SUMMARY OF THE WAIRARAPA KI TARARUA TRIBUNAL REPORT

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Letter to the Minister

1. As in any report, there is a brief letter from the Presiding Officer, Judge Wainwright, to the Minister of Māori Affairs, Dr Pita Sharples.

2. The Judge noted that there has been a historically difficult relationship between the two tribes of this region, Ngāti Kahungunu and Rangitāne, but that this has improved and it is hoped that this will set the scene for a successful negotiation regarding the Treaty breaches the Tribunal has found.

3. They note that Te Reo Māori needs special support here because it has reached a very low ebb.

4. In terms of specific issues, the Presiding Officer stated that:

   (a) The many important Māori Heritage sites in the region are vulnerable;

   (b) Māori rights in and around Wairarapa Moana need to be recognised and given effect;

   (c) The Crown purchased too much Māori Land too quickly and without regard to the inevitable plight of a Māori population left virtually landless in a part of the country where agricultural enterprise was the principal route to a good livelihood; and

   (d) The Māori population of this area find it incredibly difficult to exercise any meaningful influence on what goes on in their own locality.

5. The Presiding Officer also refers to their previously released Chapter on Public Works last year and notes that the government are yet to respond to any of their suggested amendments.

Introductory Section

6. The introductory section to Volume I does three things in three sections:

   (a) Housekeeping - explains and describes the importance of people, places and words;

   (b) Outlines briefly how the report is organised; and

   (c) Captures the Tribunal's most pressing thoughts about its inquiry into this district. It crystallises lasting impressions of what is special and distinctive about the history here of Māori and the Crown over the past seven generations since Pākehā settlers arrived.

The claimants and their claims

7. The Tribunal made the following points:

   (a) The claimants in this Inquiry are part of a Māori population that was, and remains, relatively small; and

   (b) The people remain strong in traditions of manaakitanga, they worked together tirelessly to prepare for the hearings and were wonderful hosts;

Terminology

8. Throughout the report - and for the first time in a Tribunal District Inquiry Report - the Tribunal have tried to use Māori correctly by deploying tohu tō with a macron or macrons.

Names are potent

9. The Tribunal's Report is very careful to use the correct Māori spelling, in particular, the likes of Remutaka.

What struck us most?

10. In its introduction the Tribunal outlined what it is about the Wairarapa ki Tararua District Inquiry that is most striking. The key observations were as follows:

    (a) **The leasing experiment** – the Tribunal begs the question as to whether the arrangements in the early 1850s were a pilot for a different kind of colonial arrangement that did not involve wholesale transfer of Māori land to Pākehā, but nevertheless provided a means of fulfilling the agricultural aspirations of settlers; and

    (b) **The komiti nui and what came after** – reference was made to the pivotal gathering that took place in southern Wairarapa in 1853. It was obvious that this hui turned the tide of Māori opinion in Wairarapa in regards to allowing the town to acquire Māori land.

Wairarapa Moana

11. The Tribunal refers to the capable and determined rangatira who devoted their lives to solving an enormous problem for Wairarapa Māori, which was how to get settler administration to honour the purchase deeds giving them control over Lakes Wairarapa and Onoke.

12. Māori did not get the reserves near Wairarapa Moana, they lost control of their tuna fishery and the land the Crown gave them instead was 30,000 acres at Pouakani, hundreds of miles from home in another iwi's rohe.

The Kotahitanga Movement

13. It was suggested that those of us less steeped in Māori history may be stunned to find that, in the late nineteenth century, a whole Māori complex grew up at Pāpāwai Marae on the outskirts of Hupenui (Greytown). The Tribunal stated that the buildings that once comprised the impressive complex at Pāpāwai may be no more, but the spirit of Kotahitanga lives on.

14. The Tribunal refers to the hearings in Dannevirke, where Rangitāne o Tamaki Nui-ā-Rua have worked against the odds to bring them into an era of cultural resurgence, and described that as truly inspiring.

Te Tapere-nui-ā-Whātonga

15. The transformation of the mighty Tapere-nui-ā-Whātonga (Seventy Mile Bush) was another headline story of this Inquiry. The Tribunal refers to the loss of the bush and demise of the huia as having had a profound impact on tangata whenua.

The speed of change

16. The speed at which change occurred in this district in colonial times is one of the things this Tribunal marvelled at, for example:

(a) The amazing felling of Te Tapere-nui-ā-Whātonga; and

(b) The Crown's whirlwind buy-up of 1.5 million acres in the Wairarapa in 1853 and 1854.

17. As a result, in the space of no more than a decade, from the 1850s to 1860s, tangata whenua there went from being landlords who roamed at will through an expansive territory comprising coastal and inland domain to pleading with the Government to fulfil promises of small reserves as settlers flooded in to take up all the land the Crown had just bought.

CHAPTER 1:

TRADITIONAL OCCUPATION OF THE INQUIRY DISTRICT – 1800-1840s

1. Paragraph 1.1 sets out the geographical setting of the Wairarapa ki Tararua District. There is nothing of note in this section that requires comment.

2. The key points are:

   (a) The Tribunal acknowledges that many hapū that reside in Wairarapa and Tamaki Nui-ā-Rua trace their descent to the ancestors, Rangitāne and/or Kahungunu; and

   (b) Despite a great deal of intermarriage, Ngāti Kahungunu and Rangitāne retained separate identities.

3. The Tribunal also deals with Aho Rua hapū.

Descent and Occupation

4. The Tribunal acknowledges that Native Land Court records give a reasonable indication of where different hapū were located and where they exercised rights.

5. The Tribunal's description of the geographical setting is acknowledged as a skeletal outline of the larger hapū groupings, and is by no means comprehensive.

6. Te Rangi-whaka-ewa is recognised as the principal tipuna in the Tamaki Nui-ā-Rua area.

7. The Tribunal states that while Ngāti Rangi-whakaewa hapū could often also trace descent from Ngāti Kahungunu ancestors, rights to most of the land in the Tamaki Nui-ā-Rua area north of the Manawatu Gorge and west of the Tautāne block were claimed through Rangitāne.

8. The Tribunal identifies Tamahau as the ancestor of the Ngāti Hāmua people of Wairarapa, specifically those in Central and Southern Wairarapa. Ngāti Hāmua had its strongest presence south of the Manawatu Gorge, from Te Hāwera south to the Te Oreore area near present-day Masterton.

9. In regards to the migration of Ngāti Kahungunu hapū to southern Wairarapa, the Tribunal states that Rangitāne hapū remained in southern Wairarapa with some of their land and resource use rights intact. The Tribunal briefly deals with some of those hapū in the areas of influence at page 4.

10. The Tribunal states that Ngāi Tūmapuhia-ā-Rangi is a hapū of Ngāti Kahungunu but also trace descent to Rangitāne.

11. The Tribunal utilises the evidence given by both Rangitāne groups in regards to traditional occupation sites.

12. Ngāti Hinewaka identify principally with their Ngāti Kahungunu ancestry, but also share ancestry with Rangitāne.

13. The Tribunal acknowledges that the hapū, Te Hika-o-Pāpāuma, was only linked by marriage to Ngāti Kahungunu. They also acknowledge there is much intermarriage between Te Hika-o-Pāpāuma and Ngāti Hāmua.

14. The Tribunal acknowledges the links with Rangitāne living to the west of the Manawatū Gorge and those on the eastern side, but acknowledges that each group operated autonomously and continued to do so throughout the nineteenth century.

Growing, Gathering and Hunting Food up to the early 1800s

15. This section sets out settlement patterns of tangata whenua in the district. It refers to the evidence of Foss Leach and Takirirangi Smith.

Transport and Communication

16. The Tribunal then goes on to discuss how Wairarapa ki Tararua Māori travelled throughout their rohe before 1840.

Pākehā Arrival Causes Change in the Māori Economy and Environment

17. The introduction of new plants, animals and technology and changes in land use in Wairarapa led to dramatic changes in the local economy and environment.

18. In regards to population, Angela Ballara estimates that the combined Māori population of Wairarapa and Hawkes Bay was around 5,700 in the early 1850s.

The Musket Wars of the 1820s and 1830s

19. The Tribunal discusses the 'musket wars', fought in Wairarapa and Heretaunga during the 1820s and 1830s, which were the culmination of a cycle of conflict that began in the late eighteenth century, before the introduction of muskets.

20. The Tribunal goes into further detail, having particular regard to the following:

    (a) The effects on Rangitāne;

    (b) The attacks on southern Wairarapa from the south;

    (c) The attacks on the rohe from the north;

    (d) The preparations to take refuge at Nukutaurua; and

    (e) Rangitāne's response to the incursions.

Nukutaurua – The Exodus and the Return

21. The Tribunal traverses the exodus and the return of Nukutaurua in the following parts:

    (a) Migration in waves;

    (b) Those who stayed behind;

    (c) Life at Nukutaurua;

    (d) Other groups move into Wairarapa;

    (e) Wairarapa hapū take action;

    (f) Te hokinga mai (the return home);

(g) Uncertain times in the rohe;

(h) Pākehā bring change; and

(i) The challenge of the new.

A Changing World – Missionaries, Squatters and Settlement

22. Apart from their contact with whalers at Nukutaurua, most Māori in Tamaki Nui-ā-Rua had minimal interaction with Pākehā before the 1840s.

23. The Tribunal records that no leaders from the area signed the 1835 Declaration of Independence or the Treaty of Waitangi.

24. The Tribunal also discusses native teachers, specifically their interaction with Rangitāne and Kahungunu. It refers to Hoani Meihana (John Mason) as an important Rangitāne leader who converted to Christianity in 1840.

25. The Tribunal then outlines the impact of Christianity, specifically the appeal and negative responses by Wairarapa ki Tararua Māori.

Summary

26. The Tribunal has relied on evidence prepared by Rangitāne including that of:

(a) Mike Kawana;

(b) Manahi Paewai;

(c) Tipene Chrisp; and

(d) Parsons and Ropiha.

Conclusion

27. The Tribunal notes that the period from 1800 to 1840 was one of considerable change for the people of Wairarapa ki Tararua. Within a relatively short span of years, introduced plants, animals, and technology altered the nature of the ecology and economy of Wairarapa and Tamaki-nui-ā-rua.

28. Some traditional resources were destroyed by the introduced species, while the new crops and animals became major food sources. New diseases increased death rates among the local people, and muskets transformed the nature of warfare throughout New Zealand, with enormous impact on Wairarapa.

29. In response to the escalating warfare, a large proportion of the tangata whenua population left their homelands for Nukutaurua and Manawatū. They returned in the late 1830s and 1840s, but changes in the economy and the adoption of Christianity modified their earlier settlement patterns.

30. In these years Māori social organisation was largely unaltered and rangatira continued to exercise authority in relation to land and resources as they always had – that is, with the sanction of their community.

CHAPTER 2:

THE RISE AND FALL OF THE WAIRARAPA LEASEHOLD ECONOMY

The Issues around Leasing in Wairarapa

1. This Chapter canvasses the informal leasehold arrangements that existed between Māori and settlers from late 1843 onwards. Local rangatira supported the informal leasing arrangements and essentially they were the life blood of new colony. However, in the 1850s, this economy was brought to an end by the Crown.

2. The Crown was of the view that it was infringing on its pre-emptive right in Article 2 of the Treaty. Māori on the other hand, maintained that leasing their lands was part of their tino rangatiratanga.

3. Māori in the Wairarapa were told in the late 1840s and early 1850s that these lease arrangements could not continue. They were given two options:

    (a) They could keep their lands under their own laws but they would lose Crown favour and the prospect of settlers and the benefits they brought – and they would also lose their lessees as the leases were now illegal; or

    (b) In return for peace, prosperity and partnership in developing the colony they could accept the permanent alienation of their lands and the Crown's authority over those people.

The claimants' argument

4. In broad terms, the claimants made the following allegations:

    (a) The Crown forced Māori into outright sales;

    (b) When the Crown moved to end the lease arrangements, Māori lost the opportunity to maximise their chances of participating in the new economy;

    (c) The Native Land Purchase Ordinance 1846, which made direct leasing from Māori illegal, was a slight on Māori rangatiratanga;

    (d) If Māori had been able to continue with the leasing agreements, joint business ventures may have been possible;

    (e) The Crown deliberately undermined the leasehold arrangements by not only making them illegal, but also by pursuing purchasers in the Hawke's Bay to ensure that settlement of the region advanced on a purchase and not leasehold basis;

    (f) The Treaty only contemplated pre-emption in relation to the outright alienation of land, and not leasing; and

    (g) The Crown's motivation was to force Māori into a position of inevitable sale of land, and its focus at all times was on the eventual purchase of Wairarapa.

The Crown's argument

5. In general terms the Crown's submissions were as follows:

(a) By preventing direct leasing from Māori to European the Crown argued was a legitimate and unremarkable exercise of sovereignty in the interests of the peaceful development of the colony;

(b) The right of pre-emption included all alienations of land including leasing;

(c) The 1846 Native Land Purchase Ordinance cannot be seen as a slight on rangatiratanga as there were no penalties for Māori;

(d) A leasehold system would not have helped Māori participate in the economy;

(e) Māori aspirations could only be adequately met by sale and Crown-sponsored settlement under the land fund model;

(f) The Crown's position was that it had an authority over British subjects which included the right to exclusive dealings with Māori concerning their land;

(g) The Crown's control over dealings between the settlers and Māori was at the heart of the Treaty;

(h) The leasing system would have imposed a low ceiling on the development of the colony; and

(i) Insecurity of tenure discouraged both investment and capital accumulation, and the Crown's opposition to direct leasing actually caused little direct prejudice to Māori.

