

Report of the Waitangi Tribunal on the Orakei Claim

12 Issues and Findings

12.1 Tribal Ownership and Tribal Endowments

12.1 Tribal Ownership and Tribal Endowments

12.1.1 In Part I we have related in some detail the unhappy events in the life of the Ngati Whatua hapu of Orakei which as early as 1855 found them possessed of a mere 700 of their former many thousands of acres in and around Auckland City; and which some one hundred years later saw them rendered landless and unceremoniously evicted from their papakainga.

12.1.2 The principal claim before us is that certain of the claimants and the hapu of which they are members were wrongly deprived of the 700 acre Orakei block which they say ought to have been reserved, in tribal ownership and control, in accordance with custom. They claim that this wrongful deprivation resulted from policies and practices of the Crown which are contrary to the principles of the Treaty of Waitangi. Particular policies and practices complained of are specified in paragraph 3 of the claim, as printed in Appendix I, and we will shortly be considering them; but here we deal with the main claim which is, in essence, that there was an obligation on the Crown as a party to the Treaty to secure an appropriate land endowment for Ngati Whatua at Orakei held in accordance with their custom and tradition and protected from alienation.

12.1.3 Accordingly, in paragraph 4 of the claim it is said ... Being cognizant of the Tribunal's obligation to make recommendations on the practical application of the Treaty of Waitangi to our claim, we do not seek the return of the entire 700 acres Orakei Block to Ngati Whatua but we claim that the Tribunal should declare that we are rightly entitled to the whole of it.

12.1.4 We find

(a) The Orakei block ought to have been vested in the tribe as some form of corporate entity. We found (11.11.4) that the lands owned by the Maori were held tribally and communally. The communal right so existing was recognised by the Crown in both texts of the Treaty, in the Maori by the conferral of "te tino rangatiratanga".

(b) The failure to uphold tribal ownership is the genesis of the tribe's subsequent troubles. The finding above is in itself sufficient to justify the claim and is, in our view, the main finding. The initial failure, as we will soon relate, stems from the provisions of the Native Lands Act 1865 which resulted in the 700 acres being no longer possessed in communal

ownership in accordance with custom and tradition. It is not enough to consider that Chief Judge Fenton by-passed the 1867 amendment and should have appointed trustees to hold for every individual tribal member named on a separate roll. At the very least the law should have enabled the trustees to hold not for individuals but the tribe, for as time showed, individual beneficiaries could still have partitioned their individual shares and could still have privately sold them without tribal approval or the sanction of tribal trustees. (In that respect the law has still not changed.)

(c) The failure to provide for tribal ownership was no oversight. The evidence is rather that it was conscious policy to break down the tribal control the Treaty in fact guaranteed.

(d) It follows Ngati Whatua were not willing sellers of any part of Orakei for Ngati Whatua never held the legal title that was awarded. Such as owned and may have willingly sold, sold individually and by law were not representatives of the tribe. It follows further that in terms of the Treaty there was no legitimate basis whatsoever for the Crown's acquisitions in Orakei. The land by custom being tribally owned, and that custom being protected by the Treaty, the Crown was bound to inquire of the tribe if the tribe wished to sell, and the Crown never did. It dealt only with individuals whose customary title was no greater than a right of occupancy in common with unspecified others and subject to the over-right of the group.

(e) The Crown carried a particularly high responsibility to guard against encroachments on the Orakei block. We found at 11.11.8 that Article 2 carried a reciprocal duty to ensure the tribes were left with sufficient land for their support. We have considered in this context the massive extent of the tribe's original holdings, its former dependence on agriculture and trade, the likely size of the tribe, and the minimum test as late as the Native Lands Act 1873 of 50 acres for every man, woman and child. We have considered the tribe's careful selection of Orakei as a distinctive headland removed from Auckland yet not remote. The 700 acre Orakei block was in our view a minimum endowment to secure to the tribe, and because it could not have been less, so much greater was the duty to preserve it.

(f) The evidence is that without the Crown's interference a workable endowment would have been maintained. Especially significant was Tuhaere's plan to lease sections to Europeans with ground rents to fund tribal development. Local bodies were doing much the same thing at the time and Tuhaere may have obtained the idea from what the Anglican Church was doing on nearby lands. The Anglican Church scheme worked well enough and has more than adequately endowed a fine theological college but then the assets of that Church were not apportioned to its members.

12.1.5 Accordingly, we have no difficulty in finding that save for subsequent sales to private interests, Ngati Whatua today would be rightly entitled to the whole of the Orakei block. That finding is relevant to the consideration of remedies in chapter 14 below. For now we consider the more particular claims that are made, bearing in mind that our conclusions on each are subservient to the main findings in 12.1.

Waitangi Tribunal, Department of Justice, Wellington.

12 Issues and Findings

12.2 The Native Lands Acts 1865 and 1867

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12.2.1 We have earlier related in some detail (4.2, 4.7, 5.1, 5.2) Te Kawau's aspiration for a deed to "make safe" the Orakei land, his application under the Native Lands Act 1865 and the outcome of that application as determined by Chief Judge Fenton. It resulted in the whole of the land passing to thirteen members of a tribe numbering well over a hundred. Such vesting moreover was not in trust for the whole tribe. The thirteen became the beneficial owners and as a result, all the remaining members of the tribe were, without their consent, involuntarily dispossessed of any interest in the land. The position then was much more serious than the denial of communal ownership in accordance with custom, serious though that matter was in itself. That the majority of Ngati Whatua were rendered landless with a stroke of the pen as early as 1869 and without their consent, was a most flagrant violation of the Treaty.

12.2.2 It is clear that the legislature was anxious that the right of Ngati Whatua and all other Maori to hold their lands on a tribal basis, guaranteed to them by the Crown in the Treaty, should if possible be extinguished. The preamble to the Native Lands Act 1865, is (in retrospect at least) disconcertingly candid. It says

Whereas it is expedient to amend and consolidate the laws relating to lands in the Colony which are still subject to Maori proprietary customs and to provide for the ascertainment of the persons who according to such customs are the owners thereof AND TO ENCOURAGE THE EXTINCTION OF SUCH PROPRIETARY CUSTOMS and to provide for the conversion of such modes of ownership into titles derived from the Crown ... (emphasis added).

And so it happened. The Ngati Whatua communal ownership of the land was extinguished. The stage was set for the individualisation of the title to the land.

12.2.3 The next point to note about the 1865 Act is that any one Maori could request an investigation of the title to a particular block of Maori land. The Court, after hearing such evidence as it thought fit, might order a certificate of title to be issued specifying the names of the persons or of the tribe who according to native custom own or are interested in the land. Or the Court might, if it chose, refuse to order a certificate to the claimant or anyone else. But if the Court decided to order a certificate in respect of land under 5000 acres, no more than ten persons could be named in it. The Court could decide to divide the land and issue two or more certificates if there was more than one owner or set of owners who wished this to be done. This provision was presumably intended to meet the difficulty arising from the inability of the

Court to include more than ten owners in the certificate to a given piece of land.

Lastly, the Court was given a discretion to recommend to the Government that a restriction on the alienability of any piece of land be appended to the certificate. It was not mandatory to make the land inalienable.

12.2.4 That it was intended by the 1865 Act to facilitate the individualisation of customary land is further evidenced by s 50 of the Act which enabled more than five persons named in a crown grant following the issue of a certificate of ownership to apply to the Court to subdivide the land and partition the shares.

12.2.5 It will be observed that it required only one person to instigate an investigation under the 1865 Act and the Court would proceed whether or not the remainder or a majority of a tribe agreed. The limitation of ten names to a certificate would inevitably mean in the case of a tribe such as Ngati Whatua of Orakei that if the names of all members of a tribe were to be included, the land would have to be surveyed into many separate pieces (a matter incidentally of great expense). This could result in a form of involuntary partition. Tribal ownership of land under 5,000 acres was not possible under the 1865 Act, and so, on the initiative of one person, tribal ownership could be extinguished without tribal consent. These provisions of the 1865 Act are clearly inconsistent with the principles of the Treaty referred to in 11.11.4 whereby in recognising 'the full authority' of the Maori over their lands the Crown was acknowledging their right to hold their land in accordance with long-standing custom on a tribal and communal basis.

12.2.6 We earlier discussed in some detail s 17 of the Native Lands Act 1867 and related how Chief Judge Fenton declined to implement it. Had he done so the Orakei Block would have been awarded to not more than ten as tribal representatives with the names of each and every member of the tribe being then recorded in a separate record of the Court. In fact, as we have seen, thirteen were held entitled and no other names were recorded Chief Judge Fenton choosing not to act under s 17. It is clear that Chief Judge Fenton made that election because he was ideologically opposed to s.17 and considered he had a discretion to disregard it and act under the Native Lands Act 1865, which was the course he purported to follow. It is instructive to examine further the minute which he made in respect of that matter on 7 April 1868 at the very time the Orakei case was before him. In commenting on s 17 he said it appeared the effect of the clause would be to make perpetual the communal holdings of the Maori. Later in his minute he says

It has been the practice of the Court hitherto, in cases where more than ten persons have appeared on the evidence to be interested in the land, to order a subdivision or more subdivisions than one, if one division did not sufficiently reduce the number of owners to the ten limited by the Acts; and I believe this practice has been beneficial, and in furtherance of the great objects of these laws, as declared in the preambles of the Acts of 1862 and 1865 - namely, the extinction of the Native communal ownerships, and the substitution of titles known to the laws in lieu thereof

...But it does not appear clear that, by the enactment of this provision, [s 17 of the 1867 Act], Parliament intended to take from the Court the discretion which it previously had, as to the issue or the refusing to issue a grant, after it shall have heard the evidence and the arguments on the case. On the contrary, I think the discretion is still left with us; and believing that the great object of this system of legislation is the abolition of communal ownerships of land, and the substitution of titles known to the law in lieu thereof, the inclination of my mind will be so to exercise the discretion which the Court, in my view, is still entrusted, as to refuse to issue a certificate of title, which will not on the face of it disclose the names of all the persons who are shown to the Court by evidence to be the owners, according to Native custom, of the lands described therein; or, in other words, to order subdivisions until the names in the grant are brought within the legal number, and display the whole of the persons interested in the property. (1871 AJHR A-2A : 40)

12.2.7 There could be no plainer indication than this statement of Chief Judge Fenton that he proposed not to exercise the powers conferred on his Court by s 17 since he saw the provision as incompatible with the "great object" of the 1865 Act which was "the abolition of communal ownership of land". Such was his state of mind at the time the Orakei case was before him. Regrettably, the Government of the day, although aware of Fenton's attitude and thus of the Court's interpretation of the law took no steps to clarify the legislation. The omission to take prompt action left Chief Judge Fenton free to do as he preferred and thereby deprive the great majority of their interest.

12.2.8 The Hon. Mr Richmond, Minister of Native Affairs, was aware of the Court's practice of vesting tribal communally owned land in a limited number of members. In the second reading debate on the Native Lands Act Amendment Bill 1868 he said

...The Government finding themselves foiled by the unwillingness of Mr Fenton to co-operate with them, had sent circulars round to discover cases where the 17th section had been overleaped by the Court and to obtain declarations of trusts on behalf of those Natives who had received grants for their tribes. (NZPD (1868) Vol. IV: 231)

How effective (if at all) this action was we are not aware. Certainly no such action was taken in the case of Ngati Whatua. Suffice it to say that Chief Judge Fenton chose early in the following year, as we have seen, to exclude most members of the tribe from any interest in their land by declining to use s 17 and by omitting to indicate that the thirteen held in trust for all. The Government of the day, well aware of the highly prejudicial and arbitrary way in which the Land Acts of 1865 and 1867 were being operated, took no effective steps to protect the Ngati Whatua people from dispossession.

12.2.9 These people were not afforded the protection in their lands guaranteed them under the Treaty. In the first instance tribal ownership was denied. In the second the Crown omitted to take timely and appropriate action to ensure that the provisions of s 17 of the 1867 Act were mandatory and hence complied with to prevent members of Ngati Whatua from being dispossessed of any interest in their land involuntarily and without their consent. We

emphasise again however that even the deployment of s 17, while allowing all to be in, would not have allowed of tribal ownership. As it turned out, individual beneficiaries could still have partitioned, or sold, without tribal sanction or control, or without reference to tribal trustees.

Waitangi Tribunal, Department of Justice, Wellington.

