

Report of the Waitangi Tribunal on the Orakei Claim

13 Summary of Findings

13.1 General Findings

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13.1.1 It will be apparent from our discussion of the many issues raised by the claimants in this case that we consider the Crown at various times and in various ways has failed to meet its obligations to the Ngati Whatua people of Orakei under the Treaty of Waitangi. In some cases this has resulted from Acts assented to by the Crown; in others from policies or practices adopted by the Crown including positive acts done by or on behalf of the Crown; in yet others, by omissions by or on behalf of the Crown. All of these we have found to be inconsistent with the principles of the Treaty. That Ngati Whatua have been prejudicially affected is readily apparent. Indeed, the cumulative effect of the various breaches of the principles of the Treaty was to render Ngati Whatua of Orakei virtually landless and without standing in their own homeland.

13.1.2 The critical damage was done as a result of the provisions of the Native Lands Acts of 1865 and 1867 and the 1869 order of the Native Land Court vesting the whole of the land then in communal ownership in thirteen members only of the tribe as legal and beneficial owners, to the complete exclusion of the great majority. This necessarily destroyed the mana or authority of the tribe in and over their land. Subsequent breaches of the Treaty built upon and reinforced these first critically destructive violations, especially the partitioning provisions of the Native Land Court Act 1894 which eroded the Orakei Native Reserves Act 1882, and laid the ground for the complete individualisation of the Orakei block and the Crown's planned programme for the acquisition of the whole of the land remaining. In implementing this programme, the Crown was greatly aided by the passage of s. 109 of the Native Land Amendment Act 1913 which enabled it to buy the individual interests of owners in any blocks, no matter how many on the title, and without the necessity for a meeting (see 6.2). Nor, in many cases, did the Crown comply either with its statutory or Treaty obligations to ensure that Ngati Whatua owners would not be rendered landless. That Ngati Whatua were powerless to prevent the consummation of the Crown's objective of obtaining the whole of their land was finally demonstrated by the Public Works Act taking of the 10 acre exchange block and the papakainga accompanied by the ejection of all those living on there and, shortly thereafter, by the physical destruction of all housing and other buildings forming part of the marae, leaving only the Church and urupa intact.

13.1.3 In the preceding Chapter 12 we have discussed at some length the multiplicity of claims which relate to the land at Orakei and associated

concerns. It is desirable here to re-state our findings in summary form but in so doing we are again aware of the danger of over-simplification. Accordingly, we stress that the summary which follows needs to be considered in the context of our lengthy narrative of events over 147 years, as given in Part I; in the perspective of our discussion in Chapter 11 of the nature and scope of the Treaty and, finally, in the light of our examination of the various specific claims in Chapter 12.

Waitangi Tribunal, Department of Justice, Wellington.

13 Summary of Findings

13.2 Specific Findings

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(a) The 700 acre Orakei block ought to have been maintained as a Ngati Whatua tribal reserve, vested in the tribe as some form of corporate entity and protected from encroachment without tribal approval. Were all else equal Ngati Whatua would be rightly entitled to the whole of the Orakei block today (12.1.4, 12.1.5).

(b) The provisions of the Native Lands Act 1865 which enabled tribal ownership of Maori land, on the application of any one member of the tribe, to be extinguished without the consent of the remainder of the tribe were inconsistent with the principles of the Treaty, whereby in recognising te tino rangatiratanga in and over their lands the Crown acknowledged the authority or mana of the Maori people for so long as they wished to hold their land in accordance with long-standing custom on a tribal and communal basis. As a result, the Ngati Whatua communal ownership of Orakei was extinguished and, further, all but thirteen of the tribe were dispossessed of their interest in the land without their consent. (12.2.5)

(c) By enabling the vesting of both the legal and beneficial ownership in a few members only of the tribe to the exclusion of the great majority, as occurred with Ngati Whatua at Orakei, the Native Lands Act 1865 breached the principle of the Treaty which guaranteed to the Chiefs, Tribes and the respective families and individuals the full exclusive and undisturbed possession of their lands. (12.2.9)

(d) The omission of the Crown to take timely and appropriate action to ensure that the provisions of s 17 of the Native Lands Act 1867 were not overstepped by the Native Land Court was inconsistent with its duty under the Treaty to protect tribal members from being dispossessed of their interest involuntarily and without their consent. (12.2.9)

(e) The Native Land Court Act 1894 effectively negated the Orakei Native Reserves Act 1882 by facilitating the making of orders partitioning the Orakei Block thereby laying the ground for its complete individualisation and, subsequently, its alienation. The 1894 Act, following as it did the Native Lands Acts of 1865 and 1867, exacerbated the already severely adverse effects of those statutes by effectively destroying the mana of Ngati Whatua in and over their land at Orakei and confirmed the dispossession of the majority of the tribe of an interest in their land. The cumulative effect of the Acts of 1865, 1867 and 1894 was prejudicially to affect the Ngati Whatua people in the manner indicated and was accordingly inconsistent with the principles of the Treaty which