The Tribunal's inquiry in this chapter

6. The question that the Tribunal considered was whether the Crown had breached its Treaty obligations by acting to curtail informal leasing arrangements so that settlement could proceed by means of Government purchase alone. In answering this, the Tribunal explored the following issues:

(a) Was the leasehold economy a successful one representing the fullest exercise of Māori rangatiratanga in the 1840s and with potential for development? Should officials have encouraged that system to grow?;

(b) What were the factors that influenced Crown policy? Did those factors mitigate any breach of the Treaty that the Crown committed in relation to direct leases between Māori and Pākehā?; and

(c) How effective were Crown policies and actions in bringing the leasehold economy to an end?

The Wairarapa Leasehold Economy

The arrival of the squatters

7. When Europeans first arrived in the Wairarapa they thought that it was unoccupied and unused. They soon realised that this was not the case and permission of the tangata whenua was required for any occupation of the lands.

8. The Wairarapa was seen as extremely valuable for sheep farming given minimal work was required for converting this land to pasture. The country was also well watered, with an excellent supply of timber for domestic purposes such as building and fencing.

9. The Wairarapa environment also suited merino, which could be imported from Australia and therefore the early squatters were soon rewarded for their enterprise.

Wairarapa Māori pursue the new

10. By the early 1840s, Wairarapa Māori had seen the material advantages that the settlers had brought to Port Nicholson and were keen to share with them.

11. Ngāti Kahungunu-Rangitāne visited the New Zealand Company Settlement at Port Nicholson and there was eagerness amongst the native chiefs to have settlers come and live amongst them in the Wairarapa.

12. Leases were being negotiated between Māori and prospective pastoralists and soon a number of stations had been established in the Wairarapa, and the European population had grown to almost 200 by 1848.

How did Māori conceive of the leases?

13. The leasing arrangements resembled traditional tuku whenua in many respects. This was the case with many of the original leases; squatters had to make gifts of the produce of the land to those Māori whose mana protected their occupation and supported them politically and socially. While the squatters had no choice but to accept the situation, they did not agree with these extra payments and considered the taking of items of property as theft.

14. It was these differences that occasionally brought local Māori into conflict with settlers and the Crown. What the Tribunal did find, however, is that although conflict may have arisen over things like rents, stock and trespass, one thing was clear, that these arrangements were made under the authority of the local rangatira and supported by their community.

15. The Māori view of these leases was that the relationship was ongoing, extending to the descendants of both parties. Early conflicts arose when Europeans treated the leases as purely commercial arrangements, attempting to transfer them to others without consideration of the right of the Māori owners of the land.

16. The Tribunal uses the case of Frederick Weld, who was one of the first squatters in the Wairarapa that set up a sheep station. The Tribunal looks at the relationship Weld had with local Māori and the various lease dealings he was involved in.

17. The Tribunal concluded that, in their view, Māori were "hospitable, curious, often helpful and protective in their dealings with Weld".

The leasing system brought mutual benefit

18. The Māori view was that the pastoral leasing economy between 1844 and 1853 was a mutually beneficial arrangement for both Māori and the pastoralists. Māori encouraged the establishment of sheep stations but knew they were unable to control expansion of the industry, and as their knowledge increased they negotiated better terms for themselves.

19. Initial rental was £12 for a term of 21 years. However, this increased significantly over the next 10 years, and by 1952 it had risen up to £1,200 per annum.

20. As Māori knowledge grew, further restrictions were placed in leases. For example, initially pastoralists were allowed to take timber for their building and household needs, but later they were denied the right to cut timber for any purpose and had to pay for what they used.

21. Māori were willing and able to engage with the settlers from a position of strength in that while they were receiving rental they were also gaining skills and knowledge. Some rangatira moved there kāinga to be closer to the stations and to facilitate trade. What came with these relationships was that Māori also saw that they had responsibility to not only be hospitable but to protect these Pākehā.

22. During this time, Māori showed themselves to be extremely entrepreneurial and made the most of the new settler economy. They were involved with the following:

    (a) Rental income;

    (b) Wages and payments for services;

    (c) Crown labour;

    (d) Shearing;

    (e) Operating ferries at the mouth of the Wairarapa Moana;

    (f) Transporting supplies;

    (g) Crops; and

    (h) Stock.

Summary

23. The Tribunal found that Māori had adapted quickly to the new economy and were participating at different levels in a range of activities and on equal terms. While they concluded that the initial indications were that Māori were reaping benefits from colonisation and settlement, they had questions over whether simply leasing the land was going to have long term success for Māori.

24. The Tribunal found that Māori would be unable to accumulate sufficient funds by leasing alone, and therefore would need to sell some land at a reasonable price.

25. The Tribunal also found that the Crown needed to assist Māori to put them into a position where they could raise the capital and develop the land they retained.

Leasing and Crown Policy 1840-53

26. The Tribunal considered why the Crown brought leaseholds in the Wairarapa to an end, and whether this was compatible with the promises they had made to Māori.

The land fund

27. The maintenance of the pre-emption right was integral to the operation of the land fund.

28. The purpose of the land fund was to enable the Crown to cheaply buy Māori land and re-sell it to settlers at a higher price; the surplus used to finance colonisation and government.

29. In 1939, Lord Normanby, the Secretary of State for the colonies, highlighted that to the Crown this was the best way of promoting settlement.

30. The key factors of this policy were the need to finance systematic settlement, immigration, infrastructure, social purposes and administration. Māori however, felt that the outcome was unfair.

Normanby's instructions: 'an object of the first importance'

31. Lord Normanby's instructions to Governor Hobson in 1839 were the key statement of the Crown intentions in a period crucial to the Wairarapa people.

32. Normanby's instructions were:

    (a) To negotiate with Māori cession of sovereignty; and

    (b) No lands were to be sold or gifted to anyone other than the Crown.

33. Hobson was instructed to act in good faith with Māori in recognition of Her Majesty, sovereignty and the islands.

34. In the Wairarapa, there were no old land claims (land dealings made between Māori and European prior to the declaration of British Sovereignty over New Zealand).

Article 2 of the Treaty of Waitangi and pre-emption

35. The Crown considered itself to have a pre-emptive right, irrespective of Māori agreement or otherwise. However, Article 2 did include the express right of pre-emption.

36. The Māori text contained the word 'hokonga' which was considered controversial. Some language experts consider that it was used to only mean 'sale' and not to refer to other forms of land transactions.

37. The Tribunal noted that not all claimants agreed that there was a distinction between sale, lease or gift while the Crown's evidence argued that the term 'hoko' was used interchangeably with other others, including 'tuku' and was not to have a distinct meaning of permanent alienation.

38. The Tribunal view is that the wording 'te hokonga o era wahi whenua' gave rise to considerable misunderstanding. The Tribunal went on to say that the idea of pre-emption was sold to Māori on the basis that it was for their protection.

Ensuring compliance with policy

39. Māori continued to lease land as they had in the past.

40. Hobson sought Governor Gipps' advice on the issue, and Gipps was of the view that Māori leasing was illegal by virtue of the fact that Māori did not have an individual right of property and therefore could not impart it to others.

41. Hobson considered the matter urgent and moved to introduce his 1841 Land Claims Ordinance, which significantly restricted Māori capacity to exercise tino rangatiratanga over their lands and resources. However, as no penalties were introduced by the legislation, the Crown had no way to enforce the right it had assumed.

42. Therefore, in reality little changed because it was questionable whether Māori even knew about the restriction, and if they did, they did not accept it. The restriction also did not deter the settlers who continued to enter into arrangements for land with Māori.

Crown pre-emption under challenge

43. Not only were Māori opposed to the Crown right of pre-emption due to the fact they kept land prices low, but so were the settlers and investors.

44. A strong free trade party developed in Auckland, advocating the abandonment of Normanby's land fund model and "Māori protective" approach in favour of "free colonisation".

45. From 1839-1840, it was assumed that there was much unused, unowned land that the Crown could grant or sell to new settlers and earn revenue from. This was not the case, at least in terms of the low prices that the Crown was willing to pay.

46. There was growing opinion that the Treaty had been a mistake, and this view came to the fore in the 1844 Select Committee where it was echoed in Earl Grey's subsequent waste lands instruction.

Waiver of the Crown's pre-emption right

47. Hobson's successor, Governor Fitzroy, began his term by waiving the Crown's pre-emption right due to the pressure for land and the lack of government funds.

48. He authorised a waiver of 450,000 acres in Wairarapa where a government officer was to assist in any negotiation. There was then a waiver over another 250,000 acres at places within the limits claimed by the New Zealand Company under its November 1840 agreement with the Crown.

49. A more general waiver system was introduced for the Northern District in March 1844 by the '10 shillings an acre' proclamation. Settlers were permitted to purchase a limited acreage directly from Māori on paying a fee of £4 per acre to secure the waiver permit, and £6 into the land fund for general government purposes.

The situation in Wairarapa

50. The general waiver system never extended to Wairarapa, because the right of purchase was confined to the New Zealand Company. Despite this, settlers and Wairarapa rangatira continued to negotiate directly in the Wairarapa.

Peace of the colony?

Disputes few and minor

51. In the main, the relationship between Māori and the settlers was a good one, and for the most part disputes were settled without Crown intervention.

52. Although there were disputes at times, there were no violent outbreaks over rights and rents in the Wairarapa.

53. The settlers looked to the Crown for protection, especially with respect to the ownership of freehold property, and it is likely that Crown intervention will have been required in the near future to ensure the rights of all parties were protected.

54. But essentially, the Tribunal were of the view that there was nothing to suggest that the Crown had to end leasing arrangements to maintain the peace of the colony.

Maintaining the Peace of the Colony – Did English Law Apply to Māori?

55. The Tribunal briefly discusses the law that was to prevail in the colony at page 42.

56. As many rangatira did not did sign the Treaty, including the people of Wairarapa ki Tararua, there was some confusion as to who held the sovereignty.

57. There was recognition amongst many that Māori customs should continue to a degree, but that British laws and customs would ultimately prevail, as would the authority of the Crown. The popular view seemed to be that Māori should be treated as British subjects and under British law, but that there were

advantages of accommodating Māori custom, which it was accepted could not be discarded, at least immediately.

58. The Native Exemption Ordinance 1844 allowed for a period of transition in which English law would be brought to bear gradually on Māori.

59. Some allowances were made in the criminal jurisdiction to involve rangatira in the process and also to include elements of tikanga.

The cession of Maungaroa (Bartons Run): An unreasonable exercise of Crown sovereignty?

60. This involved an incident that arose from a muru of goods due to some that had interests in land being left out of leasing arrangements and rentals. The matter was dealt with by Sub-Protector Forsaith.

61. The Tribunal accepted Stirling's assessment that Forsaith had pre-judged the case and pre-determined the punishment. His primary concern was putting down the practice of muru. He did not bother to inquire into who held customary rights to the lands to be ceded, and those that had not even been involved were still required to cede land.

62. Forsaith showed a lack of impartiality and discretion, and his actions were more akin to an attempted land grab rather than a fair arbitration under the Native Exemption Ordinance.

63. Despite subsequent Crown representatives disagreeing with Forsaith's approach, they did nothing publicly.

64. Māori were left feeling as though they had to comply with whatever the officials wanted in order to retain the protection and therefore the settler economy.

Treaty breach

65. The Tribunal found that there was a breach of Treaty principles in this regard. The Crown failed:

    (a) To act in good faith, particularly in not undoing Forsaith's deeds once the extent of their unfairness was appreciated;

    (b) To actively protect Māori interests; and

    (c) To accord Te Weretā and affected others equality before the law (the process Forsaith engaged in with Wairarapa Māori would never have been imposed on Pākehā), thereby denying those Māori the rights of British citizens under Article 3.

The demise of the Wairarapa leasehold economy: Crown policy under Sir George Grey

Grey restores Crown pre-emption

66. The arrival of Governor Grey in 1845 brought an end to Fitzroy's experiment in waiving pre-emption and ultimately the formal leasing arrangements in the Wairarapa. Grey saw pre-emption as a means of ensuring good behaviour by Māori.

67. Grey argued, too, that disputes had arisen under the waiver system because titles had not been properly investigated, and boundaries were undefined, adding to the sum of land issues already faced by the Government.

68. Grey expected that titles be correctly established to show that the land was fairly acquired with the informed consent of the proper owners, and with boundaries properly surveyed.

69. The Tribunal commented that the standards could have been applied to good, regulated leases.

Grey opposed to informal leasing

70. Grey was firmly opposed to a free and unsupervised market in land. While the 1841 Ordinance included leases as well as other land transactions that required a Crown grant to be legal, there were no penalties for ignoring this requirement, and therefore squatters were prepared to take the risk.

71. Essentially it was a safe bet because neither the government nor Māori wanted to turn them off their runs.

The Native Land Purchase Ordinance 1946

72. The 1846 Native Land Purchase Ordinance provided for the prevention by summary proceedings of unauthorised purchases and leases of land.

73. The preamble stated that government control of the disposal of land was essential to the peace and prosperity of the colony. Breaches would attract a fine, and only Pākehā were liable to prosecution. It was intended to punish European offenders rather than confiscate Maōri land.

74. Grey's position was that the Ordinance would benefit both the settlers and Māori. For Pākehā, it would guarantee them necessary security, and for Māori, his view was that unsupervised dealing in land still under native title would result in a degradation of Māori.

75. According to Grey, penalties for infringement of the pre-emptive right were within the legitimate exercise of sovereignty. The pre-emptive right of the Crown was not derived from the Treaty, and the Treaty could not alter it. It was a principle established and enforced between the Queen and her British subjects. *Queen v Symonds* (1847) NZPCC 387. There was therefore nothing remarkable about introducing penalties for British subjects who ignored the pre-emptive right.

76. Loveridge suggests that the proposed new law came as a surprise to the Legislative Council, but was accepted on Grey's assurances that the interests of existing squatters would be supported, and that a new and more effective way of opening up land would soon follow.