12 Issues and Findings

12.3 Orakei Native Reserve Act 1882

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12.3.1 Chief Judge Fenton did take one step which, in practice, gave a measure of protection to those tribal members he had stripped of any interest. He made the land inalienable. We have earlier indicated however that such restrictions were temporary measures which could be removed by the Court or the Crown at any time. Tuhaere, who succeeded Te Kawau, was anxious to prevent the individualisation of the Orakei title and, as we have seen, along with others petitioned Parliament for a Bill to hold the Orakei land intact and turn it into a tribal endowment. The result was the Orakei Native Reserve Act 1882 which enabled Tuhaere, as the new trustee, with the consent of the beneficiaries named in the Crown grant, to lease the land for up to 42 years. It could not be sold. The Orakei Act did not in law restore customary ownership, for rents were meant to be divided equally between the thirteen owners. It was rather through Tuhaere's manipulation of the Act that the tribal principle was for a time maintained. Communal cultivation continued and rents and profits were applied for the benefit of the tribe. But meanwhile, succession orders were being made and in 1891 the first application by owners to partition "their" shares was filed.

Waitangi Tribunal, Department of Justice, Wellington.

12 Issues and Findings

12.4 The Equitable Owners Act 1886

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12.4.1 Government did endeavour to provide some relief for those who had been disinherited. The long title to The Equitable Owners Act 1886 was "an Act to confirm to Natives certain Equitable Rights" and the preamble was as follows

Whereas under the Native Lands Act 1865 certificates of title to, and Crown grants of, certain lands were made in favour of or to Natives nominally as absolute owners: And whereas in many cases such Natives are only entitled and were only intended to be clothed with title as Trustees for themselves and others, members of their tribe or hapu or otherwise ...

That Act did not restore tribal ownership however. It merely allowed more individuals to be included in the individualisation process. It gave in any event no relief to Ngati Whatua, where, on the face of the Court order, the legal owner was admitted as being a trustee, and the thirteen were declared to be absolutely entitled. Accordingly the application of Renata Uruamo to overturn the Orakei Order, as we have related (5.4), received slight consideration. It was dismissed without a substantive hearing and without Renata being present or represented. The inevitable outcome was to hasten the process of partition which was now under way.

Waitangi Tribunal, Department of Justice, Wellington.

12 Issues and Findings

12.5 The 1894 Act and 1898 Partitions

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12.5.1 The Treaty of Waitangi guarantees the Maori people absolute authority over their tribal lands. The Native Lands Act 1865 was specifically enacted to encourage the extinction of customary land tenure. In the case of the Orakei land, sustained efforts were made on behalf of the tribe, despite the operation of the 1865 and 1867 Acts, to maintain the tribal principle. But a fatal inroad was made by Chief Judge Fenton's 1869 decision. The effect of this was mitigated for a time by the passage of the Orakei Native Reserves Act 1882, but its extinction was consummated by the legislative provisions which enabled individual owners to obtain a partition. In the words of Williams J in *Solicitor-General v Tokerau District Maori Land Board* [1913 32 NZLR 866, 877" . . . the Act of 1882 has become a dead letter".

12.5.2 As we have earlier related (5.6) the first applications for the partition of Orakei were heard in 1896 under the Native Land Court Act 1894 s 14 of which authorised the partition of land among the persons entitled to it. This resulted in the farm lands being divided by the Court into several lots, ranging from 10 to 20 acres, and owners being assigned different portions. The papakainga thought to contain 43 acres but later surveyed at 39 was awarded to the owners as a whole (that is, the original 'legal' owners and their successors, not all members of the tribe).

12.5.3 In making these orders partitioning the Orakei block the Court, as we have said, negated the effect of the Orakei Native Reserves Act 1882 which although it did not provide for a tribal trust did provide for overall administration of the whole block by a trustee acting with the consent of the owner group as a whole. As Otene Paora said (5.6) as late as the year before the partition was made the land continued in practice to be held in common by the tribe with part being communally fanned.

12.5.4 While the partition orders continued the caveat on alienations except by way of lease the decision to lease was now solely the prerogative of the owners of the partitioned lands. The consent of owners of the whole block was not required. The individualisation of title was complete. The mana of the tribe in the land was extinguished. The Native Lands 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 finally destroying the mana of Ngati Whatua in and over their land at Orakei and confirmed the dispossession of the majority of the tribe of all interest in their land. The cumulative effect of the Acts of 1865, 1867 and 1894 was to prejudicially affect the Ngati

Whatua people in the manner indicated and was accordingly inconsistent with the principles of the Treaty which guaranteed that this would not occur. The Crown failed adequately to honour its obligations under the Treaty to protect the people at Orakei in the possession of their lands.

Waitangi Tribunal, Department of Justice, Wellington.

12 Issues and Findings

12.6 Stout-Ngata Commission and Native Land Settlement Act 1907

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12.6.1 On 21 January 1907 the Governor appointed the Chief justice, Sir Robert Stout, and Mr A T Ngata as members of the Native Land Commission. This Commission, popularly known as the Stout-Ngata Commission, was required to review the occupancy and use of Native Land and to report which land should be retained by the Maori owners and which might be disposed of. Late in the same year the Native Land Settlement Act 1907 enabled the recommendations of the Stout-Ngata Commission (some of which had already been made) to be implemented.

12.6.2 We have already adverted (5.7) to the extraordinary nature of certain powers under this Act. It is necessary to recall the principal provisions which are contained in two parts. Part I is concerned with land which the Stout-Ngata Commission found was not required for occupation by the Maori owners and is 'available' for sale and leasing. The Governor by Order-in-Council may declare such land to be subject to Part I with the following consequences

- The land vests in the Maori Land Board to be held in trust for the Maori owners.
- The Board, with the approval of the Native Member, is to divide such land into two equal parts and set aside one part for sale and the other for leasing in accordance with the Act.
- The Board is to sell the land set aside for sale and to lease for a maximum of 50 years without a right of renewal the land set aside for leasing.
- The consent of Maori owners is not required for either the sale or leasing of such land.
- The net revenue after deduction of expenses is to be paid to the Maori owners.

Under these provisions, subject to the report of the Commission, the Governor could, by Order-in-Council, vest Maori land in a Maori Land Board for sale to settlers, with or without the consent of the owners, simply on the ground that the land was considered in excess of their needs.

12.6.3 Fortunately for Ngati Whatua, or so it seemed at the time, and as we have related (5.8) the Stout-Ngata Commission found that no part of the Orakei Block was "not required for occupation by the Maori owners". And so it appeared they would be immune from the compulsory and involuntary dispossession of their land under Part 1 of the 1907 Act. For, as we have

recounted, the Stout-Ngata Commission recommended that some 85 acres comprising the village and nearby lands be reserved for occupation of the Ngati Whatua people; that certain existing leases comprising some 496 acres be confirmed and that the remaining 63 acres might be leased through the Maori Land Board. None was to be sold. All was to remain in the ownership of Ngati Whatua.

12.6.4 The Stout-Ngata Commission reported to Government on the Orakei land on 30 July 1908 on which date the 1907 Act was still in force. The 85 acres of Orakei land recommended for Maori occupation fell to be administered under Part II of the Act which provided

- for the making of an Order-in-Council declaring the land to be subject to Part II of the Act.

- making it unlawful for anyone without the consent of the Governor in Council to acquire any interest in such land, whether by purchase or otherwise.

In fact, no such Order-in-Council was made in respect of the 85 acres or any lesser part under Part II nor was any order made in respect of the balance of the land providing for its leasing under Part I of the 1907 Act.

12.6.5 As we have earlier related (5.9) the recommendations of the Stout-Ngata Commission for the extension and protection of the papakainga (the 85 acres) and the alienation of the balance by lease only, were never implemented by the Crown. While the Native Land Settlement Act 1907 was repealed by the Native Land Act 1909 its provisions were continued in Parts XIV and XVI. So, had Orders-in-Council been made by the Crown to implement the recommendations of the Commission, these would have been continued in force under the 1909 Act. Even if, by the time the 1909 Act came into force, no such Orders-in-Council had been made, provision was made in Parts XIV and XVI (which continued the provisions of Parts I and II of the 1907 Act) for the Stout-Ngata recommendations to be made the subject of an Order-in-Council under the 1909 Act. But nothing was done. The Crown simply ignored the Stout-Ngata findings and recommendations. Yet its duty as a Treaty partner was clear.

12.6.6 In our earlier discussion (5.9) we have suggested that the provisions of the 1907 Act, continued in force in the 1909 Act, offered a unique solution to the Orakei problem. The papakainga could be vested in a Board and the Board could give occupational licences to owners and non-owners alike; through the Board, the remainder could be leased.

12.6.7 We must now consider whether the failure of the Crown to implement the recommendations of the Stout-Ngata Commission by securing appropriate Orders-in-Council under either the 1907 or 1909 Acts, was inconsistent with the principles of the Treaty of Waitangi. For reasons which follow we find there was such inconsistency and that the omission of the Crown so to act was in breach of principles of the Treaty.

12.6.8 We have earlier found (12.2.8) that the Crown acted inconsistently with the principles of the Treaty in providing the machinery under the Native Lands Acts 1865 and 1867 for the dispossession, without the consent of the great majority of the Ngati Whatua people, from their interest in their land at Orakei and also (12.5.1-12.5.3) for the legislative provisions culminating in the partitioning of the land which effectively destroyed, again without tribal consent, tribal mana in and over the land. The Crown, had it implemented the Stout-Ngata recommendations, would have gone some distance towards ameliorating the damage already sustained. The basis for maintaining a reasonable degree of tribal cohesion and the retention of their land would have been secured. The Crown omitted to take this action, which was clearly contemplated by the 1907 and 1909 Acts. The Crown, by omitting to implement the recommendations of the Stout-Ngata Commission under the legislative provisions then in force which contemplated such 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. 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 areas amounting to 558 acres approved by the Commission for leasing, and none of which was to be sold.

12.6.9 On the contrary, the Crown shortly after embarked upon and progressively implemented a planned programme to acquire the whole of the land at Orakei in Ngati Whatua ownership. It was urged upon us, in submissions by Dr David Williams, that the closer a Maori hapu and their papakainga was to a centre of settlers' trade and commerce the greater was the obligation on the Crown to ensure protection of Maori against being rendered homeless as a result of settler pressures for land. There is considerable force in this submission. Ironically, it was the Crown itself which, far from seeking to protect Ngati Whatua, actively embarked on its plan to acquire all their land at Orakei and to render the Ngati Whatua people landless. We are unable to reconcile this outcome with the Crown's responsibility under the Treaty which obliged it in the circumstances of this case to ensure that Ngati Whatua were left with an adequate endowment of land at Orakei. The recommendations of the Stout-Ngata Commission afforded it an opportunity to ensure this and the Treaty required it to take appropriate actions. Instead, it elected to follow precisely the opposite course. The outcome, a landless people, was inevitable and foreseen.

12 Issues and Findings

12.7 Otene Paora's Petitions

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12.7.1 In paragraph 5.9 we have described the various petitions by Otene in which he sought to have all the descendants of Tuperiri included in the title to the land at Orakei, or if not all, then at least the heads of all the families including, in particular, a descendant of Uruamo. As we have recorded (5.9) the Native Affairs Committee voted seven to five in favour of Otene's petition on a motion, in October 1912, that the evidence be tabled in the House with a recommendation that the Petition be referred to an enquiry. This recommendation suffered the same fate as the Stout-Ngata recommendations; it was ignored. Nor, given that earlier in the year the Crown had by Proclamation of 7 May 1912 prohibited all alienations in the Orakei Block other than to the Crown, is this surprising. For, as we have said, it was not to protect Ngati Whatua that it placed a caveat on sales until the true ownership could be established, but rather to enable the Crown to acquire the land from those whose title was in dispute. Once again it is impossible to reconcile these events with the Crown's obligation to protect the interests of the Ngati Whatua. Those interests had to give way to the determination of the Crown to acquire all the Ngati Whatua land at Orakei.

Waitangi Tribunal, Department of Justice, Wellington.

12 Issues and Findings

12.8 The Sewer and Flooding

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12.8.1 Before we proceed to consider the implications of the purchase by the Crown of the greater part of the Orakei Block we should refer to the physical intrusion from neighbouring Auckland into Okahu Bay, the site of the Ngati Whatua village. We have described (6. 1) how in 1912 construction of a sewer pipe was commenced across Hobson Bay to be extended along the foreshore cutting the villagers' access to their craft in the harbour. It was a raised pipeline supported by a concrete retaining wall both being above the level of the papakainga flats behind it. No proper provision was made for drainage and the papakainga became a swampy quagmire. Even worse, the sewer outlet itself was placed at one end of the Bay and in 1914 Auckland's sewage was discharged onto the shellfish beds of Ngati Whatua opposite their village. We reiterate our finding that there could be no greater insult to a Maori tribe even if one were intended. Not surprisingly this action is the subject of a claim before us. Witnesses at our hearings made repeated references to this despoliation of their beach and fishing grounds and the flooding of the papakainga. More than 70 years after the initial opposition expressed by Hone Heke in 1907 to the Council and the Government the intrusion and the insult continues to be deeply felt and bitterly resented. The construction of the sewer was the work of the Auckland City Council, but was effected under special legislation, the Auckland and Suburban Drainage Act 1908. Amongst other things the Act authorised the Okahu discharge site without the necessity of obtaining the consent of the Auckland Harbour Board.