Maori people. The Crown failed adequately to honour its obligations under the Treaty to protect the people at Orakei in the possession of their lands. (12.5.4)

(f) The Crown, by omitting to act on the 1908 recommendations of the Stout-Ngata Commission under the legislative provisions then in force which made provision for their implementation, thereby failed to take the active steps necessary to restore to the Ngati Whatua people, in part at least, the lands of which the majority had been dispossessed in 1869 in breach of the Treaty of Waitangi. This omission of the Crown was inconsistent with the principles of the Treaty which obliged the Crown in these circumstances to protect the property of the Ngati Whatua and to restore the tribal mana over the papakainga of 85 acres and over the remaining area amounting to 558 acres approved by the Commission for leasing but not for sale. (12.6.8)

(g) The cumulative effect of the foregoing breaches of its Treaty obligations was such that the Crown, by 1914, was under a heavy duty to make good its failure to protect the Ngati Whatua people. The only effective way it could redress the situation, as the Chief Justice Sir Robert Stout and Mr A T Ngata so clearly saw, was to provide a sufficient endowment for them at Orakei. It was even then, not too late to implement the Stout-Ngata findings. No less was required of the Crown as a Treaty partner acting, in the words of Sir Robin Cooke in the New Zealand Maori Council case (p 36) 'towards the Maori partner in the utmost good faith which is the characteristic obligation of partnership'. Instead, the Crown being either indifferent to or oblivious of its obligation, embarked on a planned programme to acquire all Ngati Whatua property at Orakei which, in its first year of execution, 1914, resulted in the Crown acquiring the bulk of the farm lands at Orakei, and which, far from providing an endowment, would ensure that Ngati Whatua had none. In so doing we find that the Crown acted in breach of its obligations under the Treaty. (12.9.3)

(h) The Crown, in authorising by special statute the sewage disposal scheme and in participating in the construction of the raised roadway (Tamaki Drive) along the foreshore of Okahu Bay, contributed to the desecration of the harbour and the flooding of the papakainga thereby significantly diminishing the people's use and enjoyment of their marae, village and foreshore. In so doing the Crown failed to meet its Treaty obligation to protect the rights and property of its Treaty partner Ngati Whatua. (12.8.3)

(i) The Crown refused to permit those Ngati Whatua owners who sold their interest in land at Orakei to the Crown and who wished to retain their house or a house site, to do so, whereas various European lessees of Ngati Whatua land were permitted to retain houses or house sites. This action of the Crown was inconsistent with the principles of the Treaty which obliged it to protect the rights of those Ngati Whatua who wished to retain part of their land to be able to do so. (12.10.3)

(j) The Crown, in executing its planned policy and practice of acquiring all land owned by Ngati Whatua at Orakei prejudicially affected

(i) Those many Ngati Whatua owners who were rendered landless by the acquisition of their interests at Orakei as a result of the Crown's failure to comply with its statutory obligations to ensure this would not happen. Such failure was a clear breach of the Crown's Treaty obligations to protect the rights and property of the Ngati Whatua owners and also of its obligation to ensure that the Ngati Whatua sold only those lands excessive to their needs and that they retained a sufficient endowment for themselves; and

(ii) Those Maori owners whose land was compulsorily acquired against their wish and without their consent and thereby acted inconsistently with the principles of the Treaty which guaranteed the Maori families and individuals the undisturbed possession of lands they wished to retain; and

(iii) Those Maori, the majority, who were not owners, because ownership was denied them; and

(iv) Those Maori who by Parliamentary petition sought to upset the title of the owners, and whose case was never directly considered in any Court or on any Inquiry (12.15.5-12.15.8).

(k) As with the bulk of the farm lands in 1914 so the subsequent acquisition by the Crown of the papakainga needs to be assessed in the light of events from and including the breaches of the Treaty in 1869. Given the particular circumstances of Ngati Whatua of Orakei including their fortuitous situation adjacent to and in time part of a great metropolis, we consider the Treaty obliged the Crown to take reasonable steps to protect them from becoming landless. This duty extended to ensuring, so far as was reasonably practicable, that they retained land on which to live as they wished at Orakei and sufficient land to afford them support and maintenance. The Crown failed to meet its Treaty obligation in this and the other respects we have earlier described. We note that the Crown has chosen not to advance any reasons to us for such failure or indeed to seek to justify in any respect the policies and practices which formed the subject matter of the complaints before us. (12.15.9)