77. To Grey, it was the first step in preventing further irregular settlement and paving the way for his new system for the regulation of direct sales and leases.

78. Those advocates of direct purchase partitioned for the Ordinance's repeal saying that it was unjust and arbitrary. The opposition argued that the Ordinance would bring an end to whaling, timber, cattle and trading stations. Petitioners said that the Ordinance was "calculated to excite the suspicions, and rouse the jealous apprehensions of the entire Native population, inasmuch as it is a virtual abrogation of the Treaty of Waitangi".

79. The editor of *The New Zealander* agreed and said that as far as the Treaty was concerned, the Ordinance amounted to "an occult breach" of that agreement.

80. It was not Grey's intention to take land off those that had already established a sheep run or timber station. He wanted to secure the occupants a right, while at the same time preventing any further squatting.

81. The Governor informed Earl Grey that he intended to introduce a licensing system which would give the Crown great influence over Māori from the fact that it regulated the mode under which the wastelands would be leased.

82. Controlling Pākehā access to use and occupation would also enable the government to insist that questions of ownership were first "amicably arranged amongst the Natives first", with claims to such lands "duly ascertained and registered".

83. He was also of the view that the Ordinance actually protected Māori. The main themes in defence of his Ordinance were:

    (a) Unregulated direct purchase and leasing would encourage tribes to take land from their weaker neighbours;

    (b) Greedy European speculators would be able to acquire large areas at small cost; and

    (c) While there was an acknowledgement that the Crown's pre-emptive power impeded Māori rights he said this was necessary to protect the peace of the colony.

84. In 1847, Grey was still looking to establish a system whereby Māori would be protected in the meantime for the rents and likewise for squatters and their tenancy. However, a few months later, the Governor received Earl Grey's 1846 wastelands instructions that cut across his own proposal. No system of securing leases to both parties was ever introduced. Instead, it was a uniform system of a large scale Crown purchasing, which was considered the best and only means of promoting settlement.

85. The Tribunal also goes into some detail with about the Native Land Purchase Ordinance, Normanby's colonisation model and Governor Grey's colonisation model with respect to the Wairarapa.

Earl Grey's wasteland instructions and the leasing proposals that came to nothing

Before Earl Grey

86. Earl Grey's predecessor, Lord Stanley, gave Grey instructions to re-introduce pre-emption to carry out Normanby's and Russell's early instructions to identify the correct owners before buying land for the New Zealand Company, and assist the company in putting settlers in possession of land.

87. Stanley also assumed that there was unused land that did not properly belong to anyone. The unclaimed wastelands would belong to the Crown, and Grey was told to register Māori claims to the land that was theirs within three years so that the unused wastelands could be clearly demarcated.

88. Stanley did expect the Treaty to be upheld and Māori land claims to be respected. Registration of Māori claims was to follow a proper inquiry as to titles based on Māori custom.

Earl Grey's approach

89. Early Grey's approach was a less generous interpretation of wastelands.

90. In 1844, he chaired the House of Commons Committee that condemned the Treaty (particularly Article 2) and the British Government's view that this meant Māori owned all lands in New Zealand.

91. Governor Grey was told to honour any prior Crown recognition of Māori title, but where there had been no such recognition; he was to follow principles set out in the 1844 report. These principles were not based on Māori customary law but on the views of a Swiss jurist, de Vattel.

92. de Vattel's principles were based on the fact that Aboriginal peoples had no laws of their own and only had title to land upon which they had built houses or laboured. This ensured that Māori title to land was narrowly defined and Crown title was asserted over the rest.

93. In 1848 Earl Grey reaffirmed the Treaty in a letter to the Wesleyan Missionary Society, and said that the Government recognised the Treaty and Māori title to lands which Māori possessed according to native usage, whether these were cultivated or not at the time of the Treaty. The exclusive right of extinguishing such title by purchase was secured to the Crown.

Governor Grey's 'nearly allied principle'

94. Governor Grey did nothing to implement Earl Grey's instructions. The Governor insisted that the Crown's right of pre-emption should be re-asserted and that Māori would submit, as in his view this was the best guarantee for the future welfare of Māori and Māori agreed to it.

95. Grey's view was that Māori would recognise the Crown's right of pre-emption so long as Article 2 guarantees applied to all lands, not just lands in use. He therefore advocated for making bigger purchases ahead of the demand from settlers.

96. With respect to the wastelands, they felt that they had very little value to Māori and that boundary issues could be resolved by nominal purchase payments.

97. Essentially Grey thought that his proposal was very similar to Earl Grey's, except that his would work while Earl Grey's wasteland instructions would be rejected outright. The Tribunal felt that it was essentially the same thing but under a different guise.

Governor Grey's approach crystallises

98. The period of which the Governor was open to Māori leasing their lands had ended. The process now was that the Crown would identify the correct right-holders and purchase from them large tracts of unwanted land at cheap prices and register Māori ownership of what was left.

99. In 1849 the New Ulster Legislative Council tried to persuade Grey to introduce an Ordinance allowing Māori to lease their wastelands under Government rules and regulations.

100. Grey opposed this and said that regulated leasing was no longer even a remote possibility.

The Tribunal's assessment

101. The land fund influenced Crown policy on leasing, but it was not the only influence and in itself did not justify the Native Land Purchase Ordinance.

102. The Ordinance was an indirect restraint on rangatiratanga as it sought to stop informal dealings in land. The Crown should have looked at a means of being able to uphold tino rangatiratanga and protect the land fund.

103. It was the Tribunal's view that controlled leasing could have achieved this with the Crown charging for registration of interest and dispute management of some kind.

104. While Earl Grey's wasteland instructions were not implemented, they were very influential. Although Earl Grey backed down from his original instructions and reaffirmed the Treaty, this only spelt the demise of the wastelands theory not its practice.

105. The only path left open for Māori participating in the colonial experiment was large scale land sales at low prices with retention of sufficient reserves to be able later to reap the benefits of settlement.

The Native Land Purchase Ordinance: A dead letter?

106. Given that Māori were not liable to penalties under the Ordinance and there were no prosecutions brought against the squatters, the Tribunal questions how it prejudiced Māori of the district.

107. The Crown's view is that it did not prejudice Māori in any way as their abandonment of leasing was a natural development, rather than as a result of government actions.

108. The claimants' view however is that the Ordinance served to ensure that they could no longer enter into arrangements as they wanted to, and the only option available to them was sale.

The New Zealand Company targets Wairarapa land

109. Grey's goal in the Wairarapa was to assist the New Zealand Company in its purchase of 150,000 acres.

110. Squatter co-operation was secured by offering them the right to purchase their homesteads and 20-30 acres for paddocks at a fixed price. Māori would be set aside reserves to encompass cultivations and land for sheep and cattle runs.

Initial rejection of the Company's overtures

111. Māori did not want to entertain the permanent transfer of their land. New Zealand Company employee, Francis Dillon Bell, who was assisting with negotiations for the purchase of land, felt that the resistance came from the fact that Māori were happy with the rental they were getting off their leases.

112. Bell asked Grey to send a letter to Māori and the squatters advising them that if they did not sell their land then the squatters would be made to leave. However, it is unclear what happened to this letter, but one school of thought is that it was destroyed by the first person that read it.

Enforcing the Ordinance

113. Lieutenant Governor Eyre thought that the best course of action would be to ignore those squatters already in occupation, and even new arrivals provided they were prepared to go somewhere that would not cause issues. However, for those entering districts where their presence was going to be an issue for future government arrangements, they were to be warned that they could be prosecuted and fined.

114. However, initially Grey had no interest in implementing the Ordinance thinking that it was the job of the New Zealand Company.

How much land could safely be purchased?

115. In March 1948, Governor Grey's instructions were to assist in the purchase of 300,000 acres. However, by June 1848 he was ordered to assist in the purchase of 1,000,000 acres.

The second attempt at purchase

116. Henry Tacy Kemp, a Native Land Purchase Commissioner, was to assist in the negotiation to end squatting arrangements. He was to be assisted by Francis Dillon Bell.

117. His instructions were that if the settlers did not co-operate, then they should be threatened with the Ordinance. He was also to purchase as much land as possible east of the Rimutaka and Ruahine Ranges, as far as the Hawke's Bay if possible, and set aside reserves that he saw necessary. What 'necessary' meant was unclear.

118. The amount of £5,000 was available with the purchase to be paid in five annual instalments with annuities of £25 each for the four principal chiefs. An estimated £2,000 would be required to compensate run-holders.

119. This purchase attempt was again unsuccessful. Māori did not like the scale of the proposed purchase, the price or the demand that land be kept forever. Māori were given the message that they must choose between two options – permanent alienation or no settlement at all. It was pushed on them that the real benefit to them was the advantages that civilisation would bring.

120. Bell's view was that due to the constant pressure that they put on Māori, their attitude began to change, although they still wanted to know why they could not sell directly to the settlers. Māori seemed to be convinced by the proposed benefit of a settlement in the area and the wealth that that would bring to them. However, there was still opposition, especially north of Ōtāraia.

121. It was discovered when boundaries were laid that those that supported alienation held the smaller and poorer portion of the valley. Those that were opposed to the alienation held the greatest amount of land in the district.

122. There was also a large gap between the vendor's asking price of £16,000 for the poorer lands and the Company's offer of £4,000 for the whole of the area south of Whareama.

123. Māori did not see the threat to use the Ordinance as credible. They only saw it as a device to force them to sell, but an ineffective one as they did not think the government was in a position to follow through on the threat.

124. The New Zealand Company then started looking at Canterbury as a better site for their settlement and Wairarapa was put on hold.

125. In 1849 McLean was instructed to make a third attempt to purchase Wairarapa, however events in Taranaki and Manawatu delayed him, and in the meantime the New Zealand Company collapsed. From the 1950s onwards the Crown negotiated for land on its own account.

McLean, Leasing, and the Land Purchase Ordinance

McLean authorised to implement the Land Purchase Ordinance

126. McLean was instructed to make a district wide purchase and prosecute under the Ordinance although the reluctance to remove squatters remained.

What did McLean do to deter leasing?

127. The Crown's evidence identified four instances where McLean directly cautioned individual squatters against illegal leases. The Crown conceded that none of these disputes however were serious. Despite occasional grumbling, relations between settlers and Māori were peaceful.

A fraught situation?

128. Wairarapa squatters began wanting Crown intervention to secure their interests.

129. They were reassured and told to expect their runs to be made freehold, and that their tenure was secure.

130. McLean was advising Māori that leasing would no longer be tolerated and that they should not expect to get a price for the freehold that reflected the level of rentals that they had been receiving.

The Hawke's Bay dimension

131. Claimants' evidence suggested that Crown deliberately tried to undermine leasing in the Wairarapa by encouraging the squatters to take up runs under a more secure tenure of Crown grant in Hawke's Bay.

132. The claimants further argued that the Crown knew that the development in Hawke's Bay would diminish the capacity of the Wairarapa chiefs with respect to not selling. While the Crown did not deny this, they said that the Crown was entitled to do so.

The Tribunal's assessment

133. The Tribunal accepted that the Crown was entitled to pursue land purchasing outside of the Wairarapa in the hope that this would persuade Wairarapa people that they too should sell.

134. However, the Tribunal did support the Crown view that it was not obliged to support squatting in Wairarapa.

135. The Tribunal found that "if leasing was more likely to enable Māori to continue to exercise te tino rangatiratanga and it was an option that they preferred to outright purchase, the Crown certainly was obliged to support it.

136. Although there may have been issues with leases and the security of the tenure, Crown purchase was not the only alternative.

137. Further, the Tribunal found with respect to the Land Purchase Ordinance that it failed to treat Māori and Pākehā fairly and equally. The Crown favoured the interests of the squatters over Māori promising to protect them and threatened withdrawal of favour and livelihood for Māori.

138. The Tribunal found that the Crown was giving Māori the message that the land had no monetary value without the promise of European labour and technology, and that only after it had been sold for a nominal price would it be eligible for any increase in price.

139. The Tribunal further found that the Crown acted deliberately to undermine leasehold tenure in the Wairarapa and its insistence on purchase was in breach of the Treaty principles of protection and equity.

Was the leasehold economy doomed to fail?

What the Crown argued

140. The Crown submitted that the leasing economy was unlikely to be sustainable. In brief, the Crown focused on the following:

    (a) The local leasing situation and whether it would have been able to carry on or grow; and

    (b) The colonial context and whether colonisation would have been possible if leasehold tenure had been allowed to expand.

141. The claimants contended that the leasehold economy was successful and that their tūpuna would have still been able to participate in the economy had the Crown not brought it to an end.

How big was the area under grass lease by 1853?

142. Lands leased in the initial stages of settlement can be put into two categories:

    (a) The valley lands; and

(b) The East Coast country.

143. The areas together comprised possibly 380,000 acres by 1855 when the Crown insisted that Māori sell their lands outright. The Tribunal noted that this figure was a guess though as a detailed survey was not made.

144. In 1847, 15 runs had been established. By June 1853, this had increased to 27.

145. In 1855, Bell estimated that 26 licences had been issued for pastoral runs on what was now Crown owned land in the Wairarapa, which covered about 380,000 acres.

Was sheep farming in the Wairarapa profitable?

146. The importance of wool to New Zealand's economy in the colonial period cannot be over emphasised.

147. Pastoralism was, apart from gold mining from the early 1860s to the early 1870s, the most important industry in the country from the mid-1850s until the 1890s.

148. The high demand was reflected in high prices, especially for the fine merino wool that could be produced in the Wairarapa conditions. This sold at a premium until the 1870s when the development of the new worsted process enabled coarser wool to be used producing a strong smooth flat cloth that became the new fashion.

149. From the settlers' point of view, sheep farming was highly profitable in those years with wool prices buoyant through the late 1840s to the end of the 1860s.