12.8.2 As we have indicated (6.1) neither the loss of the shellfish beds nor the insult nor the consequential flooding was compensated. Compensation was confined to land loss, land severance, lost access and depreciation. In fact, the flooding of the papakainga worsened in 1931, when a raised roadway largely financed by the Crown was built over the sewer pipeline along the beachfront. Not surprisingly, this added to the villagers' discomfort, turning the papakainga into a swamp in heavy rain. It was only after the people had been evicted that more adequate drainage was installed. For the land had by then become a public domain. In the same way it was only after the last remaining Maori land in the papakainga had been acquired by the Crown, that Auckland took its sewage elsewhere (again to an area adjoining Maori land, this time near Makaurau marae).

12.8.3 In the Te Atiawa Report (1983:1.1) we found that the Treaty of Waitangi obliges the Crown to protect Maori people in the use of their fishing grounds and from the consequences of the settlement and development of the land. In the same way we believe the Treaty obliged the Crown to protect the papakainga and especially the site of the marae from the deleterious effects

of a public work. It is clear that the Crown failed to meet its obligation in these various respects.

Waitangi Tribunal, Department of Justice, Wellington.

12 Issues and Findings

12.9 The Initial Crown Purchases - the Farm Lands

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12.9.1 In one year, 1914, the Crown bought the bulk of the Orakei Block having ensured by its May 1912 Order-in-Council that no one other than the Crown could purchase any part of it. We have shown (6.2) how, to facilitate its acquisition, s 109 of the Native Land Amendment Act 1913 was enacted. This provision enabled the Crown to buy the individual interests of owners in any blocks, regardless of how many were on the title, and without the necessity for a meeting. Some 460 acres, or most of the farm land, was acquired by December 1914.

12.9.2 These purchases were a direct consequence of the Crown's deliberate policy, deliberately executed, to acquire all property at Orakei belonging to the Ngati Whatua people. It knew, indeed it clearly intended, that the implementation of this policy would render the Ngati Whatua people landless. It can be said that the Maori owners agreed to sell. And so many did, although for years methods employed by the Crown's agents were the subject of complaints which have never been independently reviewed and there is considerable evidence of duress (see 12.15). But we do not see this as a justification. The Crown's planned programme to dispossess the Ngati Whatua from their lands at Orakei must be considered in the light of the following circumstances as more particularly described earlier in this Report

- The fact that by 1855 Ngati Whatua were left with only 700 acres out of many thousands which the Crown had acquired to establish Auckland City.
- The fact that in 1869, as a result of the provisions of the 1865 and 1867 Native Lands Acts and the acts and omissions of the Crown in relation to those Acts, all but thirteen of the Ngati Whatua people were dispossessed of their interest in their tribal and communal land at Orakei.
- The fact that, as a further result of the 1865 and 1867 Acts, the mana of Ngati Whatua to hold their land in accordance with their preferences was extinguished and tribal control was lost.
- The fact that Acts passed between 1865 and 1895 enabled the Crown to lay the ground for the complete individualisation and, thereafter, the alienation of the partitioned Orakei Block, thereby making more certain the impossibility of any continued communal use of the land and facilitating its alienation.

- The fact that the Crown deliberately chose not to implement the clear finding of the Stout-Ngata Commission which was intended to secure an endowment for Ngati Whatua at Orakei.

- That the foregoing events from 1869 on were the result of a series of breaches by the Crown of its obligations under the Treaty of Waitangi.

12.9.3 The cumulative effect of these 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 *New Zealand Maori Council v Attorney-General* 6 NZAR 353,370 'towards the Maori partner with 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 course which in a single year, 1914, resulted in the Crown acquiring the bulk of the farm lands at Orakei and which, far from providing an endowment would ensure that the Ngati \Whatua had none. In so doing, we find that the Crown acted in breach of its obligations under the Treaty.

Waitangi Tribunal, Department of Justice, Wellington.

12 Issues and Findings

12.10 The Failure to Maintain House Sites

12.10 The Failure to Maintain House Sites

12.10.1 Another cause for complaint over many years was the refusal of the Crown by its purchasing agents to agree to reserve out of a sale of Maori land at Orakei a part for the occupation of the owner. By contrast, the Crown reserved or allocated to a number of European lessees, house sites or other sections for their personal occupation. And so it transpired that while not a single Maori was able to keep the land on which his or her house stood (whether on the farm lands or the papakainga) the European lessees' lands were leased back to them until the Crown was ready to subdivide. The European lessees then obtained from the Crown the freehold of those parts on which their houses stood. No Maori were able to persuade the Crown to reserve a house site for their occupation. There was not one partition to cut out a house site despite the clear request of some Ngati Whatua owners for that to be done.

12.10.2 The reason for this transparent discrimination on the part of the Treaty partner can, we believe, be found in the report of 20 April 1918 of the Commissioner of Lands at Auckland (6.3) and we quote from this Report

In this connection I would bring before you the undesirability of the Natives retaining any of these lands. To permit them to do so, would certainly spoil any subdivisional scheme for settlement purposes. From my point of view it is absolutely necessary that the Crown should acquire this entire block, and therefore suggest that in the event of the Land Purchase Officer being unsuccessful in his negotiations, that special legislation should be introduced to enable the Crown to compulsorily acquire the balance of the block.

12.10.3 We are compelled, in the light of the foregoing statement, confirmed as Government policy as it is by our lengthy narrative of events in Chapters 6 and 7, to conclude that the Crown was resolved to dispossess the Ngati Whatua people of all their interest in their lands at Orakei. Not to do so would "spoil" any subdivisional scheme for settlement purposes. The Commissioner of Lands was prophetic in his view that resort to compulsory acquisition might be necessary. For so it proved to be as the 'recalcitrant' elderly and others resisted all attempts to remove them from their ancestral home on the papakainga. We find that this policy of the Crown, which worked so prejudicially to the interests of those sellers who wished to retain their house or house site, to be clearly inconsistent with the Treaty which obliged the Crown to protect the right of those Ngati Whatua who wished to retain an interest in their land to be able to do so.

12 Issues and Findings

12.11 The Crown Purchase of the Papakainga

12.11 The Crown Purchase of the Papakainga

12.11.1 Having in so short a period of time succeeded in acquiring most of the farm land, the Crown turned its energies to the acquisition of the papakainga. It will be recalled that the Stout-Ngata Commission, being of the opinion that the Orakei Block was Native and communal land and was meant to be preserved as a dwelling-place for the 'remnant' of a tribe, considered that the Orakei settlement should be so arranged as to provide ample reservations for Maori occupation. The balance not required for this purpose, it said should be leased in small areas up to 2 acres and the more remote land up to 5 to 10 acres. None was to be sold. In the result, the Commission proposed that some 85 acres should be permanently reserved as a papakainga.

12.11.2 The area of 85 acres recommended by the Stout-Ngata Commission was in fact more than twice the area of 40 acres (reduced to 38 acres 3 roods 16 perches in 1904 after land was taken later for roads) generally known as the papakainga. This area constituted one unpartitioned block in which various members of the tribe held undivided interests or shares. The Crown met considerable opposition in its attempts to acquire the papakainga. It was able to purchase undivided interests or shares only, each interest representing a certain acreage.

12.11.3 By 1927 however, the Crown had acquired all but 12.5 acres of the Orakei Block. In 1928 Orders were obtained in the Native Land Court whereby some owners of interests in the papakainga relinquished those interests in exchange for an interest in a 10 acre block on the western hillside. Those who did not agree to relinquish their interests in the papakainga found that the remaining 2.5 acres (being all that was left unpurchased in the papakainga) was partitioned into two blocks. One block of 1 acre went to Maki Waata solely and included her two homes. The remaining owners were put in a block of 1.5 acres taking in some homes and the Marae. In addition, in 1928 the Court set aside about 1 acre as a Maori reservation incorporating the Okahu Church and cemetery. This was vested in trustees for the tribe. Strangely, the Marae itself was not also set aside as a Maori reservation. 12.11.4 And so by 1928 the Crown had almost achieved its objective of dispossessing the Ngati Whatua of their lands at Orakei. But the people, perversely perhaps in the eyes of the Crown, remained. In 1935, the 32 buildings in the Maori settlement at Orakei comprised 24 dwellings, five tents, two halls and a Church of which 17 dwellings, four tents, two halls and the Church were in the main village or papakainga. But as we have related, three enquiries were to intervene before the remaining land was compulsorily acquired by the Crown.

12 Issues and Findings

12.12 The Acheson Inquiry 1930

12.12 The Acheson Inquiry 1930

12.12.1 In this inquiry (see 7.1 for a full discussion) Judge Acheson found that the Orakei Block ought properly to have been a tribal reserve protected from sales and, in the absence of evidence to the contrary (the Crown having withdrawn) that there was an undertaking, in securing the purchase of the farm lands, that the papakainga would not be touched. He recommended a conference between the Orakei people and the Ministers of the Crown without officials. No action was taken by the Government as, in the terms of the Chief Judge's recommendations, none was required. Nevertheless pressure was maintained by Ngati Whatua for the recognition of the papakainga both with the Auckland City Council and Government. On the change of Government the restoration of the papakainga and Church site was again sought. After a meeting with the new Prime Minister the Lee Committee was appointed.

Waitangi Tribunal, Department of Justice, Wellington.

12 Issues and Findings

12.13 The Lee Committee 1936

12.13 The Lee Committee 1936

12.13.1 The Lee Committee was required to report on the Church site, unsold interests, the Maori preference for a "model pa", health concerns and a Government housing scheme. Its findings (Judge Acheson dissenting) in respect of the papakainga were, briefly that the unsold interests in the papakainga ought to be purchased as being necessary for the development scheme, the proposal for the 40 acre native village was impractical as was the "model pa" proposal, the papakainga was a health hazard and housing was not the best way to utilise it because of the drainage problems. In short, the remaining Maori on what was left of the papakainga should go.

12.13.2 Judge Acheson's views are perhaps encapsulated in the passage from his dissenting report which we have earlier cited (7.2). It reflects his concern with the broader issues of the Treaty and we believe merits repetition here as both an eloquent and perceptive statement of the Ngati Whatua claim to retain their papakainga in perpetuity. Judge Acheson comments on their rights thus

The rights of the Maoris, their land rights under the Treaty of Waitangi, their moral and legal rights as set out in the Court's Report of 1930, their right to equality of treatment as promised by the Government, their pathetic clinging to the remnant of tribal lands, their right as fellow citizens to be treated with respect and consideration, their law-abiding habits, their past willingness to share in the defence of the Empire, their ability to retain dignity and cleanliness under conditions of direst poverty, their right to have one small portion of Auckland which they can call their own and where they can rebuild their ancient culture and maintain their tribal existence and honour the memory of their ancestors.

12.13.3 Some of the people were, by 1937, living on land partitioned out and owned by the Crown, and Government decided to evict them. In the same year the first state-houses erected on the Orakei Block were completed and the first occupants moved in. To leave the Ngati Whatua on their papakainga would "spoil" the development. But public spirited Auckland citizens took up the cause of Ngati Whatua, and in 1938 the Government relented and set up a further inquiry into the purchase of the papakainga.

Waitangi Tribunal, Department of Justice, Wellington.

12 Issues and Findings

12.14 The Kennedy Commission 1938-1939

12.14 The Kennedy Commission 1938-1939

12.14.1 We have earlier traversed the proceedings of this Commission which comprised Mr Justice Kennedy on his own (7.3). We here refer to the principal findings of the Commission in relation to the papakainga. We recall however the evidence of the Crown's principal land purchase officer that no one was left landless in the papakainga because everyone's shares were so trifling that they were already landless in terms of the Native Land Act 1909. This observation has caused us to think that if the Maori owners were technically landless after the farm sales, the farm sales must have been contrary to the 1909 Act by rendering them landless. The Kennedy Commission was not required to consider this question as its inquiry was restricted to the papakainga.