(1) Article 2, in the context described guaranteed the mana of Ngati Whatua over their lands in accordance with Maori traditions and customs. We believe the Maori custom in respect of gifts of land and its return in appropriate circumstances, falls within the broad ambit of this guarantee. The Crown failed to protect the interests of Ngati Whatua by enlarging and significantly altering the terms of the Maori Deed in its Grant of the land to the Church of England and in failing to give any regard to the Maori understanding of the transaction. In so doing the Crown acted inconsistently with its obligation under the Treaty to

protect the rights and property of the Ngati Whatua and in particular failed to ensure that the Maori custom in respect to gifts was protected. The Crown had no legal or other justification for deviating so significantly from the terms of the Deed of Gift in its Grant to the Church. (12.16.6)

(m) In 1925 the Crown promoted legislation to enable it to acquire from the Church of England the land gifted by Ngati Whatua (referred to in the preceding paragraph 1) apparently regardless of the terms on which it had been gifted to the Church. Both the Crown and the Church failed to consult with the Ngati Whatua people who, had they known of what was intended would have expected the land to be returned. We find that the passage of special enabling legislation and the subsequent acquisition of the land by the Crown exacerbated the earlier breach and was inconsistent with the Crown's treaty obligations in these circumstances to protect Maori property and ensure its return to the Ngati Whatua people (12.16.9).

(n) An area of 5.27 ha. was taken by the Crown in 1886 for defence purposes. This land, known as the Battery Reserve at Bastion Point, was handed to the Auckland City Council following the revocation of its defence status in 1941. The claimants say that it should have been returned to Ngati Whatua. We have expressed reservations as to whether compulsory acquisition of Maori land by the Crown is in all circumstances inconsistent with the principle of the Treaty which envisages the disposition of such land only with the consent of the owners. In this particular instance we are mindful of the fact that a settlement was reached with the Crown in 1978 in relation to the Battery Reserve and other land vested in the Crown was instead made available to the Ngati Whatua people. In the circumstances it would be inappropriate for us to make a finding that the Battery Reserve land should now be returned. Indeed, Ngati Whatua have excluded from their claim that part of the land occupied by the Savage Memorial. (12.17.6)

(o) In 1916 the Crown purchased some 9 acres at Takaparawha Point for defence purposes. The purchase was effected at a meeting of assembled owners. In this instance a majority of shareholders were opposed to the sale but a minority, who owned a majority of shares in the land, approved the sale. Accordingly the land was deemed to be sold notwithstanding the dissent of a majority of owners. We believe that the unwilling and involuntary disposition of the shareholders interests in their land to be inconsistent with the protection afforded by Article 2 of the Treaty (12.18.3). Given that the Crown no longer required the land for defence purposes in 1941 and given that the Crown had acquired the land without the consent of the majority of owners we find that the Crown should have offered to return the land at Takaparawha Point to Ngati Whatua (12.18.6).

(p) In 1951 the Crown against the wishes of Ngati Whatua compulsorily acquired their marae at Okahu Bay. It was situated on the papakainga on an area of 1.5 acres in multiple ownership. The marae was held

sacred and inviolable by Ngati Whatua. it was nearby the ancient burial ground which, along with the Church, alone was spared by the Crown. The Crown's action in taking and clearing the traditional marae site against the wishes of the Ngati Whatua people at Orakei reflected a degree of insensitivity to traditional Maori values and to the deeply held reverence for and commitment to the marae at Okahu Bay which, 30 years later, is difficult to comprehend. We have no hesitation in finding that such action was inconsistent with the principles of the Treaty of Waitangi. We consider the Ngati Whatua people should not now be prejudiced because they resisted to the end the taking of their marae and for some years thereafter continued, vainly, to hope for its return. Specifically, we find that their refusal of the alternative site and their protracted reluctance to co-operate in the development of a multi-cultural marae was not merely understandable; given the depth of their feelings it was inevitable (12.19.6).

(q) The claimants claim that the Crown has failed to prevent the desecration of their papakainga and former marae site at Okahu Bay by enabling its use as a Domain without adequate safeguards as to how, and by whom it should be used. Specific complaint was made of the use of this land for a circus with temporary public urinals being placed immediately adjacent to the burial ground (urupa). Given the nature of the site and the veneration in which it continues to be held by Ngati Whatua the Crown might reasonably have been expected, in vesting its administration in the Auckland City Council, to have imposed some restrictions which would recognize the special nature of the site and the Ngati Whatua interest in it (12.20.3).