150. In 1853 there were about 37,000 sheep in the Wairarapa which could have produced a gross income of £8,063 from wool alone using the figures of 4 pounds of wool per sheep at 14 pence per pound.

151. While considerable capital was needed to get the ventures underway, good returns could be made once established.

152. As Wairarapa pastoralists were the first large scale sheep owners in the country, they were in a prime position to take advantage of the demand for livestock as settlers ventured into new districts. There was also a ready market in Wellington for mutton. In the first 20 years, a run holder who got established benefited from good returns.

The Crown's reliance on Professor Hawke's economic model

153. The Crown's argument about the limitations of leasehold tenure basically comes from two evidential sources – Hawke and Patterson. Hawke's owner-operator model is as follows:

(a) Hawke proposes the economic model of the owner-occupier. However, the Tribunal felt that a better term for it was owner-operator. This is because an owner who lives on the farm does not necessarily run it, but the model of the owner living on and managing the farm is what Hawke says is best economic practice.

(b) Hawke considers the owner-operator model best practice because a small unit run by the farmer and his family can achieve better results than larger units with many employees. Secondly he argues that because they own the land and stock they are likely to be better farmers as they have more incentive to look after the animals and crops.

(c) The Tribunal notes that Hawke provides no evidence to support this theory apart from suggesting that it fits with modern economic analysis.

154. The Tribunal queries Hawke's analysis and suggests that:

(a) A leasehold farmer who occupies the land and manages his own stock has a lot more in common with an owner-operator farmer than he has to distinguish him; and

(b) Hawke's argument suffers for a lack of specific knowledge about farming in the Wairarapa in the 19th century, and as a result he makes assumptions that are dubious.

155. If leasing had been allowed to continue in the Wairarapa then lessees would have continued to run their own stock, live on the land and manage the farm. This is analogous to a share milking situation rather than a commercial farm scenario where the ownership and the workers are entirely distinct. Any employees would work closely with the lessee, and he would see to it that the employees work to maximise profit from the enterprise, just as an owner-operator would do.

156. The role of good employees and the success of a farming enterprise should not be underestimated, especially where the lessee is not an experienced farmer. Many of the Wairarapa lessees had no farming experience and their Scottish employees taught them the business.

157. The Tribunal used today's example of Landcorp as a large farming operation that is run by people with no ownership interest in it at all. It is a highly successful business. They also used the converse example, where today many owner-operators have inherited family farms, and they are proved to be poor farmers and lost their properties due to lack of skill or lack of interest.

158. The Tribunal also doubts Hawke's position that small scale operations are more successful. It is simply a matter of scale. Large runs using a minimum of labour produced higher returns and smaller properties carrying a few sheep. It was for this very reason that New Zealand in the 19th century included large estates and stations that dominated the agricultural scene.

159. It was concluded that Hawke's analysis failed to take into account the actual character of the agricultural economy of the 19th century. The Tribunal felt that it was the 20th century rather than the 19th century that was the era of the owner-operator family farm.

160. If Māori in Tamaki Nui-ā-Rua had been left with sufficient lands under a useable title, and had been equipped with knowledge, skills and starting capital to take advantage of this, then they may have been able to flourish as farmers in this later period.

The Crown's reliance on Dr Patterson's analysis

161. The second source the Crown relies on is Patterson's analysis of the development of pastoralism in the southern North Island. He discusses the leasehold economy of Wairarapa using the terms "quarry" or "robber" pastoralism.

162. Patterson's view was that pastoralism in the Wairarapa in the 1840s was rough and ready, and that animal husbandry was of the crudest kind with work performed with more enthusiasm than skill. It was this that he labelled "robber" and "quarry" pastoralism. Pastoralism involved a series of distinct but often overlapping phases:

(a) The first phase was the rapid spatial expansion of the industry as newcomers arrived into the country beyond the early established stations. Conditions were rough and methods basic.

(b) Then there was a period of consolidation. When money became available, permanent housing was built, a shearing shed erected, better yards put up for handling the sheep and sometimes a dip. Conditions improved but the management of the flock remained simple.

(c) The next phase was when the pastoralists began to invest their capital into development programmes. Effort and costs went into upgrading the quality of the sheep and their wool.

163. Superior merino rams were imported from the Australian colonies and England and later from France and Saxony. Fencing was one of the most important improvements in the management of the early runs.

164. Evidence shows that post and rail fences were erected in the Wairarapa in the 1840s to create grass paddocks and presumably improve stock management.

165. Some of the Wairarapa pastoralists made considerable efforts to improve their flocks, and as early as 1846 Clifford and Weld went to the expense of importing two rams and four ewes. Bidwill imported sheep from McArthur's flock in New South Wales, this early importation suggests that farmers were planning for the future and considered their enterprises to be long term.

166. The Tribunal noted that it was no surprise that in the 10 years of the Wairarapa leasing economy, pastoralists did not embark on major cultivation programmes as wool growing was far more profitable at that time than growing crops.

167. The Wairarapa pastoralists also invested in improving their accommodation.

168. The Tribunal's view was that the capital development in the form of houses, fences, cultivation, drains and bridges, as well as domestic improvements within a short time of the first runs being established, contradicts Patterson's view of robber pastoralism.

169. It also does not support the Crown argument that development of the colony required the settlers to have freehold titles.

170. Had the leasehold economy not been cut short by the Crown's purchase of the land, then it is anyone's guess as to how far the lessees may have continued along the path of developing their properties despite the lack of freehold.

171. While greater security of tenure was probably required, serious thought and money should have gone into devising and setting up means of enforcing the terms of the leases.

172. There was therefore no reason why, had tenure been assured, leases could not have served to support pastoralism in the Wairarapa for a lot longer. This would have in turn given Māori more opportunity to gain the capital and skills to farm sheep on their account, or to enter into partnerships with settlers.

The Tribunal's assessment

173. The claimants argue that the Crown breached the Treaty by taking action to deliberately end direct leasing of land in the Wairarapa. The Crown's response is that even if it can be proved that they did intentionally bring leasing to an end the negative consequences were minimal because the leasehold economy in the Wairarapa had no future. They based their conclusions on the reasons offered by Hawke and Patterson.

174. Based on the evidence the Tribunal were not persuaded by the Crown's argument. In particular they felt that:

(a) The claim that better results were obtained by smaller owner occupier units and by larger units was not supported by the evidence. Larger units were highly profitable because of economy of scale. Hawke's analysis does not explain how the difference between an owner operator and a lessee operator was a critical one and the Tribunal did not think that it was. They felt that the most important consideration was the security of the leasehold tenure and adequate return on outlay;

(b) They further agree with the claimants that leasing created no particular bar to further settlement and development of the Wairarapa;

(c) The robber pastoralism model was not support by the evidence. The evidence showed that squatters did invest in improvements like homestead gardens, woolsheds, fences, bridges etc;

(d) The evidence showed not robber pastoralism, but the normal process of development from a simple system to a more complex one; and

(e) The leasing economy had not reached its high point when the Crown moved to end it in 1853 or 1854.

175. The Tribunal did not see any pressing need why the Crown had to end entirely the leasing arrangements under customary authority to an outright purchase of the land so that the colony could progress.

176. The Tribunal felt that limited leasehold should have been tenable.

Tribunal analysis and findings

177. In the final section of the leasehold chapter, the Tribunal identifies eight questions that it must consider to determine whether the Crown acted in accordance with the principles of the Treaty in relation to the Wairarapa leases.

What were the Crown's pre-emptive rights

178. The question here is did the Crown's right of pre-emption include all alienations – that is leases as well as sales? If so, was this adequately explained to and understood by Māori? Did the Crown have to tell Māori about its intention to change how it exercised pre-emption? In prohibiting direct leasing, was the Crown acting in good faith?

179. The Tribunal accepted the Crown's contention that its pre-emptive right was over all types of land transaction not just sales. However, the Tribunal felt that the principles of the Treaty must come first. Therefore, when the Crown can legitimately exercise power pursuant to a legal or Treaty right, such as pre-emption, the further question that needs to be asked is whether the Crown acted in good faith and with interests of Māori in mind. For this question, the Tribunal agrees with the claimants.

180. The Tribunal said that the next step must be to inquire into whether the Crown's intentions to include leasing in the pre-emptive right was an effort to protect Māori, or rather to force them into a position of inevitable sale of land.

181. To understand whether the Crown's curtailment of leasing was fair, the Tribunal needed to look at what Māori understood with respect to the Crown's right of pre-emption.

What did Māori understand about pre-emption?

182. The Tribunal concluded that it was unlikely that Māori understood what they would and would not be allowed to do following the Treaty with respect to their lands.

183. The Tribunal held that the word "hokonga" was inadequate to convey such an idea.

184. Colenso himself said that from the speeches at Waitangi it was clear that the chiefs did not have any intention of surrendering the right that they had to exercise "an unlimited discretionary control over the disposal of their own lands". Colenso's view was that Māori leaders should have been consulted before Grey's 1846 Ordinance was introduced.

185. Pre-emption was not adequately explained at Waitangi, and therefore the Crown did not communicate the Treaty effectively to Māori. However, this is somewhat irrelevant in the Wairarapa context, as they were not at Waitangi and therefore did not have the opportunity to view the Treaty or hear what the Crown officials had to say. The Crown also did not talk to them about introducing penalties for unauthorised leases in 1846.

186. The message received by Wairarapa Māori was that they had to accept the Crown's right to control all land transactions and had to sell land to the Crown or lose all the chances of good settlement.

Protection and good faith

187. The Tribunal found that it was clear that Grey and other officials saw pre-emption as a way of acquiring uncultivated Māori land as cheaply as possible.

188. The Crown dealt with Māori and squatters differently. They had no intention of using the Ordinance to institute criminal proceedings where settler interests had been already established. The laws merely intended to deter new leases being taken up. But while Māori were being told that the squatters would have to go, squatters were being told the opposite.

189. The Tribunal found that the findings of the Hauraki Tribunal were relevant to this Inquiry. The Hauraki Tribunal found that the Crown's actions with respect to the pre-emptive rights to leasing were neither protective in intention or effect. The Hauraki Tribunal found that the Native Land Purchase Ordinance denied Māori "the opportunity for entering into transactions which offered them experience in commercial enterprises...while still retaining the beneficial ownership of their land".

Was the Crown entitled to intervene in the squatting economy?

190. While the Tribunal accepted that there was a need for some means of settlers ascertaining that they were dealing with the correct right-holders and securing title, the Tribunal formed the view that there was more interest in emphasising the seriousness of any problems with leases as justification for prohibiting them altogether.

191. The Tribunal found that there was justification in the concern to fund colonial infrastructure, but that this alone was not the only motivation for ending leasing in the Wairarapa. The Ordinance was intended to seriously impact on Māori rangatiratanga and that it was a deliberate move to limit Māori choices.

192. The Tribunal notes that while some would argue that such an interference with te tino rangatiratanga could never be justified, they were not prepared to go that far. They thought that if in return for giving up choices for dealing with their land Māori received benefits that together comprised fair compensation for what they lost, then the result might be fair. If, however, they received only nominal payments for the bulk of the district and were left with only small occupation reserves and no capital to develop even those, then the assessment would obviously be otherwise.

The Crown's grounds for ending leasehold

193. **Proposition 1:** The high point of leasing in the Wairarapa may well have been reached by the time of the first sales to the Crown

    (a) The Crown argued that leasing had reached its zenith by the time of the first sales in June 1853. The Tribunal found that there were two points that contradict this claim.

    (b) Firstly, a considerable area of the district had still not been taken up in lease arrangements, and secondly, the partial economy was still in growth phase in 1853 and that phase continued for the next 20 years. The Tribunal found that the Crown did not establish that leasing had reached its

high point. They did go on to say however, that they were not suggesting that leasing could have gone on forever with Māori living off the proceeds. They were of the view that longer experience as landlords would have afforded Māori the necessary time and space to learn what they needed to be able to run a farming business on their own account, or participate in joint ventures with the settlers.

194. **Proposition 2:** The Wairarapa squatting model would have imposed a low ceiling on the colony's development

(a) This argument was based on Hawke's evidence that was first presented to the Hauraki Tribunal and that the Crown has applied to the Wairarapa Inquiry.

(b) Hawke's argument was all encompassing – either Māori had the land, or Pākehā got it. He makes no allowance for anything in between.

(c) The Tribunal agreed with the claimants that there were other options available; in particular that Māori may have sold some land at a price that gave them the capital to develop the remainder. While the Tribunal accepted that the government used cheap land to fund the development of the colony, it came at a very great cost to Māori.

(d) As a result, Wairarapa Māori were left almost landless and without capital.

195. **Proposition 3:** Lack of security of tenure would have limited investment for pastoralists

(a) The Tribunal found that the lack of security of tenure was an issue for the squatters but it did not appear to have been an overwhelming anxiety for them. Any anxiety that they may have had could have been resolved by an extension of powers of the native protectors or other officials.

(b) Despite lack of security of title, pastoralists had to begin to develop their properties in terms of their accommodation, woolsheds, stockyards, fencing, drainage, bridges, cultivation etc. They were also upgrading the quality of their sheep.

(c) As the leasing system developed it became more finely tuned and both parties continued to benefit, so there was no reason to think that a more formal system might not have developed, it was just that the Crown never gave it a chance.

196. **Proposition 4:** Exploitative management techniques meant that pastoralism had a limited lifespan

(a) The Crown based this proposition on Patterson's conclusion that the methods of pastoralists equated to robber pastoralism.

(b) The Tribunal found that this was a misinterpretation of the pastoral development in the district. They found that settlers started basic and as conditions improved became more sophisticated.

(c) What the Tribunal found in the Wairarapa is that there was a gradual evolution to a more sophisticated system from the rough and ready practices of the expansion phase. How much further this would have gone can only be a matter of speculation.