12.14.2 After finding that the Crown acquired a good title to the lands purchased in the papakainga the Commission next considered whether there was any provision in the then law which prevented the Native Land Purchase Board (through which the Crown made its purchases) from lawfully purchasing the land or interests in it or which rendered such purchases invalid. Under the Native Land Amendment Act 1913 the Board, before completing a purchase of the interest of a native owner in any land, was obliged to ascertain that such purchase would not render the seller landless within the meaning of the 1909 Act. The Board was required to obtain particulars of any other interests in land in which a seller was beneficially interested. A native whose total beneficial interests in Native freehold land were insufficient for his adequate maintenance would be a "landless Native". But even if this duty was not discharged and the prohibition not complied with, the purchase was not invalidated.

12.14.3 As we have shown, the Kennedy Commission considered that in many cases the duty to inquire had not been discharged, and in many cases Ngati Whatua people were certainly left landless, but also in many cases the owners had other land interests (often in distant places). In 24 of the 36 sales the sellers held less than half an acre in shares. They were not rendered landless as technically they were already landless.

12.14.4 The Commission next considered whether there were any extra reasons why the Crown should have abstained from purchasing the interests of the owners who were willing to sell and did sell their interests to the Crown. Its formal answer was that in 'certain' circumstances the purchase would render the Natives landless and that was the reason why as the law stood the Crown should have abstained from purchasing the interests of certain native sellers. It considered there were no other valid reasons. In saying this the Commission made no reference to the Stout-Ngata Commission

recommendation made only a few years before buying began, that none of the land should be sold. Nor, of course, was the Crown's obligation under the Treaty considered. As to whether promises were made that the papakainga land would not be purchased, the Commission, after considering conflicting evidence, on balance concluded in the negative.

12.14.5 Before the Crown had any opportunity to proceed with its eviction proposals the war intervened. No further action was taken; intermittent discussions took place and in 1943 Prime Minister Fraser announced a proposal to build houses for Ngati Whatua on the eastern plateau, to retain the marae area on the flat and to assist with the building of a new meeting house on the site of the old one. While welcoming the Government's offer to assist with rebuilding the marae Ngati Whatua could not agree to relocate on the eastern plateau. And so the position remained stalemated until the Government changed late in 1949.

Waitangi Tribunal, Department of Justice, Wellington.

12 Issues and Findings

12.15 The Final Stage

12.15 The Final Stage

12.15.1 In 1951 the 10 acre 'exchange block' was compulsorily acquired for 'housing purposes'. The 1 and 1.5 acres of the papakainga, (which included the marae) were compulsorily taken for the purposes of a recreation ground. Apart from the Okahu cemetery, Ngati Whatua of Orakei was now landless.

12.15.2 It had taken some 40 years for the Crown to acquire the whole of the farm lands and the papakainga at Orakei. While Ngati Whatua succeeded in having three inquiries made into the Crown purchase of interests in the papakainga, no independent review was made of the acquisition of the farm lands. The Crown had made it clear in 1914 that it intended to acquire the Orakei Block and it took steps to ensure that no one else would be able to purchase any part of it from the Ngati Whatua people. The Crown was therefore in a position of ascendancy and greatly advantaged in its dealings with the Maori owners. In 6.2 and 6.3 we have related the complex and what must often have been totally bewildering techniques employed by the Crown's agents to secure the purchase of the whole of Ngati Whatua land. What real choice but to sell, did the owners of shares in a piece of land have once the Crown had purchased other shares in the same piece of land? The Crown knew this and the remaining owners were thereby subjected to pressure to sell which became increasingly difficult to withstand. Nor, in many cases, did the Crown comply with its statutory duty to inquire whether owners would be rendered landless and to refrain from purchasing if this would be the outcome. It is a melancholy story. Yet the Maori owners did not have the protection of the Native Land Court they would have enjoyed had they been selling to purchasers other than the Crown, no doubt for the reason, sadly misplaced, that the Crown would honour its statutory obligations.

12.15.3 Nor had they the protection of their traditional tribal authority. It can never be said Ngati Whatua sold for of course the lands had been individualised, most of the individuals had been disinherited, and there never was a Ngati Whatua meeting to determine in the traditional way, whether the block should be sold. Clearly therefore, the sales offended the Treaty, for the customary owners, Ngati Whatua as a tribe, never freely and willingly agreed that they no longer wished to retain the block in their possession.

12.15.4 Given however, that a number of individuals were in law possessed of different blocks at that time, we still question the propriety of the Crown treating separately with individuals within them. The law had been changed to permit the Crown to do this, only months before buying began and customary collective decision making was once more denied. As we noted however, the meeting of owners procedure was occasionally used. There, voting was conducted on a poll according to shareholding. Even non-Maori

land cannot be sold in that way, but both the sales by individuals and those effected by a poll were inconsistent with the Treaty, for the Treaty was meant to uphold the mana of the people to deal with their lands and to make decisions affecting them, in their own way.

12.15.5 In an earlier paragraph (12.9.3), we found, in relation to the policy and practice of the Crown in purchasing the bulk of the farm land in 1914 that the Crown was acting in breach of the Treaty. The purchase of the remaining farm land and the acquisition of the papakainga by purchase and compulsory taking was a continuation of that same policy and practice. In executing that policy it is clear that the Crown prejudicially affected

(a) Those many Ngati Whatua owners, who were left 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 obligation 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.

(b) Those Ngati Whatua 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.

12.15.6 These further two instances of specific breaches of the Crown's duty under the Treaty were an inevitable consequence of its wider policy to acquire the whole of the Ngati Whatua land at Orakei. Certainly Auckland City was steadily and irrevocably moving out to enclose the Ngati Whatua enclave at Orakei and pressures over which Ngati Whatua had no control were steadily transforming them from a rural to an urban-based people. These developments however do not excuse the Crown. The Crown, had it been conscious of its Treaty obligations, could reasonably have been expected to foresee the even more compelling need to ensure that its Ngati Whatua partners at Orakei were protected from becoming landless in their ancestral homeland. Statutes in force required no less.

12.15.7 We are unable to avoid the conclusion that, throughout the period of some 40 years during which successive governments pursued a common policy of progressively acquiring the whole of Ngati Whatua's land at Orakei, the Crown appeared to be oblivious of its responsibilities under the Treaty. It reflects among other things a lack of appreciation of the crucial importance of land in Maori culture. By way of illustration Sir Ivor Richardson in his judgment in *New Zealand Maori Council v Attorney-General* (1987) 6 NZAR 353, 381 cited the following passage from the New Zealand Maori Council's paper *Kaupapa-Te Wahanga Tuatahi*

It [land) provides us with a sense of identity, belonging and continuity. It is proof of our continued existence not only as a people, but as the tangata whenua of this country. It is proof of our tribal and kin group ties. Maori land represents turangawaewae.

It is proof of our link with the ancestors of our past, and with the generations yet to come. It is an assurance that we shall forever exist as a people, for as long as the land shall last.

Nor did the Crown throughout this lengthy period appear to appreciate that it was required by the Treaty to play an active role in the protection of legitimate Ngati Whatua interests. That the Crown is under such an obligation is made clear by the President of the Court of Appeal, Sir Robin Cooke, in the New Zealand Maori Council case in the following passage (p370)

What has already been said amounts to acceptance of the submission for the applicants that the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's Te Atiawa, Manukau and Te Reo Maori reports which support that proposition and are undoubtedly well-founded. I take it as implicit in the proposition that, as usual, practicable means reasonably practicable.

12.15.8 A striking feature of the three hearings which this Tribunal conducted is that no appearance was made by the Crown in opposition to any of the claimants' claims. Before the final hearing the Crown had available to it a lengthy report giving the detailed history of the way in which Ngati Whatua became landless at Orakei the substance of which is reproduced in the first ten chapters of this Report. This was not challenged in any respect by or on behalf of the Crown. Mr Neil Cooper speaking on behalf of the Commissioner of Crown Lands told us that the Commissioner had read the draft report and did not wish to challenge any part of it. Specifically, no reason was given as to why the Crown chose not to implement the Stout-Ngata report in respect of Orakei. We have no reason to believe this could not have been done. Had it been the mana of Ngati Whatua over the land would have been preserved, the people would have had secured to them a permanent place on their ancestral land and, in addition, an endowment towards their support and maintenance. They would have had land available from which to benefit, as envisaged by Lord Normanby, as the value and utility of land generally increased.

12.15.9 As with the acquisition of the farm lands in 1914 so the subsequent acquisition by the Crown of the remaining Ngati Whatua land needs to be assessed in the light of events from and including the first breach 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, which their ancestor Te Kawau signed at

Manuka (Manukau), 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. It has chosen not to advance any reasons for such failure or indeed to seek to justify in any respect the policies and practices which form the subject matter of the complaints before us. Is such apparent indifference consistent with the Treaty of partnership which the Crown was so anxious to enter into with the Maori in 1840?

Waitangi Tribunal, Department of Justice, Wellington.

12 Issues and Findings

12.16 The Orakei Church Site

12.16 The Orakei Church Site

12.16.1 So far we have been concerned in this chapter with the disposition of the bulk of the farm lands and the papakainga at Orakei. We revert now to one of the first transactions relating to Ngati Whatua land at Orakei. It should be noted that it took place in 1858 at the initiative of Apihai Te Kawau and other leaders and at a time when the land was indisputably held on a tribal and customary basis. It concerns the gift of land at Orakei to the Anglican Church and its sale by the Church to the Crown nearly 70 years later. The complainants say that Ngati Whatua were prejudicially affected by the actions of the Crown in vesting part of the tribal land in the Anglican Bishop of Auckland without ensuring its return to them if it ceased to be used for the purpose for which it was given and then, in 1925, passing a law providing for its sale to the Crown.

12.16.2 We have earlier traversed the circumstances in which the Deed was made and the gift effected (4.3) and the subsequent acquisition of the church property by the Crown in 1926 (6.5). We here recapitulate the essential elements in the two transactions

- In or about 1837 a chapel was built at Orakei and by 1844 a school was operating under a native teacher. As was usual the chapel and school were built and staffed by local Maori under missionary supervision.
- The chapel and school were, in fact and in law, the chapel and school of the Ngati Whatua people.
- In 1858 Te Kawau and another Maori leader Keene executed a Deed of Gift pursuant to the New Zealand Native Reserves Act 1856 which enabled Maori land to be given for church purposes.
- The Deed of Conveyance to the Crown written in the Maori language, acknowledged the purpose of the gift, to provide for a chapel, a burial ground and THE school (*italicising here and below has been added*). The official translation changed this to read "a site for a church, for a burial ground and for the endowment of a school."
- When the land was conveyed by the Crown to the Church by Crown Grant No. 14422 the land was vested in the Bishop of New Zealand "upon trust as a site for a Church and Burial Ground and as an Endowment FOR SCHOOLS FOR THE BENEFIT OF THE ABORIGINAL INHABITANTS OF THE COLONY OF NEW ZEALAND".

- While the Grant followed the form of others made at that time it did not follow the pact with Te Kawau and Keene as evidenced by the Deed nor did it follow Maori custom.

- Under Maori custom the land would have been given to secure a church, burial ground and a school for the people, not a church, burial ground, and a school for the Church, and the people in this case being Ngati Whatua, not all Maori.

12.16.3 The question arises whether Ngati Whatua were prejudicially affected by the act of the Crown in conveying the land deeded to the Church in terms significantly different from that intended by the donors. The further question is whether in so doing the Crown acted inconsistently with the principles of the Treaty. Our short answer to each question is, Yes.

12.16.4 Under Maori customary law the Ngati Whatua people, in donating land for a church, burial ground and the school, did so in the expectation that the land would be so used; that the donee, the Church, would honour the mana of the giver by fulfilling the terms of the gift and, should that no longer be possible or appropriate, then the gift would terminate and the land return to the donor. See N Smith, (1960:102-103) where the ingredients necessary to constitute a complete gift of land according to Maori custom are stated

(a) The donor must have sufficient right to make it;

(b) The gift must have been widely known and publicly assented to, or tacitly acquiesced in, by the tribe;

(c) The donee or his direct descendants must have continued to occupy. Smith further states that where a donee died without leaving children, or having children, they or their descendants failed to occupy or perform any conditions attached to the gift, the land reverted to the donors. The failure by the Church to occupy and use the land for the purposes stipulated in the Deed of Conveyance to the Crown signed by the donors Te Kawau and Keene resulted therefore in an obligation on the Church to secure the return of the land to the donors, that is, to the Ngati Whatua people of Orakei.

12.16.5 The Crown Grant to the Church was in terms quite different from Te Kawau's Deed. The land was to be an endowment for schools for all Maori not, as was clearly stated and intended, an endowment for a school for Ngati Whatua people only. The consequence was that whereas the terms on which the land was endowed were no longer honoured by the Church and hence the Ngati Whatua people could expect the land to be returned, the Church honoured the extended (but unwarranted) terms of the Crown Grant. This is clearly to the prejudice of Ngati Whatua.

