua marae in 1954, near to where most of the State homes were. But other people were wanting a marae for Auckland or a national marae and in 1959 the Crown allowed the land to be given over for that public purpose. The marae however was part of Ngati Whatua ancestral lands and adjoined homes where the remnants of the tribe were living. They had no control of it and in the events that followed the tribe was to witness the take-over of even their culture, as a marae was built and named, by others, for the tribal ancestor.

The people's culture we find, was meant to be protected by the Treaty. The Crown's gift to the nation of the marae intended for Ngati Whatua was a breach of Treaty principles.

In 1976 the Crown moved to a final disposal of its remaining lands at Orakei. Ngati Whatua had notified their interest in that land for resettlement of their claims. The move to dispose of that land without prior resolution of the Ngati Whatua claim was contrary to the Treaty.

In the event, a section of Ngati Whatua led a protest by occupying Bastion Point for 506 days. It was a culmination of 100 years of Ngati Whatua petitions through formal channels. It followed dispossession, and a legacy of bitterness.

The protests however involved a trespass. They also caused a split in Ngati Whatua ranks as many could still not countenance a departure from the old tribal policy of maintaining "peace and good order" and "the necessary laws". The claimants were arrested and now seek a pardon for their trespass convictions and compensation from the Crown.

We find however that as the protests involved a trespass and were thus outside the law, they were contrary to the Treaty of Waitangi for the Treaty is directed to the maintenance of law and order. There were mitigating circumstances however that we draw to the attention of the Attorney-General.

In 1978 the Crown effected a settlement with certain Ngati Whatua. The settlement was limited to some of the land taken under the Public Works Act, land not used for the purpose taken. Within those terms it was a generous settlement. It was most significant that the descendants of those whose lands had been taken asked that the Crown land given in exchange return not to them but to the tribe as a whole. That was agreed to. That agreement gave effect to what had been sought in auctions and petitions over 125 years, be it in respect of only a small part of the land that remained.

The Crown's actions in 1978 was consistent with the principles of the Treaty, but it was inconsistent with the Treaty that reparation was not provided in respect of a wider range of grievances and was limited to only two blocks taken under the Public Works Act.

Having reached a conclusion that the whole of the 700 acre Orakei block should have been secured to Ngati Whatua, and all in tribal ownership, we have considered the remedies might be now provided. We have not considered the compensation payable for the loss of that block, but rather what might be done to re-establish Ngati Whatua as a tribe on its ancestral land in keeping with certain original tenets of the Treaty of Waitangi.

The claim itself was couched in concessionary terms. No claim was made in respect of any land currently used for roads or homes so as to upset private interests. The claim was limited to the Orakei parks and other lands in Crown or 'public' ownership. The parks however are extensive and of considerable value to the city.

Despite the Ngati Whatua losses and the claimant's natural desire to 'recover' as much as practicable of the block that ought to have been secured, we consider the 'return' of the parks would sow the seeds for further discord. They could not be developed to the tribe's advantage, at least not without much rancour.

The greater Ngati Whatua need, we consider, is for more homes, work-generating schemes, an economic base and the restoration of the tribe's status, a status severely put down by the City though the tribe was its founding partner.

As a result of the 1978 settlement, Ngati Whatua have presently some homes and some ground for building more, all vested in the Ngati Whatua of Orakei Maori Trust Board. As part of that settlement they also have a debt of \$200,000. They have no cash assets.

To achieve the economic objectives described we recommend adding to the current land base the Youthline House site, the Community House site, and

certain Housing Corporation lands that adjoin, all of which are vacant Crown lands, and the remission of the \$200,000 debt to the Crown. \$3,000,000 is the minimum cash contribution we consider necessary to begin urgent housing and other programmes to re-establish Ngati Whatua on the land and we recommend payment of that amount.

For the proper restoration of the tribe's status in Auckland's affairs, we recommend that the greater part of the parks of the Orakei headland including the former village site, be vested in the Ngati Whatua tribe, but for the purposes of a public park and with the management vested in a Board comprising a partnership of Ngati Whatua and Auckland City Council representatives. We recommend that the parks be given such name as the tribe approves.

Most importantly, we recommend that the Orakei marae be also vested in the Board.

Our understanding of the background history, our findings on the principles and application of the Treaty and above all, our full recommendations and the reasons for them, are given in the report that follows.

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*Waitangi Tribunal, Department of Justice, Wellington.*