197. **Proposition 5:** With no formal process there was no way of enforcing agreements – between pastoralists and Māori landowners or between pastoralists

(a) The evidence showed, and the Crown acknowledged, that disputes between squatters and their landlords were not significant in the Wairarapa. They further infer that the tensions were not necessarily as a result of the extra-legal character of the leaseholds on Māori land.

(b) The Tribunal found that the leases would have become more formal, and enforcement would have developed along with the Court system had they been allowed to continue.

Māori and pastoralism after 1853: What if?

198. The Tribunal looks briefly at what might have happened had Wairarapa Māori retained ownership of their land, and the leasing economy had continued beyond 1853-54.

199. The Tribunal are confident that had the leases lasted their full term of 21 years they would have remained highly profitable.

200. On land they retained, Māori would have continued to grow crops and gardens and run livestock. As they became more familiar with the workings of the commercial economy, they would have begun to trade directly with Wellington businessmen rather than through Wairarapa pastoralists acting as middlemen.

201. As flock numbers increased, there would have been more opportunity for Māori to work on farms, and more of them would have learnt farming skills.

202. They may have chosen to sell some land while retaining other parts and the sales would have been at a higher price than the minimal amounts paid out by the Crown in 1853-54. This extra money from the land sales would have given Māori the opportunity to improve their own lands or to establish other businesses.

203. As landowners, Māori would have been able to control the pace of development in the Wairarapa, and would have been able to do so in conjunction with the needs and wishes of their lessees as this would have been in their best interests.

204. There would have been problems remaining that needed to be solved, such as security of tenure, but the Tribunal found that there is no reason to think that these challenges were so overwhelming that leasing was bound to fail.

205. In time there would have been pressure by the government to individualise title, and how long Wairarapa Māori could have held their land is arguable. However, what is certain is that the longer they did the more savvy they would have become, and the more they would have been able to participate in the economy.

206. The Tribunal concluded that the Crown's active opposition to leasehold in the development of the colonial colony was the loss of a major opportunity for Māori engagement on a more equal footing, and one that must ultimately be laid to the Crown's account.

Findings

207. The Tribunal made the following four findings:

(a) While the Crown had a legal right to control all transactions, the Tribunal do not think that this was exercised in good faith. There was no evidence that the Crown explained to Māori that its control of land transactions included leases, or that Māori really understood pre-emption at all. There was no law and order imperative that gave legitimacy to the exercise of such a power;

(b) Making leases illegal so that Māori had no option but to sell was neither fair nor reasonable. The Native Land Purchase Ordinance 1846 was an unwarranted interference in Māori rangatiratanga undermining their capacity to engage with settlement on equal terms. The Tribunal considered this to be a serious breach of Māori rights under Article 2;

(c) The 1846 Ordinance privileged settler interests over Māori. Māori were threatened with the removal of squatters, but the squatters themselves were reassured that their tenure would be

protected and strengthened if they assisted the Crown in acquiring the freehold for Māori. This differential treatment breached the Treaty principles of good faith and equity; and

(d) The Crown's demand that Māori cede an extensive tract of land at Maungaroa/Bartons Run was a breach of the guarantees in Article 2 and the principles of active protection and equity.

CHAPTER 3A:

CROWN PURCHASING: POLICY AND PRACTICE, 1853-65

1. Until 1853, Wairarapa ki Tamaki Nui-ā-Rua Māori essentially engaged through land leasing. This changed dramatically from June 1853–January 1854. By 1865, when the Native Land Court was established and Crown monopoly of purchase ended, over 1.5 million acres had been purchased via 207 deeds and receipts. The result of this was that an enormous area had been acquired for settlers to buy/occupy.

2. The transfer of ownership came about through four key sets of negotiations:

   (a) Negotiations between McLean and rangatira based in Hawkes Bay, Pōranga-hau, Mātaikona and Kaikōkirikiri, culminating in the Castle Point purchase in June 1853;

   (b) The hui at Tūranganui in August 1853;

   (c) McLean's negotiations to ameliorate the legacy of Thomas Forsaith and the Mataōperu Deed of October 1853; and

   (d) Negotiations of Crown Purchase Officers to buy remaining lands and tidy up issues arising from earlier purchasers.

3. It is noted that there is disagreement between parties as to what Māori really understood when they signed the Castle Point Deed. This is the case with the komiti nui that followed in August 1853. It is agreed that it was not an "arms-length commercial transaction", but the parties differ on whether it was a Treaty, tuku or otherwise. There are other key disagreements as well.

4. Following the komiti nui, a number of deeds were signed which purported to extinguish the rights of all people in defined blocks. Deeds were transacted with fewer chiefs, without survey plans, and with purchases overlapping through disputed boundaries. Complaints followed, and much of the activity of Crown officials during these years was directed at solving problems caused by its earlier dealings.

5. The Tribunal then considers the above key events through the Treaty lens and determined that the following questions were crucial to its analysis:

   (a) What was the likely Māori understanding of their land transactions at this time? Did customary perspectives still dominate, or had they been affected by prior experience with leasing and their discussions with Crown officials, missionaries and others?

   (b) Did Māori understanding of, and attitude to, Crown purchase change over the period under consideration?

   (c) What were the Crown's standards of purchase conduct at the time, and were those standards met?

6. The report then sets out the positions of the claimants and of the Crown and the key points on which they differ.

7. The Tribunal also notes the Crown concession that Māori within Wairarapa ki Tamaki Nui-ā-Rua today are virtually landless, and also that the potential for insufficiency ought to have been apparent to the Crown by the turn of the nineteenth century.

The Pillars of Crown Purchasing Policy as at 1853

8. The pillars of Crown land purchase policy were essentially that:

   (a) Māori would benefit from settlement;

   (b) Māori would benefit from reserves; and

   (c) Māori would benefit from part of the proceeds on on-sale being spent on Māori.

9. It was the general train of thought from Pākehā and the Crown that the real payment to Māori would be the advantages of civilisation and "valuable institutions by which it is accompanied". It is likely that this was the theme of the 1853 negotiations. In addition to this, it was important to ensure that Māori understood that private purchasers could not deliver the same advantages as the Crown and the low price was part of that sacrifice to ensure those advantages.

10. Officials accepted Normanby's policy that no land was to be purchased from Māori that was essential to their future welfare. Despite this, there was no consensus about what this obligation entailed and future options for Māori provisions were considered. It seemed to be accepted that, at a minimum, Māori should retain the land they intensively occupied.

11. The idea that the Crown's investment of the proceeds of resale in Government and immigration would benefit both Māori and Pākehā was intrinsic to land fund theory. A number of Crown officers acknowledged that Māori would need to be actively assisted in this regard, and in January 1841 the idea of using a portion of the profits from on sale of land to create an endowment fund to benefit Māori specifically was introduced. However, lack of funds meant that there was no practical result from that idea.

12. In the late 1840s and early 1850s, Grey proposed that, after survey and administration costs, 15% of the profits from on-selling land purchased from Māori should be spent on Māori purposes.

13. Whether this was entirely genuine is impossible to know, however, Grey's promotion of this new arrangement was no doubt a part of what persuaded Māori to agree to sell their land and end the leasing arrangements.

14. The Tūrakirae, Tūranganui and other major deeds allowed for this further consideration, albeit that the percentage was only 5%. This district was distinctive for how often the 'koha' or '5 percent' clause was inserted in purchase deeds (12 of the early deeds contained them). However, the practice was soon abandoned when faced with hostility of the colonial government, and with no Grey there to defend it.

What were the purchasing standards of the time?

15. In closing submissions, Crown counsel contended that there was no accepted standard during the early period and the Crown practice was evolving to respond to the changing circumstances. Normanby directed that agents should act with sincerity, justice and good faith and provided agents with guidelines for dealing with Māori and their land. The view of previous Tribunals has been that the Crown, at the time, understood what was required for Māori consent to be meaningful.

16. More debatable at the time was the question of what size the blocks should be. Some thought that blocks should be smaller than 10,000 acres in order to be valid and ensure there were fewer overlapping rights. Others, like Grey, preferred large scale purchases with "ample reserves" to be purchased at minimal prices. Grey did, however, appreciate the need for prior identification of all rights-holders and informed consent.

Conclusion

17. The Tribunal acknowledges the acceptance of responsibility by the Crown in their approach to purchasing land from Māori. The sense of responsibility on the part of the Crown seemed to have arisen only partly from Article 2, but also from other interests, including humanitarian and balancing Māori sacrifice in selling land cheaply.

18. The Crown knew what it took to purchase well and had "best practice standards" to meet. The Crown also undertook responsibilities for the long term welfare of Māori in terms of providing sufficient reserves, assisting Māori to adapt to the settler economy and providing opportunity to prosper from settlement.

Crown Purchases in Wairarapa ki Tararua, 1853-64

The Castlepoint Transaction

19. The Castlepoint purchase was a breakthrough purchase in Wairarapa for the Crown. As such, it is an important starting point for Wairarapa purchases and a model against which to assess the Crown's evolving practice. The land in the Castlepoint vicinity was strategically located, although not considered high quality land.

20. One of the initial tactics employed in this purchase was to actually display a sum of money to Māori which could be gained from sale during negotiations. This was later used by Grey in 1853.

21. The immediate cash benefits of sale, together with other advantages, such as mills, schools and agricultural implements, began to work in the Crown's favour, especially given that leasing was not going to be allowed to continue.

22. The preliminary survey work for Castle Point began in March 1852 with the aim of obtaining the whole of the district subject to reserves for those Māori along the coast. However, there were issues regarding the boundaries as noted by Te Pōtangaroa and Wiremu Paraone to McLean.

23. In 1852, McLean appealed to the Executive Council for pressure to be placed on Māori. This appeal was "fuelled by his belief that Māori would only commit to sale once the possibility of leasing was ruled out." The result of this was that Māori were convinced the only legitimate way to receive revenue from their lands would be by disposing of them to the Crown.

24. The Tribunal also discusses the promotion by Masters and Grey of land sales and land gifting, noting the gifts made by Wairarapa rangatira at Pāpāwai and Kaikōkirikiri.

25. The signing of the Castlepoint deed in June 1853 is also discussed, particularly the "tangi clause" which conveyed the fact that the transaction was to be final and permanent.

26. It is largely accepted that support for the transaction was extensive and that, by comparison with later purchases, the Castlepoint transaction was something of a "gold standard". However, the Tribunal notes that significant problems with surveying and the protection of reserves emerged later and often took many years to resolve.

27. A number of reserves were undefined as well as the question of how far inland the purchase would go. The result of this was that some of the land had to be re-purchased in later years and some reserves were lost, or otherwise compromised.

28. However, the Tribunal notes that particular aspects of the purchase show the Crown's attempt to ensure that Māori owners were all identified, consulted, that they freely consented, and that adequate provision was made for their future – even though it insisted on a large-scale alienation of territory.

The komiti nui of Tūranganui, August 1853

29. The Tribunal begins this part by discussing Grey's attributes, which were critical to his persuasiveness and plausibility. The Tribunal notes that he played on personal attachment to him and "used his knowledge of Māori ways of doing things and perceiving the world to good effect".

30. Although Grey's report to the Colonial office does not say precisely what he actually said at the komiti nui, it is known that it served to pave the way for the Crown's acquisition within a few months of well over half a million acres.

31. After discussing what is known about the Crown obligations arising from the komiti nui, the Tribunal states that it is likely that Grey's address covered the usual ground i.e. the benefits of peace, settlement, reserves, prosperity and a joining together of the two races into the future. Grey must also have made some quite specific commitments, including the five percent.

32. In discussing the Māori understanding of what had taken place, the Tribunal summarises the three alternatives that have been presented to them – as a kawenata, a tuku, and 'choosing modernity'.

33. Drawing on the evidence, the Tribunal describes 'kawenata' as follows:

    (a) The komiti nui constituted a 'personal treaty' between Wairarapa Māori and the Crown. Grey personified the Crown, and he encouraged Wairarapa Māori to view the arrangement in this way.

    (b) Stirling emphasises the political dynamic. Using a 'komiti nui' to advance the Crown's position in negotiating land purchase was, as Kemp noted at the time, a 'new principle' and 'would have included a far broader group than had consulted him [Grey] in Wellington a few months earlier'.

34. Again, drawing on the evidence, the Tribunal describes 'tuku' as follows:

    (a) Customarily, the difference between lease and sale was one of degree, rather than an essential difference in the nature of the transaction. Leases were less tapu than the arrangements proposed by Grey and agreed to by Māori, which 'connoted marriage between two people, ensuring the survival of tangata whenua, and tying the incoming tangata heke (migration) to the land through whakapapa and kōrero';

    (b) Use of the word 'tuku' would have encouraged the belief that purchases were consistent with the transfer of land during traditional times and, had the Crown wanted to clarify its real intention, it could have called the transaction a 'hokowhenua' (bartering or selling land); and

    (c) Wairarapa Māori did not agree to sell their lands, they did not see the payments as being finite – they fitted the transactions around their customary views, conceiving the Crown's payment obligation as one that would continue indefinitely.

35. Finally, the Tribunal discusses 'choosing modernity':

    (a) Māori chose to sell their land to develop the new society, knowing that they were giving up all rights but failing to comprehend the long term consequences; and

    (b) Māori comprehended sale, and sold as an active acceptance of kāwanatanga (government), and because they thought that this would enhance their power by affording them access to European goods and knowledge.

36. The Tribunal finds it hard to 'credit' that Māori were not aware that the Castlepoint transaction was different from the sorts of arrangements they had made before. The Tribunal considers that the foremost Māori intention was to establish an enduring relationship with the 'powerful newcomers'.