12.16.6 The Preamble to the Treaty speaks of the anxiety of the Crown to protect the just rights and property of the Maori people. Article 2 as we have seen guaranteed their mana over their lands in accordance with their

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 the Ngati Whatua by enlarging and significantly altering the terms of the Maori Deed in its grant of the land to the Church. In so doing it acted inconsistently with its obligation under the Treaty to protect the rights and property of 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.

12.16.7 Early in 1920 the Crown, as part of its on-going programme to purchase the Orakei Block approached the Church with an offer to buy the 4 acres. Lengthy negotiations ensued. These were detailed in evidence before us by the Bishop of Auckland the Right Reverend Bruce Gilberd and Mr J E Towle, Chancellor of the Auckland Diocese. Mr Towle told us that initially the differences between the terms of the originating Deed in Maori and the terms of the Crown Grant were of no consequence. However, as years passed the land ceased to be used for a church or for a school. Instead, as we have earlier related (6.5) the land was occupied for many years down to the mid-1930's by several Maori families in houses and whare which they had erected on the land no doubt in the belief that the land had "returned" to them. Mr Towle informed us that from the time the Church was approached by the Crown in 1921 until the Crown actually acquired the land from the Church in 1926 and thereafter up until recently, the Church saw its responsibility with regard to the land and the trusts imposed upon it definitively and exclusively expressed in the Crown Grant. He told us that the Church at all times considered only its obligations under the law to deal with the land and to be responsible as trustee for it within the terms of the Crown Grant. No reference appeared to have been made to the narrower purposes set out in the English translation of the Maori Deed of Gift nor to the still narrower purposes of the Maori Deed of Gift. Mr Towle confirmed that the Church did not consult with Ngati Whatua on these issues. Without doubt, he said, they would have been opposed to the sale. He further told us that if the four acres were still under the control of the Church and the circumstances of use and occupancy were still the same as those pertaining in 1926, the Church would be seeking to change the terms of the Crown Grant in order to be able to make the land available in some form to Ngati Whatua since the original purpose of the gift had long gone. With the wisdom of hindsight Mr Towle said, the Church considers that it ought not to have sold the 4 acres to the Crown.

12.16.8 But the Crown was anxious to acquire the land. It promoted a special legislative enactment (s 7 Reserves and Other Lands Disposal and Public Bodies Empowering Act 1925) which expressly empowered the Church at Auckland to sell the land (4 acres 36 perches in all) to the Crown and to invest the proceeds in the same trusts as were contained in the Crown Grant. Dr David Williams submitted on behalf of the claimants that s 7 of the 1925 Act was a form of "compulsory acquisition" which ruled out any consideration whatsoever of the terms of the original gift from Ngati Whatua to the Church from the Maori perspective of a continuing relationship between donor and donee which, if brought to an end, should precipitate a return of the gift.

He claimed that the legislation prejudicially affected part of Ngati Whatua's tribal endowment in Orakei.

12.16.9 We have already found that the Crown, in enlarging the terms of the Trust without the consent of the Maori owners did so in a way which infringed the Treaty. In 1925 it promoted legislation to enable it to acquire the land from the Church 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 s 7 and the subsequent acquisition of the land exacerbated the earlier breach and was inconsistent with the Crown's Treaty obligations to protect Maori interests and to ensure return of the land to the Ngati Whatua people. The only consolation to the Ngati Whatua people is that some 130 years after Te Kawau's Deed of Gift in 1858 a small part of the land, the urupa comprising 1120 square metres, has finally been returned to them (No 3 in appendix III).

Waitangi Tribunal, Department of Justice, Wellington.

12 Issues and Findings

12.17 The Battery Reserve

12.17 The Battery Reserve

12.17.1 The claimants have complained of the taking by the Crown of parts of Ngati Whatua land for defence reserves and of the failure of the Crown to return them when they were no longer needed for defence purposes. The land in question is in two parts. One being land acquired by the Crown for a battery reserve at Bastion Point; the other at Takaparawha Point also acquired for defence purposes. The circumstances surrounding the acquisition of these two pieces of land, and the Kohimarama Rock, are detailed earlier in this Report (4.4). It is convenient to consider each in turn. We consider first the Bastion Point land taken for defence.

12.17.2 By Proclamation dated 26 August 1886 the Crown took some 5.27 ha. for defence purposes

- The land so taken was situated on the headland at Orakei known at the time as Kohimarama Point but later as Bastion Point.
- At the time it was taken the land was in the name of Paora Tuhaere as trustee in terms of the Orakei Native Reserves Act 1882 for the 13 beneficiaries and their successors.
- On 5 August 1889 compensation amounting to \$3000 was awarded for the taking of the land.
- The compensation moneys were largely absorbed by survey costs in an earlier survey of the land.
- The defence status of the land was revoked in 1941 and the area handed to the Auckland City Council to administer as a reserve.

12.17.3 The land was taken compulsorily by the Crown in 1886. Paora Tuhaere, as we have related (4.4), had promoted a Bill in the House of Representatives which would have enabled him to subdivide and lease the resulting sections for housing. On the face of it the Crown's action in compulsorily taking this land appears to be in clear breach of Article 2 of the Treaty which requires the consent of the Maori proprietors to any disposition of land. At the same time the Preamble to the Treaty speaks of the anxiety of the Crown not only to protect the just rights and property of the Maori but also to secure peace and good order. It is arguable that the sovereign act of the Crown in taking land for defence purposes with a view to securing peace and good order is acting for the benefit of all citizens, Maori and European alike, and is not inconsistent with the principles of the Treaty. For reasons which follow we do not find it necessary to decide this issue. It may be that,

should a similar need arise today, having regard to Maori sensibilities to the involuntary loss of their land, the Crown might seek to lease rather than acquire ownership of the land. Any such lease could be for the estimated time of the works with a right of renewal for the full term of the works relating to defence.

12.17.4 In this case, as we have seen (9.5), the Battery reserve land at Bastion Point was, along with other land, the subject of negotiations between representatives of Ngati Whatua at Orakei and the Crown which led to the settlement incorporated in the Orakei Block (Vesting And Use) Act 1978. The other land in question was the 10 acre exchange block which was compulsorily acquired by the Crown under the Public Works Act 1950. The exchange block owners' claim was based on the principle that land compulsorily taken, and not used for the purpose taken, should be returned. While the owners could not point to any specific statutory authority which required the return of such land, s 436 of the Maori Affairs Act 1953 had long provided a mechanism whereby Maori land so taken and no longer needed, could be returned to the descendants of previous owners. (The exchange owners, it will be recalled, sought the return of the ten acre block not to themselves but to all the Ngati Whatua people of Orakei). Moreover, in 1975 the statutory provision was strengthened; land, "no longer required for any public work" being changed to land "no longer required for the public work, or other public purpose for which it was required or is held."

12.17.5 It was considered that the same principle applied to the Battery Reserve land taken by the Crown in 1886. This too, it was claimed, should have been returned. However a significant part of this land was now the site of the M J Savage Memorial. It was thought inappropriate to claim that land. Instead other land was sought in lieu of the Battery Reserve land by way of equivalence. The Crown agreed to this.

12.17.6 We have expressed reservations as to whether compulsory acquisition by the Crown of Maori land is, in all circumstances, inconsistent with the principle of the Treaty of Waitangi which envisages the disposition of such land only with the consent of the owners. We are mindful of the fact that in relation to the Battery Reserve land of 5.27 ha., a settlement was reached with the Crown in 1978 and other land vested in the Crown was made available to Ngati Whatua. In all the circumstances we do not propose to recommend that the Battery Reserve land of 5.27 ha. should now be returned to Ngati Whatua. In coming to this view we are mindful that the land returned by the Crown in lieu of the Battery Reserve land, was land which came into the hands of the Crown through a series of breaches of the Treaty commencing with that associated with the enactment of the Native Lands Acts of 1865 and 1867. It was tainted land.

12 Issues and Findings

12.18 The Acquisition of Takaparawha Point

12.18 The Acquisition of Takaparawha Point

12.18.1 We have described (4.4) how in 1859 the Port of Auckland was thought to be in imminent danger of an invasion by Russian forces and how Apihai and others agreed to give to the Crown for defence purposes some 9 acres at Takaparawha Point. The gift was expressly made on the basis that the land would revert to the Ngati Whatua if it were no longer required for defence. In the event a battery was built closer to the city and the land was not at that time taken up by the Crown. It was included in the 1869 Orakei Block award. Not until the First World War did the Crown again become interested in the land for defence purposes. It was purchased for this purposes in 1916.

12.18.2 The purchase by the Crown resulted from a meeting of assembled owners. Votes were counted according to shareholding. Eleven owners voted for sale, fourteen against but as the sellers held a majority of shares their will prevailed over the majority who opposed the sale. At 6.2 we explained how the land of two leading non-sellers became sold - Otene Paora and Te Hira Pateoro. Otene had fewer shares than he would have held had Uruamo not been excluded by Chief Judge Fenton's order of 1869. Had Uruamo not been excluded the vote would have been different and the sale would not have happened.

12.18.3 The procedure for the sale of land by assembled owners was authorised by Part XVIII of the Native Land Act 1909. It was developed to facilitate the sale of land owned jointly by a number of Maori. It necessarily meant that a minority of shareholders, if opposed to a sale favoured by the majority with a majority shareholding, would be deprived of their land without their consent. Even a majority of shareholders opposed to a sale if, as was here the case, they did not own a majority of shares would find their interest in the land sold without their consent. This unwilling and involuntary disposition of shareholders' interests in their land is clearly inconsistent with the protection afforded by Article 2 of the Treaty.

12.18.4 In this particular case, with New Zealand being heavily involved in the First World War, it is very probable, had a majority in value of interests declined to sell, that the Crown would have taken the land compulsorily for defence purposes as it had the Battery Reserve at Bastion Point. Had it been so taken it would no doubt have been the subject of a claim in 1978 along with the Battery Reserve land which the Crown had failed to return after it was no longer needed.

12.18.5 Underlying any consideration of the acquisition of this land by the Crown is the shadow that lies over the title of the owners who did agree to

sell. We have given an instance of this (12.18.2). But not only Uruamo was excluded for this was part of the land the subject of Chief Judge Fenton's 1869 Order. We have earlier found (12.2.7) that the omission of the Government of the day to take prompt remedial action left the Judge free to act in a way which deprived the great majority of the Ngati Whatua people of their interest in the Orakei land involuntarily and without their consent, this being in clear breach of the Treaty. And so, in 1916, we find a majority of those members of Ngati Whatua who did succeed to interest in the land, again being deprived of their land without their consent.

12.18.6 The claimants say that, given the reasons for the acquisition of the land at Takaparawha Point, the Crown was in any event under an obligation to return the land to the Ngati Whatua people when some 30 years later in 1946 it found it no longer needed the land for defence purposes. Instead, it vested the land in the Auckland City Council as a reserve. We believe the cumulative effect of the various considerations we have enumerated is such that the Crown should have returned the land at Takaparawha Point. But in so finding we must bear in mind that the Crown did pay for the land in 1916.

Waitangi Tribunal, Department of Justice, Wellington.

12 Issues and Findings

12.19 The Failure to Secure a Marae Site

12.19 The Failure to Secure a Marae Site

12.19.1 Under this heading we consider two related claims by the claimants. They relate to alleged policies and practices of the Crown of

- Failing to secure land for us as a marae, and giving land proposed for us as a marae, to other persons, for a national marae;

- Failing to heed our numerous petitions to spare our papakainga from the buying, to reserve us land for a papakainga, and to reserve land for our marae.

We will also consider the claim that the Orakei Marae should now be vested in the Ngati Whatua Trust Board.

12.19.2 We consider first the provision of a new marae site. We have related (8.4) how, when the marae buildings on the papakainga at Okahu Bay were demolished, the Crown, late in 1952, offered a new site for a marae at Bastion Point behind what is now Kitemoana Street. And we explained why the people refused it. At the risk of over-simplifying the involved and confusing legal and related developments, we attempt here to summarise the essential elements in the events leading to the creation of a new marae at Orakei.

12.19.3 (a) The Crown offered land as a site for a new marae on Bastion Point.

(b) Ngati Whatua people refused it. The sanctity of the old site made it irreplaceable.

(c) The Crown nevertheless persisted and in 1954 one acre 19 perches was set apart "as a reserve for the use and benefit of Maoris" under the Land Act 1948.