(r) In 1954, the Crown, having expelled Ngati Whatua from their marae in Okahu Bay, set apart a site for a new marae for Ngati Whatua. This site came to be developed as a multi-cultural marae and the land came to be vested 'for Maoris' and additional lands subsequently added came to be vested for 'all Maoris'. It is clear that the marae site when it was first reserved in 1954 was meant for Ngati Whatua to replace the former site at Okahu Bay and we consider that the land might properly have been vested in trustees exclusively for Ngati Whatua as should the pieces of land added later. Subsequently a new house was built not by Ngati Whatua but with the help of some of its members. To Ngati Whatua humiliation it became known as a 'Pakeha marae' administered largely by outsiders. Without consultation with Ngati Whatua the new house was named for the Ngati Whatua ancestor and as a result Ngati Whatua could no longer have a commitment to any other site. As a consequence of the site being for 'all Maoris' and the extension of that to mean 'all people' there was a failure by the Crown to secure a marae site for Ngati Whatua and that failure was, in the circumstances of the original acquisition, contrary to the principles of the Treaty. The lack of Ngati Whatua control was a denigration of the Ngati Whatua mana that the Treaty was meant to uphold. It is now imperative that the mana of Ngati Whatua of Orakei be restored. Without a marae of their own this cannot be done. We consider there is an overwhelmingly strong case for the

vesting of the marae in the Trust Board. This will be to the ultimate advantage of the Education Centre, 'all Maoris' and the public of Auckland (12.19).

(s) The claimants complain of policies and practices of the Crown which required those Ngati Whatua provided with housing at Orakei to remain as State tenants and which prevented them from obtaining freehold titles although other State tenants at Orakei were permitted to buy their homes. The purchase by State tenants of their homes was first authorised in 1950. Since then the policy has operated 'on and off'. On the evidence before us we find that the Crown did not refuse sales of homes without good reason such as outgoings being beyond the tenants' means, offers to sell lapsing or not being accepted. We accept that in no case was a sale declined because the houses were occupied by Ngati Whatua although there was a period from 1974-1976 when as a consequence of Government policy the Housing Corporation was not selling State houses. At this time it was also considered advantageous to retain Ngati Whatua occupancy and prevent on-sales outside the tribe. We note that there are a great many other State tenants at Orakei who have not bought their homes, in many cases no doubt because they could not afford to do so. We find that the claimants have failed to establish their claim. We nonetheless appreciate the tenants' concern to obtain some degree of ownership of their homes and consider that may be practicable though there is now the need to keep ownership and occupation within the tribal group (12.2 1).

(t) We conclude from the circumstances surrounding the agreement between Ngati Whatua elders and the Government which culminated in the passage of the Orakei Block (Vesting and Use) Act 1978 that Ngati Whatua are not precluded from making a claim under the Treaty of Waitangi. In particular, we believe it would be contrary to equity and good conscience for the Crown to rely on undertakings given at the time on behalf of the elders as foreclosing the possibility of claims being made for the remedy of grievances for which no legal provision existed in 1978 but for which provision was later made in 1985. It is not surprising therefore, that no such claim was made by or on behalf of the Crown. But we would emphasise that in considering claims before us, regard should properly be given to the terms of the agreement evidenced by the 1978 Act which was reached in good faith by the Crown with representatives of Ngati Whatua who were reasonably regarded as having authority to speak for Ngati Whatua. (12.22)

(u) The evidence is that Ngati Whatua of Orakei look to their Trust Board as the modern embodiment of tribal authority. Tribal authority is guaranteed by the Treaty. The current limitations on the Trust Board are inconsistent with the full authority guaranteed by the Treaty (12.23).

(v) There was nothing inconsistent with the Treaty that the claimants, and others, should demonstrate to protest the failure of the Government to redress Ngati Whatua losses at Orakei or to provide some forum for the

issues to be fully researched, debated and determined. It was inconsistent with the Treaty however that the protest in this case was made unlawful through acts of trespass. We make no recommendations on the claim for pardons and compensation.

There were however extreme circumstances to goad the Maori Committee Action Group to break from the Ngati Whatua tradition of working only through official channels and legal forums. We find also the Action Group held sincerely to the view, no matter how erroneously, that what it was doing was right. Accordingly, we will report to the Attorney-General on the background circumstances to assist him in considering whether he should exercise any jurisdiction he may have to grant relief (12.24).

Waitangi Tribunal, Department of Justice, Wellington.

13 Summary of Findings

13.3 The Entitlement to Remedies

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We find, as a consequence of the many breaches of the Treaty of Waitangi we have recorded, and the serious loss and deprivation which Ngati Whatua at Orakei have incurred as a result, that appropriate relief should be granted to them. No relief is sought for individual members of Ngati Whatua, rather for the tribal members as a whole through the agency of the Ngati Whatua of Orakei Maori Trust Board constituted under the Orakei Block (Vesting and Use) Act 1978. Given that some relief was granted to Ngati Whatua through the Trust Board under the 1978 Act we agree that unless otherwise indicated, this Board is the appropriate recipient for the further relief which we propose.

Waitangi Tribunal, Department of Justice, Wellington.