37. The Tribunal broadly agrees with Smith's proposition that the Castlepoint transaction 'was part of a continuum that connected Māori with the past, where their main reference points were their traditional concept of tuku, and their experience of leasing', but acknowledges however that some rangatira may have had a keener insight into Pākehā norms, as Head claims, and may have understood sale and purchase in the ordinary way.

38. The Tribunal agrees with Lyndsay Head in that Wairarapa Māori were pursuing the new, but states that this meant much more than wanting to sell land for cash – that they were coming to grips with what was going on in the only terms they knew. Therefore, what they were learning about the different ways of the Pākehā would not have instantly transformed their world view.

39. The Tribunal considers it 'entirely plausible' that tangata whenua would have seen the five percent/koha payments as utu and would have expected that they would be paid as long as Pākehā remained on the land.

The First Wave: McLean's Negotiations, 1853-54

40. Less than two months after the komiti nui, the Government was announcing in the Gazette that Wairarapa land was available for settlement.

41. According to Dr Brad Patterson, McLean's approach to land purchasing significantly increased the pace of alienation and reduced protections for Māori.

42. The Tribunal also notes the arguments made by Crown counsel, and Counsel for the claimants, regarding the conduct of the purchases.

43. The Tribunal then goes on to look more closely at what McLean did immediately after the komiti nui and how, drawing on the evidence of Tony Walzl and Barry Rigby. The Tribunal notes at the outset that the general trend was for the standard of the negotiations to settle the land deals to fall as time went on. The result was that a good number of the purchases resulting from such negotiations had to be renegotiated, and further payments made to solve problems left by inadequate process and the failure to survey and protect reserves.

44. The deeds entered into regarding land in the southern valley that are discussed/noted by the Tribunal in this part are:

    (a) A homestead at Tuhitarata;

    (b) Ngāti Kahungunu interests in the Port Nicholson region;

    (c) Tūrakirae;

    (d) Tūranganui;

    (e) Ōwhanga; and

    (f) Kahutara.

45. The Tribunal notes that neither Tūranganui nor Tuhitarata were surveyed before purchase, nor the boundaries walked (the implications of the lake boundary of this deed being explored in Chapter 7).

46. The blocks that are noted/discussed by the Tribunal in the upper valley are Kaiwaka, Tauherenīkau 4, deeds for some formerly leased runs – Morrisons, Gillies homestead and station at Te Torohanga, Burling's homestead and station, and Collins' at Te Oreore. None of the boundaries for the Gillies and Burling homesteads were stated; however, the deed for the Collins homestead named boundary points and gave land features clause.

47. According to Rigby, most of the area in the Tauherenīkau 4 purchase was actually also included the Ōwhanga, Taratahi, Kuratāwhiti and Mōroa purchases.

48. In discussing the Kaiwaka block, the Tribunal notes that the five percent clause was being used as a bargaining tool and that McLean had stated that he considered the land was secured at a 'wonderfully cheap rate'.

49. The Tribunal considers it plain that McLean was determined to acquire all the land he could, but he really had no idea how much he was buying, who held rights in it and in what proportions.

50. In regard to the Manawatū block, only four of the original 33 signatories to the deed receipt for the block appear on the subsequent deed.

51. In regard to the blacksmith homestead deed, the Tribunal states that the implication is that the description of its boundaries may not have been very definitive, and an accurate survey depended on the parties being in attendance.

52. The Tribunal discusses the Mataōperu deed in detail. It was an important deed as it purported to settle past grievances, and it was the first deed conveying coastal land below Castlepoint. The Tribunal examines the events leading up to the signing of the deed, including:

    (a) Barton's complaints arising from disputes with Māori;

    (b) The attempted repudiation by southern Wairarapa chiefs of the cession of the Maungaroa land;

    (c) McLeans attempts to fix up the 'cession' debacle;

    (d) The fact that a lot more was paid for Mataōperu than for Whareama, Pāhaoa and Kaiwhata (however, there was no five percent clause recorded for the Mataōperu transaction, but two reserves are noted – one of which reserves being purchased in 1862); and

    (e) The Āwhea deed, which Barton persuaded the Crown to enter into. Only five Ngāti Hinewaka signed the deed and no reserves were defined. The Tribunal notes that aspects of this transaction foreshadowed McLean's approach to subsequent deals with Māori in the Wairarapa district – haste, inadequate consultation, a mandate from the small group of rangatira, and a failure to provide for reserves satisfactorily. The Tribunal further states that the settlers' needs were to the fore, and that, as a result of the Mataōperu and Āwhea deeds, Barton's domain became larger and more secure.

53. The Tribunal then goes on to discuss the transactions that resulted in the Crown purchasing most of what remained of the East Coast south of Castlepoint between October and December 1853. The transactions discussed are:

    (a) 'Part Pahaua and Wilsons Run' - There was a koha clause and four reserves were listed, however, their location was expressed in a way that would be meaningful only for a limited time and only to those directly involved;

(b) Whareama 2 (South) - The reserves recorded in the deed were poorly defined and Māori were required to share the firewood on their reserves;

(c) Waihora (also known as Whareama 4) - This was the 19th Wairarapa transaction to be concluded since the komiti nui that took place two months earlier. There was no five percent clause nor any reserves provided for;

(d) Whareama 3 (also known as Whareama North Block) - Again, there was no mention of the five percent clause, nor of any reserves;

(e) The Coastal Block Part (Whareama 1) - The deed included the five percent clause and two reserves;

(f) Upokongāruru; and

(g) An inland area of Whareama - There was no reference to the five percent clause and only one reserve.

54. The Tribunal makes particular note of the few inadequate reserves provided for in these Whareama deeds. The reserves made were also vulnerable, as unless the reserves agreed to were promptly surveyed under close supervision by the parties to the deeds, it would be impossible to mark out the reserves promised. Not long afterwards, the Crown acquired both Hikurangi and Awatoitoi out of Whareama North.

55. The Tribunal then discusses the inland blocks purchased by the Crown, including:

(a) The Manawatū Block;

(b) The Mākōura Block - there were no reserves provided in that deed;

(c) A number of smaller transactions listed by Walzl;

(d) Two deeds for Ōwhanga;

(e) 'Manihera's Reserve', which included a gift to the government of an additional block, Mora;

(f) Kaiwhata Block - the deed made no mention of the five percents, nor any reserves, however, four small reserves for cultivations were recorded in the second deed for Kaiwhata (east of) later;

(g) Part of Paeroa;

(h) The 100,000 acre block of coastal land at 'Te Awaiti and Part Pahaua'. There was no mention of the five percent clause, but several reserves were noted, although Walzl says 'with the usual lack of specificity';

(i) Tautāne Block - this deed had a five percent clause and provided for two reserves, including a wood;

(j) Wharekākā Block - there was a koha clause and 1,000 acres reserved for Te Mānihera;

(k) The Ahiaruhe Block in which deed there was no mention of reserves nor the five percents;

(l) Kōhangawariwari - there was, again, no reference to the five percents but the deed did contain a vague reference to reserves; and

(m) The Āwhea Block - there was no five percent clause, but there was provision for reserves to be settled at a later date.

56. It is noted that, by Boxing Day, McLean had purchased 1.7 million acres in the Wairarapa since August and had committed the Crown to paying £13,000 for this land.

What do the first-wave purchase deeds tell us?

57. In this part, the Tribunal relies on the work of Dr Barry Rigby in order to conclude on what the deeds of this early period tell us about Crown purchase procedure. The important conclusions made by the Tribunal include:

(a) The distinction between receipts and actual deeds is 'far from clear'. It is noted that McLean considered all of the deeds as the starting point of the transactions not the end, and there were therefore uncertainties;

(b) The uncertainty about reserves and five percents, including the lack of definition of what lands would be 'reserves' and the purpose of reserves – i.e. whether they were to be held for Māori use or not; and

(c) What drove the inclusion or exclusion of the five percents is also unclear.

58. The Tribunal then considers the questions of who was entitled to sign and how was it determined who should sign the deeds? Rigby suggests that certain chiefs dominated the deeds for particular parts of the valley, although some of their involvement was controversial.

59. A number of deeds in the first wave of purchases were signed away from the land in question; the Tribunal noting that in those circumstances questions are raised as to whether that community had a good understanding of what was going on. A possible example given is the sale of the three Tūrakirae reserves, which may have been arranged in Wellington. Other examples noted are Kaiwhata, Te Awaiti, Āwhea, Wharekākā and Kohangawariwari.

60. Although the Tribunal notes that there was a distinctly public element to some of these purchases, according to Rigby, the purchase of the Tūrakirae reserves 'still leaves many questions unanswered'. These lands may have been sold without the knowledge of people who participated in the original transaction.

61. In summary, the Tribunal states that some very serious questions are raised in considering the process of the first wave of purchases, including:

(a) It is impossible to know who really knew about and understood what was going on. The Tribunal states that without genuine understanding, how can there be genuine consent?

(b) The uncertainty regarding important aspects of the deals is contrary to good contractual practice and left Māori vulnerable.

The Second-Wave: Purchases from November 1854 to August 1864

62. McLean's momentous six months of buying up the Wairarapa for the Crown ended the Wairarapa leasing regime and transferred about 1.5 million acres of land from Māori to Crown ownership.

63. After all that, one might have thought that it was time to stop, draw breath, reflect. But no. Before the end of 1854, the Crown put McLean, and later Cooper, into the field again for a second round of purchasing. For information on this period, the Tribunal relied on the work of Helen McCracken.

64. The features of the second-wave of purchasing included:

(a) There was a distinctly public element to purchases undertaken in Wellington after 21 December;

(b) Few reserves recorded in deeds:

(i) It is noted that only four of the 78 second-wave transactions to January 1856 included explicit provision for reserves in the deeds, although more were granted in later second-wave transactions;

(c) Koha or five percent clauses and provisions for reserves, which also became a thing of the past;

(d) Acquisition of lands originally reserved;

(e) Dubious decisions about who held rights, who could sell, and who should consent;

(f) Failure to ensure that the right people were paid;

(g) Deploying the 5 percents and other money in dubious ways;

(i) Money was spread around in a way that gave the impression that Grey's vision of a prosperous future for Māori was coming through, however, it was being used as a source of patronage and tribal lands were being further encumbered; and

(ii) Referring to entries in McLean's account books for November-December 1854, the Tribunal concludes that McLean was paying monies to individual chiefs on undefined lands, with no evidence of wider consent, and that practices like these undermined the capacity of Māori to make informed community decisions about whether and how much land they should alienate, and at what price.

(h) Important contractual terms were left undecided.

65. The Tribunal then goes on to discuss the 'new climate of dissension' which came about as the effects of McLean's hurried and unsurveyed transactions began to be felt. Disputes erupted over boundaries, reserves and even whether the land had been sold at all. The Tribunal also discusses the Government's involvement in calling for the settlement of disputes relating to land purchases in the Wairarapa.

66. The Tribunal then goes on to discuss the Tautāne purchase in detail. Matters of note include:

(a) When the original sale of Tautāne was arranged, the principal right-holders were not there (according to Ballara);

(b) Given McLean's lack of knowledge of Hawke's Bay, he should have known that one of the main Māori that he was dealing with, Te Hāpuku, did not have the right to enter into negotiations for the sale of Tautāne without the explicit consent of the people living on the land;

(c) Signing the original deed in Wellington, along with other deeds that were later disputed, indicates that McLean was not concerned about whether his process had integrity or not;

(d) Tautāne was supposedly settled in March 1858, being dealt with as part of a wider adjustment of Ngāti Kahungunu disputes fuelled by government purchases in the Hawke's Bay, but which also affected Wairarapa based Ngāti Kahungunu and Rangitāne;

(e) Although reserves were provided for in the second deed, it is unclear whether they were in addition to the two reserves listed on the first deed. It also seems that there may have been uncertainty about the size of the proposed reserve(s);

(f) The signatories to the deed agreed to give up the five percents for an additional payment of £500, this being criticised by Ballara and Scott as being 'nothing less than fraud';

(g) The Crown acknowledged then, as now, that some of the resident right-holders had been left out of the original transaction however, and that rescinding the original flawed deed was never seriously contemplated; and

(h) Despite the Government's 'patch up job', matters remained unsettled at Tautāne. This is due to disputes regarding the division of money and delays in the conduct of surveys. Dissatisfaction about how the Crown purchased Tautāne and about how the monies were distributed remained.

67. Pōrangahau was also discussed briefly in this part, where similar issues arose.

Searancke's Negotiations and Purchases, 1858-61

68. Searancke encountered similar difficulties in the Wairarapa to the problems experienced at Tautāne, including:

(a) Purchases had excluded major right-holders, boundaries were disputed when surveyed, promises had not been kept, and there was dubious use of the endowment fund;

(b) Not all right-holders had received their portion of payments; and

(c) Māori in the southern valley, in particular, could ill afford to sell more land and were in an increasingly impoverished state.

69. Despite the above, Searancke continued to purchase whatever land he could, using the same practices of his predecessors including:

(a) Accepting offers of Wairarapa ki Tararua land while in Wellington;

(b) Paying advances before boundaries and all right-holders had been properly identified;

(c) Delaying surveys to save expense; and

(d) Purchasing more land (including reserves) to settle disputes. Particular transactions noted include the reserve at Taratahi and the Whangaehu Block.

70. Although Searancke noted that so much land had been purchased in the lower valley that any more might 'inconvenience' Māori, he proceeded in late May 1858 with negotiations for Manaia, Tirohanga, Rangitumau and Maungaraki, all located near Masterton. The purchase of Maungaraki was however not completed due to disputed ownership.

71. Despite the problems that have resulted from failure to survey before purchase, Searancke still considered it was impossible to do so, although agreeing that he should walk the boundaries of the land.

72. Despite past problems, Searancke continued as before, making numerous payments on Wairarapa lands to 'patch up' earlier transactions and paying advances to individuals, but without any record as to how he had satisfied himself as to the legitimacy of their claims and the portions in which they were held, or as to the views of other possible right-holders in the land.