(d) There is no significance in the fact that the gazette notice referred to "Maoris" and not "Ngati Whatua". This was standard drafting to conform with the Maori Affairs Act. It is left to the Maori Land Court to define with more particularity the precise Maori entitled after being informed of the Crown's intent. There is no room for doubt that the Crown, having expelled Ngati Whatua from their former marae, intended to provide an alternative site for them. This is confirmed by the action of the Crown in applying for an order under s 437 of the Maori Affairs Act. This section provides a mechanism to divest the Crown of land held for Maori in a way which leaves to the Maori Land Court the responsibility for selecting owners and representatives or trustees. If the Crown had intended a

multi-cultural marae in public ownership and control
it would not have used s 437 but alternative provisions in the
Reserves and Domains Act 1953.

(e) The Crown's application was first heard in 1955. We would have expected the representative of the Minister of Lands to have advised the Court that the land was for Ngati Whatua of Orakei. Instead, the Court was advised some matters had still to be settled and the matter was adjourned.

(f) Meanwhile, pressure had developed from various quarters, including other Maori, Polynesians, Europeans, and local authorities for a marae for "all Maori" and for "Auckland". A pan-tribal and multi-cultural marae was proposed for the Orakei site but the acquiescence of Ngati Whatua, as the tangata whenua, was needed.

(g) Eventually, Ngati Whatua gave way. Notwithstanding the newly emerging groups, and their new activities, there remained traditional obligations on Ngati Whatua as tangata whenua. These obligations they were in no position to meet. Not only were they struggling for their own survival, but they had no marae from which they could perform their customary duties or maintain their customary mana and nor were they in a position to build one. To extricate themselves from an embarrassing situation, they became compelled to accept the proposals.

(h) At a resumed Court hearing in 1959 the Court was advised that a multi-cultural marae for Auckland was proposed, to be funded by joint Maori and European endeavour and that the people of Orakei had "resented the proposals at first" but had recently agreed to "other Maori" coming into the trusteeship. It was thought Ngati Whatua would still retain the "natural control". In the event the Court appointed fifteen trustees representing various interests, including four from Ngati Whatua to hold the land for the benefit of "Maoris". The question of which Maori was left unanswered.

(i) In 1974 and 1978 the marae site was extended. For reasons which we have already stated (8.4), there is now confusion

- the original area is held "for Maoris" but the additional lands are held for "all Maoris".

- the original area is vested in individual trustees; the additional lands are vested in a non-existent Board in respect of a 'Reserve' which is not a Reserve.

However the Minister of Lands has accepted that all the land is Maori land. It now forms one marae complex.

(j) Subsequently a new marae was built, not by Ngati Whatua but with the help of some of its members (see 8.6). To Ngati Whatua humiliation it

became known as "the Pakeha marae", administered largely by outsiders but by virtue of location clearly associated with them. From the naming of the building for the Ngati Whatua ancestor, that association was confirmed and Ngati Whatua of Orakei could no longer have a commitment to any other site.

12.19.4 It is clear to us the Crown did not reserve the land for a multicultural marae for all people. It specifically declined to make that averment in Court when challenged to state for whom the land was reserved. It is abundantly clear the marae site, when it was first reserved in 1954, was meant for Ngati Whatua to replace the old site at Okahu Bay. We are of opinion that if in 1959 it was convenient to change that intention and create a multicultural marae for all people, then it would have been necessary to cancel the 1954 designation and create another type of reserve under the Reserves and Domains Act 1953 without the involvement of the Maori Land Court. The failure to adopt that course is not a mere procedural technicality. It would have brought to a head the issue as it stood in the 1950s. The avoidance of that issue by a specious argument that 'Maoris' meant 'all Maoris', the extension of that to mean 'all people' and the unfulfilled promise that the 'natural control' would remain with the local people, was to deny Ngati Whatua its proper entitlement. The vesting of the initial area in 'Maoris', does not determine the question of 'which Maoris', and since the question must be determined by reference to the intention of the Crown in 1954, when the area was gazetted, the reserve ought properly to have been vested in trustees exclusively for Ngati Whatua. The 'added' areas, being intended for the same persons as held the initial area, ought also to have been vested in trustees exclusively for Ngati Whatua.

12.19.5 We must now consider whether, as the claimants say, the Crown acted contrary to the principles of the Treaty of Waitangi, by adopting policies and practices which failed to secure for Ngati Whatua a marae at Orakei and in giving land proposed for them as a marae to other persons for a 'national marae'. At the outset we should record that Ngati Whatua resisted to the end the taking by the Crown of their marae at Okahu Bay which they held sacred and inviolable. It was situated on part of the papakainga on an area of 1.5 acres in multiple ownership. It was taken by the Crown against the wishes of Ngati Whatua by proclamation in 1951 for the purposes of a 'recreation ground'. It was nearby the ancient burial ground which, along with the Church, alone was spared by the Crown.

12.19.6 It could be argued on behalf of the Crown (although no such argument was in fact made to us) that Ngati Whatua chose not to accept the alternative marae site offered it by the Crown and having so elected cannot now be heard to complain that it came to be developed as a multi-cultural marae. It is perhaps not surprising that no such argument was put to us for the Crown's action in clearing the traditional marae site against the wishes of the people reflected a degree of insensitivity to traditional Maori values and to the deeply held reverence for and commitment to the marae at Okahu Bay that, 30 years later, is difficult to comprehend. Such action was incompatible with the obligations of the Crown under the Treaty of Waitangi. We believe the Ngati

Whatua people should not now be prejudiced because they resisted to the end the taking of their marae and for some years after the event continued, vainly, to hope for its return. Their refusal of the alternative site and their protracted reluctance to cooperate in the development of a multi-cultural marae was not merely understandable; given the depth of their feelings it was inevitable.

12.19.7 The only objections to the transfer of the control of the marae to Ngati Whatua, and to the Ngati Whatua Board, came from P Rikys, former Director for the Education Centre and member of the Marae Development Council, M C Boyce, a member of the Marae trustees and Education Centre, and others of the Education Centre. Apart from P Rikys and M C Boyce the others seemed primarily concerned that whatever happened, co-operation between the Board and the Centre should be maintained and that the Centre should continue to have an association with the marae. Rikys and Boyce were the principal objectors and were mainly concerned with the public subscription of funds to the buildings. M C Boyce submitted that for that reason, the 1959 'constitution' should be maintained. P Rikys contended a change to the 'constitution' would represent a fraud on the public that gave. There were no other objectors despite the public and individual notices given including notices to the members of the marae trustees and former members of the Development Council who represented various civic interests. Several spoke in support of the transfer of the marae to Ngati Whatua including the chairman of the marae trustees.

12.19.8 We consider a change to the current constitution would not represent a fraud on the general public that gave - rather, the reverse applies, the failure to accept Ngati Whatua control more likely represents a fraud on Ngati Whatua. For the general public gave for a marae, and as I H Kawharu said "a marae is a marae is a marae". It is a place where matters are ordered on Maori terms, and a marae at this locality could be ordered on no other terms than those of Ngati Whatua. The trouble was that this marae, developed to further cultural understandings we were told, was putting down the very cultural understandings it was meant to maintain.

12.19.9 Certainly it was also said, in the Development Council's publicity material of the time that the marae was held "for the benefit of the entire Auckland community and for all Maoris in New Zealand (Maori Land Court Order 1959)". That was not said by Ngati Whatua, and was a blatant misrepresentation of fact. But even were it true, Auckland benefits from its tangata whenua having a proper marae of their own so that they as founding partners of the city can contribute to civic occasions. So also all the Maori in New Zealand benefit for it is important that in visiting Auckland they should acknowledge first the marae of the tangata whenua.

12.19.10 Closer to the point was another message in the public brochure that the marae would be a place where Ngati Whatua "could act fully in their host capacity". The trouble was that that message was nearly forgotten in the take-over of Ngati Whatua culture that followed.

12.19.11 Several kaumatua of Ngati Whatua spoke on the significance of a marae in their culture. We will endeavour to summarise what was said, drawing in particular from the eloquent address of Rev Maori Marsden. He described the marae as the focal point of every Maori village. Village customs and traditions are rootless and meaningless without a marae, for while Westerners are accustomed to the severance of civic activities to a variety of buildings, for the Maori the marae was at once his Parliament, Church, reception centre, theatre, school, business house and community hall. Hapi Pihema added

The marae is the repository of my kawa (procedural rules), history, legends, art, culture - my very Maoritanga. It is not just a carved house.

12.19.12 The marae illustrates a customary predilection for belonging as distinct from owning. In olden times a Maori did not own land, but belonged to it. In similar vein he belonged to a family that belonged to a hapu that belonged to a tribe that belonged to the marae. Complementing the marae is the meeting house usually named for an ancestor common to all the villagers. He is usually depicted on the gable of the roof. In the Maori world where things unseen are as real as those seen and symbols maintain an interaction between the living and dead, the meeting house is the living body of the ancestor. The ridge pole (tahuhu) is his backbone, the rafters (heke) his ribs. One enters into the bosom of the ancestor through his mouth (kuwaha or door) and sees out through his eyes (matapihi or window).

12.19.13 In this way the sense of belonging, perfected in the ancestral house, is carried beyond the world of the living to the spirit world that pervades the Maori past, present and future. For the Maori it is important that funeral rites (tangi) are conducted at ancestral marae for there the tribal living and dead meet to greet and care for each other.

12.19.14 It does not follow that those not linked to the common ancestor have no place on a marae. The carved wallposts (poupou) of meeting houses depict ancestors of other tribes enabling those from a distance to be at home. Visitors may prefer to sit or sleep beneath their own ancestral wallpost. Here it is necessary to distinguish visitors and those who have come to live or work amongst the villagers. The latter, in the good course of time, may become 'adopted' into the tribe. Some may be asked to sit on the marae paepae, or seat of authority, in order to welcome visitors. It is usual they do not ask for that right, but that it comes about, if that seems appropriate, in the good course of time.

12.19.15 Visitors are accorded a special place. The locals are known as tangata whenua (those of the land) and have turangawaewae (a right to stand). Visitors are known as waewae tapu (those whose feet are sacred) and are received according to a particular ritual. There is one paepae (speaking place and seat of authority) for the local people and another for the tangata heke, or visitors. Inside the house there is a place for hosts and a separate place for guests, at least until the formalities are over.

12.19.16 The sameness of the 'one people' syndrome is not presumed. The presumption is the other way round. The distinction between tangata whenua and others is maintained and people are expected to know their different places and roles. In Maori thinking it does not follow that divisions result. Everyone is welcome on a marae but in pragmatic terms, everyone is thought to belong to someone. It would be presumptuous to think otherwise. It is not just the individual visitor who is respected and welcomed, be he Maori or European, but the visitor's family, tribe or people, whether they are with him or not. Conceptually, in the Maori view, unity is sought by respecting differences, and the separate mana (status) of those different groups or families to which we individually belong. It is seen as more important to respect differences and negotiate the bonds that bridge them. The protocol of a marae is directed to that end.

12.19.17 Above all else it is the mana of the tangata whenua and the ancestor of the local people that must be respected. This is one place where the locals have standing as of right. Today it is even more important. Here the tangata whenua take a front place and matters are ordered on their terms. On a marae the tangata whenua cease to be a mere minority in a society predominantly European or confused by tribal mixing.

12.19.18 That was the culture to which Aucklanders contributed. It is because the marae belongs or should belong to Ngati Whatua that it belongs in a sense to Auckland, that they might acknowledge the history, culture and traditions of the people who helped found a settlement on their lands. No one had the right to take that culture from Ngati Whatua or to presume to direct it. The culture, and tribal marae were guaranteed by the Treaty of Waitangi.

12.19.19 We have no hesitation in recommending that the Orakei marae be now vested in the Ngati Whatua Board. We feel strongly that it would be grossly wrong not to do so. That change, we consider will be to the advantage of "all Maoris", and the public of Auckland, in helping them to recognise the rightful place of Ngati Whatua in the city's affairs. It should ultimately benefit the Education Centre too in our view, for it must recognise the full significance of both cultures to continue its otherwise well earned association with the marae.

12 Issues and Findings

12.20 Desecration of the Papakainga

12.20 Desecration of the Papakainga

12.20.1 We consider now the complaint of the claimants that the alleged policies and practices of the Crown resulted in it "failing to prevent the desecration of our papakainga by enabling the use of the former papakainga as Domain without adequate safeguards as to how and by whom it shall be used." The former papakainga is now part of the Orakei Domain, in grassed open space administered by the Auckland City Council under the Reserves Act 1977.

12.20.2 Complaint was specifically made of the use of this land for a circus with temporary public urinals being placed immediately adjacent to the urupa. The Auckland City Council licensed its use for circus purposes without any liaison with the tangata whenua. Ngati Whatua were powerless to intervene despite their strong objection to the perceived desecration of their former papakainga.

12.20.3 We have seen that the Crown acquired part of this land compulsorily and in breach of principles of the Treaty of Waitangi. Given the nature of the site and the veneration in which it was then and is still 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 have recognised the special nature of the site and the mana of Ngata Whatua over it. It is not too late for remedial action to be taken.