73. While Searancke continued to make acquisitions where and when he could, the socio-economic position of Māori appears to have deteriorated, despite Searancke being aware of and remarking on the decline in Māori health and well-being.

McLean's 1862 visit to Wairarapa ki Tararua

74. Searancke did not make the progress hoped for in settling disputes, so McLean was sent in – as Māori wanted – to sort it all out. Most of the disputes were settled through the payment of additional amounts of money.

The Pāhaoa and Wainuiorū dispute

75. The Pāhaoa and Wainuiorū dispute stemmed from the failure of the Crown to survey the reserves detailed in particular purchase deeds, and there was also little certainty about exactly which areas were included in the four transactions noted (being in the Āwhea-Pāhaoa area).

76. It appears that the issue of the reserves was not settled until the 1880s, and the question of koha on Pāhaoa lands also continued to be argued for some years between Māori right-holders and the Crown.

Featherston's deeds, 1862-63

77. The Tribunal then goes on to discuss particular transactions that Dr Isaac Earl Featherston was involved in between 1862-63, as well as contextual information, including comments made on the problems caused by poor documentation.

78. The Tribunal then also discusses the wider political context – noting that there was a pause in land purchase activity in the Wairarapa ki Tararua area because of what was happening in the Waikato.

1864: Copper returns to sort out problems

79. The Tribunal then discusses the return of Crown purchase agent Cooper to the Wairarapa in 1864 to sort out disputes and finalise purchases. Particular transactions noted include:

    (a) Kopuāranga, Pouawatea, Rangitoto, Tauheru, Motukaitūtae and Whakataki; and

    (b) Kōhangawariwari, where a party claimed they had been promised access to the bush for bird sneering; and

    (c) Pukengaki, where settlers made a selection of land that local Māori disputed as their alienation to the Crown was more limited (a survey problem).

Conclusion

80. From late 1854 to 1865, the Crown endeavoured to purchase and settle the Māori land that remained in the Wairarapa ki Tararua district after McLean's initial flurry of deed signing. Between these dates, it has been suggested that 220,000 acres was sold. Land prices were higher than in the earlier period, but the number of Māori signing the purchase deeds decreased – the practice being for a small number of chiefs to sell land to gain financial benefits and other rewards.

Tribunal Analysis and Findings

81. In regard to the komiti nui of August 1853, the Tribunal concludes that:

    (a) Although it is clear that by the early 1850s Māori Society and Wairarapa ki Tamaki Nui-ā-Rua was engaged in a process of change, key practices and beliefs remained intact;

(b) With regards to land sale, Māori must have known that more was being asked of them than before, although, what exactly they thought they were giving up is not clear. The Tribunal considers it likely that Māori understood and agreed that they would no longer control who came and went on the land, however, whether they understood that transactions were complete and permanent no matter what happened in the future is less clear;

(c) Clearly, what was promised was something different from landlord and tenants in leasehold tenure, and that it was partnership that the rangatira sought when they signed the deed – this being accomplishable by 'tuku' of land; and

(d) There was an element of compulsion e.g. McLean had made it clear that only those Māori who sold their lands could be considered friends of the Crown.

Did the komiti nui generate specific Crown obligations?

82. Grey's presence and his promises at the komiti nui were crucial tipping points towards sale for rangatira. Grey's approach and presence at the komiti nui created a 'bond of trust', creating the obligation on the Crown to try to give Grey's promises effect. This extended not only to services provided and priorities for infrastructural development, but to how Crown officers went about their purchase activities - that fair practice was required.

83. What land purchase officers and surveyors did and thought was overwhelmingly weighted in favour of settler interests.

84. Although there was clearly some enthusiasm amongst Māori to embrace the new, the Tribunal does not think that Māori rapidly abandoned all their laws and customs, or that they did not require persuasion to agree to what Grey, and later McLean and other purchase officers, wanted.

85. The Tribunal agrees with Crown Counsel that, after the komiti nui, McLean used the koha or five percent clauses as a bargaining tool, although they ceased to feature in deeds for a significant period.

86. There are many indications that Māori expected koha payments to be ongoing.

87. The understandings reached at the komiti nui perhaps amounted to a kind of treaty about how the region was to be opened up to settlement, however, from the evidence that is available, nothing seems to have happened there that took the Māori entitlement beyond their Treaty of Waitangi rights.

88. The Tribunal sets out the legitimate expectations of Māori and reasonable requirements of the Crown regarding the Crown purchase of Māori land in this Inquiry district, resulting from the komiti nui. These include obligations of fairness and equality, good faith, free consent and consultation.

Did the Crown's land purchase methods conform to the standards of the time?

89. The undertakings made by Grey at the komiti nui established the context for purchasing in the Wairarapa.

90. McLean's practice rapidly departed from Grey's new arrangements and from his own Castlepoint model.

91. The Tribunal agrees with the claimants that there were unnecessary shortcomings in the deeds that followed the komiti nui, which happened because settlers were privileged over Māori. Further, the 'mopping up' exercise happened in haste, with the Crown officers deploying the same methods that had led to the problems they were now trying to fix.

92. As a result of the nature of the early transactions, some rangatira were soon virtually landless. Any solutions proposed almost always required Māori to compromise. The Tribunal states that "the whole process can really only be described as rough and ready".

93. The Tribunal then goes on to discuss the considerable experience of the Crown in land transactions with Māori, including that they knew of the standards that needed to be met if consent to sale was to be meaningful. In the Wairarapa however, McLean rushed the purchases through to enable further development of the Wellington province as a whole. This was a case where the standard was simply departed from, and not for any reason that is justifiable in Treaty terms.

94. There is more than a suspicion that McLean dealt too much with particular chiefs in the purchase of the Wairarapa Valley – more because they were more likely to give him the answers he wanted than because they had the right to speak for those who owned the land interests in question. The practice of dealing with some chiefs first, letting others in later, and then leaving it to them to sort out a fair division of the purchase price amongst themselves, was wrong.

95. If McLean considered that the komiti nui justified his taking procedural shortcuts, he was wrong. The komiti nui was a starting point, but it involved no inquiry into who held rights in particular lands and particular resources and in what proportion, and McLean's job was to attend to the key information regarded for a valid purchase.

96. The Tribunal considers it particularly problematical in this Inquiry that Crown officials accepted offers and made payments on Wairarapa lands when they and co-operative Māori were in Wellington, and that this raises serious questions about informed consent.

97. The Tribunal's overall finding in this regard is that the purchasing practices adopted by McLean, and continued by his successors, breached Article 2 of the Treaty, its duty to act in good faith and the principle of active protection.

Did the Crown ensure that land block boundaries were adequately defined?

98. The long delays in surveying land greatly impeded the possibility of informed choice for Māori, and also left the lands that were to be reserved for future Māori use and prosperity very vulnerable.

99. Furthering the Crown's purchase programme took priority over properly completing purchases already made. The financial pressures on the government led to deeds being hastily drawn up and signed without proper plans, resulting in a severe lack of documentation.

100. The lack of survey was another disadvantage to Māori in the bargaining process. They could neither really ascertain the fundamental terms of the deal, nor, as Rigby notes, grasp the "accumulative effect of the 40 odd first-wave purchases". Neither Wairarapa ki Tamaki Nui-ā-Rua Māori, nor the Crown, could have been sure of what was being transacted, given the inordinate haste with which these deeds were made.

101. If the Crown, in its submissions, is implying that it was Māori aspirations for the Crown to purchase their land that led to the Crown's very extensive purchasing programme, the Tribunal does not agree. Even if a purchase was initiated by Māori, the Crown is not absolved of any of its responsibilities as Treaty partner.

102. The vagueness of the boundary descriptions in the deeds made surveying almost impossible, without the assistance of McLean. Searancke is also criticised for adopting poor practices regarding surveying and setting aside reserves without accurately recording their size or location, and declaring purchases concluded before full surveys had been made.

103. The problem with the surveying conducted continues to this day, it being noted by Patterson that distortions have been carried into modern cadastral maps. The Tribunal agrees with the claimants, that

much of what was wrong with the survey was attributable to the desire of McLean to push ahead. The Tribunal considers that:

(a) The Crown's failure to survey land before the sale was finalised, or within a short period thereafter, compounded the Crown's breaches;

(b) The Crown's knowledge that the purchases conducted in this way were deficient due to purchasing continuing without survey information, breached the Crown's obligation to act towards its Treaty partner in good faith;

(c) Purchases arranged without defined and certain boundaries lacked informed consent and were a clear breach of Article 2; and

(d) The lack of survey information breached the Crown's duty of active protection, as the Crown could not act to protect Māori from excessive land sales even if they had been so minded.

Did the Crown pay a fair price?

104. The Crown's determination to pay as little as possible ignored what Māori would need in terms of capital to develop the lands that they retained. This was a serious oversight in policy and practice.

105. The Crown's suppression of private leasing meant that Māori and Wairarapa ki Tamaki Nui-ā-Rua could only enter the economy by selling their land and, in these years, could only sell to the Crown.

106. There was an important relationship between the Crown's monopoly of purchase, and its obligation to deal fairly with Māori. The Tribunal agrees with the Ngāi Tahu Tribunal, that Māori willingness to sell land should not have been 'allowed to compromise their future as a tribe'; this was implicit in Treaty protections and the guarantee of tino rangatiratanga.

107. There is no indication that Crown officers were at all concerned to offset the Crown's monopoly position by ensuring that Māori were paid fair value. Rather, the evidence suggests that they were paying as little as they could, except in particular situations where politics called for a more liberal attitude.

108. The practices adopted by the Crown in regard to the prices paid for the land purchased in the 1853-54 period were dubious. One of which was to confirm a purchase but leave open what would be paid until some future date, and a land sale where vendor and purchaser have equal bargaining power would not leave so much at large.

109. The Tribunal concludes that the money paid for the land was not, on its own, adequate recompense for the totality of what Māori gave up, however that they also need to take into account other benefits, including reserves and assistance provided.

Did the Crown deal appropriately with reserves?

110. The Crown favoured settler interest over that of Māori in its reserve policy, and this breached the Crown's duty under the Treaty principles of equal treatment and active protection.

111. Too little land was reserved.

112. 'Most damningly', the Crown began almost immediately to make purchases within the reserves that had been set aside.

113. The Crown treated many reserves as the personal property of rangatira, and therefore there's to dispose of at will. This was a failure to exercise active protection.

114. To its credit, the Government sometimes resolved such problems in Māori favour, Āwhea being given as an example.

115. Māori complaints about lost and ungranted reserves were often not resolved or not resolved quickly.

116. The Tribunal then goes on to discuss specific issues relating to Mataōperu (Bartons Run) and the Tautāne Block:

(a) In regard to Mataōperu:

(i) The deed was not good enough, and, effectively, Māori were in "a take-it-or-leave-it situation". That does not conform the Crown's responsibilities under Article 2 to ensure informed consent to the alienation of Māori land;

(ii) The approach by the Te Tau Ihu Tribunal is endorsed in that belated recognition of the rights of owners that were at first excluded might mitigate, but does not remove, the Crown's breach of the Treaty in not doing the purchase properly in the first place; and

(iii) The Crown's conduct breached Article 2 of the Treaty and the principle of active protection.

(b) In regard to Tautāne:

(i) What the Crown did to secure the first deed was a very long way from what was tika. Questions concerning the land should have been debated in open hui on the whenua. McLean made no public inquiry into the existence of other claimants, their consent or otherwise to the sale, in what proportion rights were held and what they expected to receive in return for their agreement;

(ii) The Tribunal agrees with the claimants that McLean's concern was to drive through a purchase whatever the opposition, and that he knowingly ignored the rights of resident hapū;

(iii) There was no opportunity for all legitimate right holders to exercise a genuine and informed choice about the land before any moneys were paid, or promises made. This was a clear breach of the Treaty and the principles of partnership, active protection and equal treatment;

(iv) The agreement subsequently negotiated with those left out does not cure 'the essential wrong of contriving this outcome';

(v) Although the second deed achieved wider community acceptance, this was 'in a context of heightened intra-tribal tensions';

(vi) The fundamental Treaty breach is that the Crown arranged this purchase very deliberately to ensure that only those willing to consent were initially involved, and withheld from known 'nay-sayers' the opportunity to intervene. The Crown trapped them into the sale and this was a case of the Crown acting in bad faith; and

(vii) The purchase by McLean and Cooper for £500 of the koha/5 percents breached the Crown's Treaty duty to exercise the utmost good faith in its dealings with Māori, and also the duty to actively protect their interests.

CHAPTER 3B:

CROWN PURCHASING: PRE-1865 RESERVES

McCaw Lewis LAWYERS

What the claimants say

1. The Tribunal summarises the submissions of the claimants regarding reserves as follows:

   (a) The Crown ought to have had a clear policy for ensuring the provision of sufficient reserves to secure an adequate tribal land base, especially in the context of the Crown's intention to purchase much of the district;

   (b) The Crown failed to provide reserves, and to ensure they were retained; and

   (c) The Crown put much more effort into extinguishing Māori title than into setting aside and protecting reserves.

What the Crown says

2. The Tribunal notes the following:

   (a) The Crown concession that, in this Inquiry District, Māori were landless at least by the turn of the 20th century and that the Crown therefore breached the principles of the Treaty.

   (b) The Crown concedes that it should have delineated and protected the reserves agreed upon and issued grants where they were promised, and that where Māori suffered prejudice from these failures, the Crown agrees that the Treaty was breached; and

   (c) The Crown does not see the subsequent loss of reserves by Crown purchase as necessarily prejudicial however, arguing that it depends on a number of factors, including the purpose of the reserve and whether that purpose remained relevant at the time of alienation.