Waitangi Tribunal, Department of Justice, Wellington.

12 Issues and Findings

12.21 State House Purchase Rights

12.21 State House Purchase Rights

12.21.1 The claimants further complain of policies and practices of the Crown "requiring those of us provided with housing in Orakei to live as State tenants and not enabling us to obtain freehold titles (though permitting other State tenants in Orakei to do so)". For reasons which we now give we are not satisfied that this complaint is made out.

12.21.2 Information was supplied to us by the Housing Corporation of New Zealand. The following are the principal facts which emerge from the evidence we received:

- The purchase by State tenants of their homes was first introduced in 1950.
- Since then the policy has operated "on and off" depending on the Government of the day.
- The houses subsequently vested in the Ngati Whatua of Orakei Maori Trust Board by the 1978 Act were available for sale at all times there was a sales policy in operation.
- Several Ngati Whatua tenants applied to purchase their respective State homes. Copies of applications and associated papers were produced by the Housing Corporation in respect of applications made in 1952, 1954, 1956, 1963, 1970 and 1973. Offers to sell the houses were made by the Housing Corporation in most cases; no sales were concluded for a variety of reasons (offers not accepted, offers lapsed, likely sale prices indicated that the purchasers would be unable to meet outgoings). We were informed, and we accept in absence of evidence to the contrary, that in no case was a sale declined because the houses in question were being dealt with on a basis different from state houses occupied by other tenants.
- For a time between 1974 and 1976 the Housing Corporation was not selling State houses, and it also considered the housing occupied by Ngati Whatua should be retained for Maori housing, which could not be guaranteed if existing Maori tenants purchased their houses and on-sold them to non-Maori. The earlier policy of sales to tenants was however resumed in 1976 following a change in government.

12.21.3 We deduce from the evidence that in a number, if not most of the cases where tenants did not accept an offer to sell from the Housing Corporation, it was because the outgoings including the need to meet rates and repairs, were beyond the financial resources of the prospective purchasers.

In the result, they along with other tenants, if they have remained in occupation over the past 30 or more years will, as the Housing Corporation indicated, have paid appreciably more by way of rent than they would have paid had they been able to afford to purchase their State homes. This will almost certainly be the case with some of the two hundred or so other tenants of state houses at Orakei who have not purchased their homes.

12.21.4 We nonetheless appreciate the tenants' concern to obtain some degree of ownership of 'their' homes and consider that may now be practicable. The properties are now vested in the Ngati Whatua Board which may lease but not sell. It is practicable for the Board to sell tenants 'their' buildings, converting tenancies to residential leaseholds, while existing restrictions on assignments, in the current Orakei Act, would continue to restrict user to within the tribe. The conversion of house rents to ground rents, the lessee's paying maintenance and rates but owning their homes, is feasible, though current rents are so low that the result would represent an increased outgoing for the current occupiers, and satisfactory terms would need to be agreed.

Waitangi Tribunal, Department of Justice, Wellington.

12 Issues and Findings

12.22 The 1978 Settlement

12.22 The 1978 Settlement

12.22.1 We come now to consider a further claim relating to alleged practices and policies of the Crown in "failing to give adequate recompense for our losses in the Orakei Block (Vesting and Use) Act 1978 or to make adequate enquiry into all the circumstances of our losses throughout Orakei Block having regard to the Treaty between our tipuna Apihai Te Kawau and the Crown in 1840." The claim before us, the Orakei claim, effectively reviews the 1978 settlement in light of the principles of the Treaty. Accordingly we need not examine the specific claim, that the 1978 settlement was inadequate, at least in isolation. We consider instead two questions arising from it, whether those who were parties to it had authority to bind the tribe and whether the settlement was meant to be in full and final satisfaction of everything.

12.22.2 In preceding chapters 8 and 9 we have detailed the events which culminated in the passage of the Orakei Block (Vesting and Use) Act 1978, here referred to as the 1978 Act. It is not possible to reach any view on the complainants' grievance in respect of the 1978 Act without having regard to the complex often conflicting claims of the three principal parties involved namely, the Crown, the majority of the elders of Ngati Whatua at Orakei and the protestors led by the Orakei Maori Committee Action Group. Also involved were the Auckland City Council, environmental groups and other interested citizens. The protest action had its genesis in an announcement on 19 November 1976 by the Minister of Lands of broad proposals for the use of the 60 acres of uncommitted Crown owned land at Orakei. It is useful here to recall the locality of this land which we referred to in 8.1. The Crown in 1951 after acquiring the 10 acre exchange block and the remaining papakainga land held some 174 acres of open space comprising

- Thirty seven acres of headland at Bastion Point which became consolidated as part of the Orakei Domain under the name of M J Savage Memorial Park (administered by the Auckland City Council) (Nos 19, 20 appendix III).
- Forty three acres of headland subsequently known as Takaparawha Park which became part of the Orakei Domain (administered by the Auckland City Council) (No 21, appendix III).
- Thirty four acres of land at Okahu Bay comprising the former papakainga and which became part of the Orakei Domain (administered by the Auckland City Council) (Nos 18, 23, 28).

- Sixty acres of uncommitted Crown lands in an elevated position behind the headland parks, much of it with commanding views of city and harbours (Nos 29-31, 103-113).

Much of the subsequent history of Orakei is concerned with the areas of uncommitted Crown owned land.

12.22.3 We propose here briefly to recapitulate the principal events (earlier described in some detail in Chapters 8 and 9) which led up to the Act of 1978. Again, we incur the risk of over-simplification, and what we here record must be read in the light of our earlier detailed narrative:

- On 19 November 1976 the Minister of Lands announced plans for the uncommitted 60 acres of Crown land; 17 acres was to be for private housing; 1 acre for a Youthline Hostel; 22.5 acres to be added to the Orakei Domain; the remaining 19 acres around Kitemoana Street to be the subject of further investigation.

- In February 1977 the Crown advised that of the 19 acres under investigation, 7 acres were to be for Maori housing and reserves; the remaining 12 acres would be added to the 17 acres earlier assigned for private housing making 29 acres (about half) available for private housing.

- Even before the February 1977 announcement there was widespread opposition to the Crown's proposals from a variety of sources including those who objected to the prospect of high cost private housing when the perceived need was for low-cost housing; from environmentalists who wished to preserve the existing open spaces; from local residents whose views and outlooks would be adversely affected.

- The Orakei Maori Committee was emphatic in its objections. It sought:

(i) The transfer of the Orakei Marae to Ngati Whatua control;

(ii) The uncommitted 60 acres and in addition, the parks within the Domain to pass to a Ngati Whatua Board but with the developed parks to be administered as public reserves;

(iii) The Maori State tenants to have title to their houses (as being already paid for in rents), and

(iv) The Youthline site to be used specifically for Maori youth.

- On 5 January 1977 an Action Group of the Maori Committee led by J P Hawke and J Rameka occupied the uncommitted Crown land and remained in occupation for some 506 days.

- On 14 January 1977, at the initiative of the former owners of the 10 acre exchange block, a claim was formulated which sought:

(i) The 10 acre exchange block which had been compulsorily acquired by the Crown "for housing purposes" but never built on by the Crown to be returned, not to its former owners, but to the Ngati Whatua people as a whole;

(ii) In exchange for the Battery reserve which had been compulsorily acquired for defence purposes but was no longer used for that purpose, the Crown to transfer to Ngati Whatua a roughly equivalent acreage in Kitemoana street;

(iii) Both pieces of land to be vested in a tribal trust to house Ngati Whatua at Orakei;

(iv) An adjustment be made between the value of the Bastion Point and Kitemoana sites with a compensating payment (in the event fixed at \$200,000) to be paid by Ngati Whatua to the Crown. The guiding principle was one of "equivalence".

(v) Although part of the papakainga site had also been taken compulsorily by the Crown no claim was made in respect of that land as it was thought the land was being used for the purpose for which it had been taken.

(vi) The claims were based on legal not moral grounds.

- At a meeting of the tribe on the evening of 14 January 1977 representatives of the Maori Committee Action Group strongly dissented from the exchange block owners' proposals. It was claimed (among other things) that by limiting the claim to land taken and not being used for the purpose it was taken, it discounted any claims in respect of anything else and ignored all moral obligations on the Crown to return other land to Ngati Whatua. In the result, while the exchange block owners' proposal was acceptable to most elders, conforming as it did to legal concepts without reliance on moral claims, and being consistent with working within the law, it was unacceptable to the Action Group.

- From January 1977 on until the settlement was reached with the Crown, the "moderates" were led by Piriniha Reweti. The Government was caught in the middle, accused of creating the division by dealing only with the moderates and yet faced with the moderates insistence that the Crown deal only with them.

- Negotiations ensued between representatives of the moderates and the Crown during 1977 and the Minister of Maori Affairs also met with the Action Group leaders at Orakei on 1 July. Seven days later, the Minister of Lands announced that civil proceedings had been filed in the Supreme Court to end the unlawful occupation of Crown land at Bastion Point.

- Following a report of a Joint Planning Study Group in November 1977 matters progressed. In December 1977, Piriniha Reweti sought a meeting

with the Prime Minister and the Ministers of Lands and Maori Affairs. This took place in the Auckland Town Hall on 25 February 1978. Two days later the Minister of Lands, having in the meantime consulted with the Auckland City Council, announced a proposed settlement. With some minor variations this was subsequently incorporated in the 1978 Act.

- Most of the Ngati Whatua elders and some forty senior members of family groups were present by invitation at the meeting in the Town Hall. Those not invited included the Chairman of the Orakei Maori Committee, the Action Group and elders or senior members of the Hawke and Rameka families. It is said this was not a tribal meeting and nor was it held at the Marae.

12.22.4 The first question is whether the settlement which emerged at the meeting is binding on the Ngati Whatua people as a tribe. Further and more critical question is whether the meeting accepted the settlement in full and final satisfaction of all claims it might have in respect of the land at Orakei or whether it was a settlement only in respect of the 10 acre exchange block and the Battery Reserve.

12.22.5 We will consider the second more critical question first. Was the settlement arrived at as a result of the meeting on 25 February 1978 intended to be in full and final satisfaction of all claims by Ngati Whatua against the Crown in respect of the land at Orakei? In December 1977 Piriniha Reweti wrote to the Prime Minister, the Minister of Lands and the Minister of Maori Affairs a letter, details of which we have set out in 9.5. It is clear from this letter that the claim brought by those he represented.

(a) Was limited to land taken from them by the Crown and not used for the purpose for which it was taken and

(b) That there were a variety of grievances, some of which were referred to, for which no remedy was sought because they fell outside (a). The letter concluded with a disclaimer in the following terms

And finally, unless fresh evidence pertaining to the former Ngati Whatua ownership of the Orakei Block is unearthed and upheld in a New Zealand Court of Law we would forego any claims against the Crown at Orakei.

12.22.6 We consider the following considerations are relevant to the question we have to answer

(a) The claim was a limited one and related to a relatively small area of land.

(b) That other grievances existed was made clear.

(c) The disclaimer was qualified and recognised the possibility that further claims might subsequently be made if they could be legally sustainable in a "New Zealand Court of Law".

(d) At the time of the settlement (1978) claims made under the Treaty of Waitangi Act 1975 were limited to Acts or other statutory provisions and policies or practices of the Crown for the time being in force or any act of the Crown done or omitted after the commencement of the Act. The present ability to go back to the date of the signing of the Treaty (6 February 1840) came only in 1985 when the 1975 Act was amended.

(e) Piriniha Reweti could have had no knowledge or expectation in 1978 that the Treaty of Waitangi Act 1975 would be so radically amended in 1985 by a new Government.

(f) Neither the Minister's press release of 27 February 1978 nor, more importantly, the lengthy preamble to, or the 1978 Act itself, claimed that the agreement between the representatives of the Ngati Whatua hapu and the Crown was conclusive of all grievances or intended to be in full and final satisfaction of such grievances.

12.22.7 We conclude from the foregoing that Piriniha's letter and undertakings do not preclude a claim being made under the Treaty of Waitangi Act 1975 as amended in 1985. While the Waitangi Tribunal is not a "Court of Law" it does have exclusive authority to determine claims brought under the Act. It would be contrary to equity and good conscience to rely on Piriniha's undertakings 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 before us by or on behalf of the Crown.

12.22.8 Professor Kawharu, a confidant of the elder in his lifetime, agreed Piriniha had not closed the door to a review provided it was under due process of law. The Ngati Whatua Board expressed a similar opinion in a letter to the Tribunal of March 1987 adding that our extended jurisdiction enabled old evidence to be reviewed afresh and in new light, the light of the Treaty of Waitangi.

12.22.9 Finally, on this question, we would emphasise that when considering the 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.

12.22.10 In view of the conclusions we have expressed in the preceding paragraphs it is unnecessary for us to determine the remaining question of whether Piriniha Reweti and those he represented had full authority to bind the Ngati Whatua tribe at Orakei.

12 Issues and Findings

12.23 Status of Ngati Whatua of Orakei Maori Trust Board

12.23 Status of Ngati Whatua of Orakei Maori Trust Board

12.23.1 The history of Orakei is the history of a people's persistent attempts to uphold the mana or status of a tribe by seeking on the one hand, the right to tribal ownership of its land and on the other, to speak and socially and economically advance through its own institutions. In 1978, tribal ownership was restored, at least for a small balance of the land, but at 10. 1 we asked, was tribal authority resurrected too on the creation of the Ngati Whatua Trust Board.

12.23.2 We think it was not. Though it was clear to us from the responses we received that the people expected the Board would become the modern embodiment of their traditional tribal authority, we find the authority of the Board is not in fact the full authority of the tribe, for it is severely constrained.

12.23.3 The Trust Board as we see it, is constituted as a Maori Trust Board and as such is simply the caretaker of the assets vested in it by its empowering Act, and the distributor of largesse to its beneficiaries from the resultant profit for the promotion of health, social and economic welfare, education and "such other or additional purposes as the Board from time to time determines". That means, by legal rules, other things of similar social type.

12.23.4 It is disconcerting to us that this should be so. The Board's beneficiaries include all of Ngati Whatua and are exclusive to them, putting paid to the problems associated with the previous statutory body, the Orakei Maori Committee. Only Ngati Whatua can elect Board members and, through an amendment to the Maori Trust Boards Act in 1983, only they can be members of the Board. Yet this Board has no legal standing to speak for Ngati Whatua on all issues. Its authority is limited to the administration of particular assets and profits. In that respect it is more limited than the Orakei Maori Committee.

12.23.5 It is also more limited than other Maori Trust Boards (which are in themselves limited enough). The other Boards can buy land but the Ngati Whatua Trust Board cannot (s 7(2) Orakei Act). The other Boards can administer other Maori land (s 240 Maori Trust Boards Act 1955) but not the Ngati Whatua Trust Board. The Ngati Whatua Trust Board is entirely a creature of statute with only those powers the statute gives it. In this case it has only those powers of other Trust Boards as are not inconsistent with its own Act, and its own Act limits its power to the land vested in it by that Act and to the provision of services and amenities on that land (s 4 and s 7 Orakei Act).

12.23.6 The Board's position is therefore analogous to that of a Maori Incorporation, the authority of which is also limited to the lands vested in it. That Maori Incorporations may not extend their brief to other interests or enterprises has been long held, as for example in *Proprietors of Taharoa 2C1 Inc (1961) Wairoa MB Maori Land Court*, *Proprietors of Waipiro A13 Inc (1966) 8 Ruatoria MB Maori Land Court* and *Ngati Whakaue Tribal Lands Inc v Rotorua District Council 17.2.82 High Court, Rotorua, 436/80*. The practical results are, that save for an amendment to its Act

- the Board cannot represent Ngati Whatua on general issues not pertaining to the land vested in it

- it cannot acquire other land, it could not buy further homes at Orakei for example

- it cannot administer other lands, the marae or urupa for example

- it cannot establish and administer a work scheme, education scheme or some form of in-town industry, although it could make grants to others for those purposes.

12.23.7 It is not for us to determine that the Ngati Whatua Trust Board should be the embodiment of the tribal authority but we found no demurrer from the suggestion that it should be, and a great deal of support for that concept. Nor was any reason given to us as to why the Board should be prescriptively constrained. The Treaty of Waitangi requires in our view, that the tribes are entitled to develop their own tribal authorities without undue circumscription. We appreciate that several tribes do not see Trust Boards as the right vehicles for their overall development but we are dealing here with a compact tribe that appears to want that to happen in this case, and to have the Board care for a range of interests including even the administration of its marae, church and urupa. We consider that the Board's authority should not be restricted to the land vested in it by its Act, that it should be able to buy, borrow, lease, manage and the like and should be authorised to represent the tribe in public affairs on all issues arising. We will recommend that the authority of the Board should be re-defined, in its governing Act, in the manner outlined and with such particularity as may be settled in consultation with the Board.

12 Issues and Findings

12.24 Arrests and convictions

12.24 Arrests and convictions

12.24.1 The claimants seek recognition of the personal sacrifices made by the protesters "to highlight the grievances in relation to Orakei", free pardon for all convicted following the arrests of 1978 and 1982, a cessation of any further attempts to enforce payment of outstanding fines for trespass convictions and compensation (the amount was not specified) payable to the Orakei Maori Action Committee.

12.24.2 This supplication, more fully set out in Part II of the statement of claim (as printed in Appendix I) has caused us deep concern. The claimants maintain they were prejudicially affected by the injunction proceedings taken against them, the arrests and convictions all of which they consider were contrary to the principles of the Treaty of Waitangi. They said, and we agree, the stand at Bastion Point was the culmination of over 100 years of representations through every proper channel all to no avail. The protest was the course of last resort for a section of Ngati Whatua who were otherwise law abiding.

12.24.3 Before dealing with the main issues, as we see them, we refer to a comment from J P Hawke. He reminded us that in 1976 he was the first applicant to this Tribunal, shortly after it was formed, claiming that his prosecution for a breach of fishing regulations when fishing on Waitemata harbour was contrary to the Treaty. The Tribunal did not investigate the relevant regulations for compliance with the Treaty, but held simply that Hawke was not 'prejudicially affected' as required by the Treaty of Waitangi Act for he had not been convicted and fined but convicted and discharged (Hawke Fisheries Report 1978). Well now, he said, prejudice was proven for on the protests he had been convicted and fined! While we now resile from the opinion earlier given and would investigate a claim without any need for an arrest, conviction or sentence, we have nonetheless continued to tread carefully where criminal proceedings are involved. On another claim for example, we decided not to continue with a hearing while prosecutions remained extant in the District Court, though invited by that Court to proceed, lest we interfere with the determination of those proceedings in accordance with law (Te Weehi Fishing Report 1986).

12.24.4 We also note at this juncture, with regret, that we did not have full argument on the propriety of this Tribunal addressing the matter of pardons, the authority of the Attorney-General to propose any relief or of this Tribunal to make recommendations to him. We invited the Crown to make a submission on these matters but it did not. However, we did have a written submission from Dr D V Williams of Auckland University Law Faculty. He considered a stay of proceedings too late in the day and urged legislative intervention modelled on s 7 of the Tauranga-Moana Maori Trust Board Act

whereby "the character and reputation" of certain persons who fought at Gate Pa was made "the same as if a full pardon had been granted to them". The convictions he submitted, added insult to injury.

12.24.5 Some relevant factors we considered were not as clear cut as first appeared.

(a) To the Crown's credit it sought the Supreme Court injunction only after it had concluded a settlement with certain of Ngati Whatua. From the Action Group perspective however, no settlement was sought with them or the Orakei Maori Committee. The latter had approved the protest and was a statutory body with authority to represent the Maori of the district.

(b) The Supreme Court, in a considered judgment determined that the claimants who were party to the proceedings were occupying Crown land without right, title or licence and that no grounds existed for withholding relief on equitable grounds. We incline to the opinion of Professor Brookfield however that the protest was

... the culmination of grievances caused by the policies of legislatures and governments, many of the grievances not justiciable and unlikely to have been concluded by a legal judgment which, however sympathetic, simply could not extend sufficiently to the issues of policy involved (Brookfield 1978:383).

In addition of course, the principles of the Treaty of Waitangi had no place in the law at that time, save for claims under the Treaty of Waitangi Act 1975.

12.24.6 Our approach to this matter has been to consider first the Treaty of Waitangi in relation to Ngati Whatua. The Treaty with Ngati Whatua followed in the wake of the musket and the 'trespass' on Ngati Whatua lands, homes and people by certain more northerly tribes. Te Kawau, it will be recalled, sought to end this state of affairs through an alliance with the white settlers in the Treaty of Waitangi, and only months after, he sought the establishment of a township on his lands to the greater security and advantage of both partners. The Treaty itself spoke of peace, order and "the necessary laws and institutions". In the factual matrix of its time, that reference had particular significance for Apihai Te Kawau and his people of Ngati Whatua.

12.24.7 Indeed, Te Kawau appears to have appreciated that a pledge to uphold peace and good order sometimes requires adherence to even unpopular laws (at least until the law itself is put right), or a commitment, to borrow a phrase quoted later, "to superior loyalties". Imprisonment for example, was barbaric to the Maori mind, and as we have seen (4.1) in 1841 Te Kawau was to shelter one of his tribe convicted of larceny; but he was also to relent, returning the offender to custody and calling on his people to accept the white-man's law and learn more about it.

12.24.8 That began a Ngati Whatua tribal policy to uphold the law and to work only through legal and proper channels. That policy, as we have seen, was to lead Ngati Whatua through a long series of Court actions and petitions in a bid to save the Orakei block. We need not review those actions again.

12.24.9 It is sufficient to say here that the Ngati Whatua circumstance indicates the importance of the "necessary laws and institutions" (as so described in the Treaty of Waitangi), and the value placed upon those words by one group of Maori at that time.

12.24.10 We come next to consider that the law denies no-one the right of protest, protest that is within the law - see for example the 1968 article, The Right to Protest (Keith 1968:49). With reference to the Maori protests of the following decades the late Professor R Q Quentin-Baxter was to add

Protest is the yeast working in our society, in a world society, provided in either case that the protest is made with a framework of superior loyalties (Quentin-Baxter 1984:207).

Here, we are mainly concerned with the proviso. "If the proviso is disregarded" added Quentin-Baxter "and the protest amounts to outright rejection, it can only be a step on the road to anarchy". That, we find, is a step away from what our forbears on both sides sought in the Treaty of Waitangi.

12.24.11 The protests in this case we find were unlawful, unlawful because they each involved a trespass. We come therefore to the conclusion that while there is nothing inconsistent with the Treaty that the claimants, and others, should have demonstrated to protest the failure of the Government to redress Ngati Whatua losses, it is inconsistent with the Treaty that such demonstrations should have been made unlawful through acts of trespass. To put it in a nutshell

(a) it was not the Crown that was in breach of the Treaty in taking steps to end or prevent illegal trespasses, but the protesters for effecting a trespass.

(b) it is not the Crown that is bound to provide compensation for the convictions, but rather the protesters, 'compensation' in this case being represented in the fines imposed. We would therefore make no recommendations for pardons assuming we might appropriately do so.

12.24.12 But we do not see that as the end of the matter. These things to us are clear and ought also to be brought into account -

(a) The stand at Bastion Point was the culmination of over 100 years of continual representations made only through proper channels and a series of complicated inquiries and court actions. Those representations and actions were futile for Ngati Whatua, and yet there is a long history of clear breaches of the Treaty, breaches that turned a proud and loyal

tribe into virtual refugees - a disillusioned, scattered and landless people. Any illegalities in the protest should be weighed with the enormity of the Ngati Whatua loss and the need, seen then as compelling, to call a stop to what was happening.

(b) The protest was the course of last resort. There was at that time no Court or Tribunal that could fully research and hear argument on the background facts and make findings upon them, at least in the light of that which is the source of all law for Maori people, the Treaty of Waitangi. This Tribunal was at that time limited to matters post 1975.

(c) Upon hearing the claimants, we find they held sincerely to the view, no matter how erroneous, that what they did was necessary and right. J P Hawke summed up their views as follows - "I went onto the Point" he said "not to invite an arrest but to arrest a wrong". He thought it good to rely on the law provided the law is just, but in his view, a law where the Maori is always morally right but legally wrong is a law in disrepair, and protest was needed not to destroy but mend it. In that sense we discern a commitment to superior loyalties, Hawke adding that he had no wish to be a protester, but in his view, his people had no other option if they were to obtain substantial justice. It is therefore extremely important to him that his name should now be 'cleared'. Those factors weigh heavily in mitigation in our view.

12.24.13 We have not researched the authority of the Attorney-General to recommend or grant any relief or the propriety of our own intervention, but with regard to the claim for pardons and compensation we conclude

(a) the protests, in so far as they involved unlawful trespass, were inconsistent with the principles of the Treaty of Waitangi. We therefore decline the recommendations sought, but nonetheless

(b) our findings on the background to the protests, and in particular the matters referred to in 12.24.12, should be conveyed to the Attorney-General for his consideration.

Waitangi Tribunal, Department of Justice, Wellington.