The Crown and reserves in the early years

3. In the foundation years of the colony, Crown officials made a clear commitment to help Māori to weather the impact of an influx of settlers. All Māori land essential for their well-being would be protected, so that they could use their remaining resources fully and also have access to the benefits of settlement.

4. It was Crown practice to focus on confirming and protecting Māori ownership of sites already intensively used, rather than on retaining land suitable for commercial ventures. The result is that what Māori got to keep was fairly limited.

5. In any event, the Tribunal notes that a basic commitment to the principle of active protection did survive with regard to reserves.

Reserves created in Wairarapa ki Tararua 1853-65

6. In the late 1840s, when Governor Grey was in charge, the Crown made large-scale purchases with large-scale reserves. In our inquiry district, only the Castlepoint purchase conformed to this model, and the Mātaikona reserve of 17,770 acres was the only extensive tract specifically reserved for deed signatories.

7. After briefly discussing the Castlepoint reserves, the Tribunal goes on to discuss the number of reserves that were made in the pre-1865 period. A Royal Commission investigation in the 1880s noted that the Crown had created around 90 reserves in the district.

8. The Tribunal then goes on to discuss the provisions for reserves, noting their vague nature. Of the reserves made by McLean for the Māori community, few reserves were large enough for running stock or for leasing out to others.

9. Where the purpose of the reserve was apparently the future economic expansion of hapū interests, the size deemed appropriate was 1,000 to 2,000 acres. However, these provisions became less likely as Crown purchase officers "filled in the patchwork of Wairarapa blocks and extended their activities into Tamaki Nui-ā-Rua".

10. The Government gave steadily less consideration to the future needs of Māori and the Tribunal identifies particular examples of where this is apparent in the evidence. McLean did not envisage Māori retaining extensive properties and a strong presence in the valley; however, he remained committed to them keeping their most valued resources, provided the areas were not extensive.

Reserves for continued access to customary resources

11. The Tribunal then discusses the reserves created because resources that Māori particularly valued were found there, noting that there were a great many harvesting places that were not reserved. The areas reserved that are noted include:

    (a) Stands of bush along with places for the people residing there; and

    (b) The retention of eel and fishing sites, the Tribunal noting however that, where possible, McLean attempted to ensure that this did not interfere with European farming practices, drainage and access to the lakes and coast.

12. Often the written deeds did not say why land was being reserved, an example of the ramifications given in relation to the reserve made for Rawiri Piharau from Owhanga block.

Reserves providing for Māori participation in the new economy

13. There was less coherent thinking about setting aside reserves to provide for Māori participation in the new economy.

14. The Tribunal considers the evidence of Brian Gilling and concludes that there is no evidence from this period that the Crown thought in any sustained or consistent way about the effect on Māori of their significant land buy up, or what Māori might need in order to prosper.

Reserves for/not for rangatira

15. In its discussion of the reserves made for rangatira, the Tribunal begins by noting the ambiguities with the reserves made regarding whether they were intended for rangatira themselves or to be held on behalf of hapū. However, the Tribunal notes that reserves were specifically conceived as 'sweeteners' for influential leaders, and gave particular examples of where this was apparent.

16. The Tribunal then discusses particular reserves which were meant to be for the wider community but ended up in the hands of a few individuals. Examples are given of this situation regarding the following reserves:

    (a) Tūrakirae;

(b) Two reserves made as a result of the Mataōperu purchase; and

(c) Kōhangawariwari.

Later Crown officials follow McLean's lead

17. The Tribunal then goes on to discuss reserves made by Crown Officers after McLean. It is noted that they continued as much as he did in making small reserves for Māori for the most part, even though they began to note the adverse impact of Crown purchases of Māori land. One particular Officer, Searancke, estimated that he had reserved some 1,350 acres after purchases amounting to 49,000 acres.

18. It was also noted that in the early 1860s the Crown did return just over 6,300 acres of reserve land at Whakataki, seemingly for the support and maintenance of the former owners and to fulfil old promises dating back to 1853.

19. It was concluded that in Tamaki Nui-ā-Rua, the reserves sometimes made by the Crown proved very limited, as did the effectiveness of the protections provided under the Native Land Laws and associated legislation.

Reserves lost 1854-81

20. As has been discussed, the Crown's policy and practice with regards to reserves had serious problems. Reserves were created erratically, their purpose was muddled, and their size varied (although they were mostly small and limited to land that Māori were using intensively). But worst of all, reserves were not well protected, meaning some were encroached upon by settlement almost immediately.

21. The Government response would either be settling Māori on alternative sites, or repurchasing land from settlers to give effect to promises made by Māori. However, often problems were simply neglected.

22. The Crown also began at once to purchase reserves both in the valley and the bush area. The Tribunal states that the Crown's practices indicate the Crown was unlikely to be genuinely interested in implementing a legal regime that would really ensure reserves remained in Māori hands.

23. The Tribunal then discusses the Crown purchase of reserves, noting particular examples, including:

(a) A small portion of Waiariki;

(b) A piece of bush intended as a reserve for Ngātuere Tāwhirinātea at Taratahi;

(c) Ritokau;

(d) Three of the Tūrakirae reserves, purchased within a few months of the original transaction;

(e) The Castle Point reserves of Porotāwhao, Puketewai and Whakataki;

(f) Fifty acres from Mātaikona;

(g) Taurangawaiō;

(h) Two reserves from the Whareama purchase – Hikurangi and Awatoitoi; and

(i) Two of Te Mānihera's reserves, being accepted as security for a mortgage to settle his outstanding debts.

24. The Tribunal states that McCracken has noted ten cases where reserves were inadequately identified or protected – Tuhitarata, Tūranganui, Te Ōri, Whāwhānui, Waitutu and Takapūai (at Castlepoint), Kaiwhata, Ōwhanga, Awaiti Part Pāhaua (Pūkaroro Rerewhakaaitū) Reserve, and the Whakatai Reserve (at Whareama). The Tribunal gives examples of Te Ōri, Whāwhānui, and Ōwhanga.

Reserves purchased back from the Crown by their original owners

25. The purchase back of reserves was done under individual title, rather than being kept as reserves held by hapū. The benefits of holding the land in individual title included being eligible to vote as (male) property owners and protecting land from encroachment.

26. Examples discussed in detail are Akitio and Whakataki. The Tribunal later notes that many years of waiting followed for those who purchased back their reserves in expectation of a Crown grant, and that this was an important grievance for Māori, acknowledged by the Crown. It hindered their political, social and economic empowerment.

Pre-1865 reserves under the Native Land Court system

Rangatira seek proof of title

27. Wairarapa rangatira brought their reserves into the Native Land Court system as soon as they were able to, seeking from the Court proof of their ownership. When the Native Land Court began operating in the Wairarapa, the areas promised to rangatira and other reserves out of the Crown's earlier purchases were amongst the first blocks bought through it.

28. The Tribunal notes that some reserves were granted to the individual rangatira making the application, with no protections placed in the title. It also notes the consequence - that they were fully open to the direct settler market and, of course, when such lands were lost to the individual they were also lost to the hapū.

Restrictions on alienation under Native Land Legislation

29. The Tribunal discusses the failures of the native land regime in regards to the provisions relating to restriction on alienation and the protection of Māori Land. This is explored in more detail in Chapter 4.

30. It was concluded that no effort was made to ensure that sufficient land was retained to permit Māori to engage with the agrarian economy on equal terms with Pākehā, or to give them a capital base from which to make investments in other fields of endeavour. There was not even a blanket rule that ensured that all habitations and sites of significance were retained, although this had been an important element in the reserves being made in the first place.

Reserves lost

31. The Tribunal gives three examples of the process of attrition in respect of the loss by Wairarapa Māori of the following reserves – Tūranganui, Ngātahuna, and Whareama.

The Royal Commission of 1882-83

32. The Tribunal discusses how a Commission of Inquiry into the Wairarapa reserves came about. This was as a result of a number of Māori complaints about lost reserves.

33. There is then a discussion on the report prepared by the Commissioner of Native Reserves, Alexander Mackay, noting the following:

(a) Although he included reserves at Seventy Mile Bush, he excluded several instances where reserves for individual rangatira were noted within a deed and the Court issued title without restrictions;

(b) He did not investigate the reserves at Forty Mile Bush; and

(c) In a third of the cases listed, Mackay noted that Crown grants had been issued to named individuals and 'others' but did not document their subsequent history.

34. The Tribunal provides a table which summarises the alienations, excluding leases that Mackay identified.

35. The Tribunal also notes adjustments made in order to resolve disputes, commenting that these were generally instances where the government had mistakenly sold the reserves to settlers.

What did the Crown do next?

36. The Tribunal discusses what was done about the problems Mackay identified and whether anything changed in terms of the Crown's general policy or its practical commitments.

The Native Reserves' Titles Grant Empowering Act 1886

37. This Act was one of the Crown's responses to the investigations of reserves in the Wairarapa and elsewhere.

38. In the case of Wairarapa lands, the Act stated that instruments of title should be issued to such persons who had been identified as beneficially entitled to the reserves. The Governor was therefore empowered to execute warrants for the issuing of certificates of title and to impose any necessary restrictions on the title. Thus, after three decades of waiting, Wairarapa Māori could finally get title to the land that was still theirs.

39. The Tribunal, however, notes that it was too late for some reserves as some had been long encumbered to settlers and grants had been backdated to legalise ownership by settlers, not Māori. The Tribunal notes that, in other cases, restrictions were short lived and were lifted to allow grantees to sell the reserves. Other examples are noted.

The reserves MacKay identified as having unresolved problems

40. The Tribunal notes the blocks identified by MacKay in 1882 as having unresolved problems. Of those identified, the Tribunal only discusses the information that it has on the following reserves – Ōwhanga; Pūkaroro, Rerewhakaaitū and Waipuna; Kākati, Mangapōkia, Waimīmiha and Te Ōroi:

(a) Regarding Ōwhanga, the problem was the fact that the site was undesirable and flood prone. Because of this, the owners did not want it and soon sold and were forced to 'squat' on Crown Lands;

(b) Regarding Pūkaroro, Rerewhakaaitū and Waipuna, the problems included:

(i) What was reserved fell well short of what was initially promised under the relevant deed;

(ii) The quality of some of the land reserved; and

(iii) Problems with succession due to the Crown's sale of two of the reserves.

(c) The problem with Kākati was that Mackay had incorrectly identified the reserve as part of the purchase of the Kaiwhata block;

(d) Regarding Takapūai, the problem was that this Castlepoint reserve had never been surveyed and the land had been taken up by settlers in the meantime;

(e) With Mangapōkia, the problem was remedied - a shortfall in the reserve had to be made up with the addition of 42 acres of land;

(f) Regarding Waimīmiha, the problem was that the owners of the reserve had to wait until the early 20th century to get title, as the reserve had never been surveyed. The Tribunal discusses in detail the partitions that were made in order for this to be remedied; and

(g) With Te Ōroi, it took Ngāti Hinewaka a long time to obtain title.

Conclusion: Provision of reserves and redress generally ineffective

41. After three decades of waiting, Wairarapa Māori were finally awarded titled to most of the lands that remained from the first waves of Crown purchase.

42. In the Tribunal's view, however, an inquiry such as that conducted by Mackay was unlikely to provide an adequate remedy for the various failures in policy that had taken place:

(a) The concentration on sites in active occupation without sufficient provision for long-term needs;

(b) The awards to individuals at the expense of an adequate provision for the community as a whole; and

(c) The various losses through Crown purchases or failures of court-imposed restrictions.

43. Mackay did not question the purchase of reserves, and regarded those blocks as legitimately sold. Even where purchases were the subject of disputes, or where the sale really constituted coercion of owners to accept a fait accompli, there was no question of those transactions being overturned as a result of his inquiry. Nor did Heaphy or Mackay consider looking behind the award of title of reserves to individual grantees by the Native Land Court.

44. Protections belatedly entered on titles of these last remaining 'reserves' usually came under immediate challenge. The reasons for Māori to give them up were various, but often they were too small to develop, or had problems to do with access or land quality. Also, their owners were under financial pressure, and there was no countervailing enthusiasm by policy makers to take meaningful action to help Māori keep their land.

Tribunal Analysis and Findings

The adequacy of reserves and the sorts of land reserved

45. The Tribunal begins this part by outlining the assurances made to Māori and the fundamental nature of those assurances to the relationship between Crown and Māori in the early years. The Tribunal does not think that any of the changing circumstances - economic or political - took away the Crown's responsibility to try to follow through on what its officials promised.

46. It was concluded that the Crown's reserve policy was flawed from the start – contradictory, vacillating and so limited in nature that even if fully implemented, the Crown's performance as a Treaty partner might well have fallen short.

47. A crucial weakness was that the Crown's policy focus was almost exclusively on Māori retaining the land that they were then intensively occupying, not on providing for a variety of uses in the long term. In doing so, the Crown failed to give effect to the limited objective of protecting Māori in their existing habitations.

How much land did Māori need?

48. The early official concern that Māori might be injured if the whole of the valley was to transfer out of their hands, was short lived, and far more enduring was the imperative to buy as much land as possible, as cheaply as possible. To achieve this, the Crown paid little regard to its duty to ensure that adequate land of good quality was left in the possession of Ngāti Kahungunu and Rangitāne.

49. Settlement would not have been stopped or impeded if the Crown had fulfilled its Treaty duty as there were relatively few Māori in the Wairarapa, therefore providing reserves that met their reasonable demands for both present and future needs would still have freed up hundreds of thousands of acres for settlers.

50. The Tribunal also discusses how the Crown's intention was to close down the practise of settlers leasing customary land from Māori directly. Grey's and McLean's main objectives were to get rangatira on to their own farms under individual tenure so that leasing would be a temporary option only, dependent on whether the needs of settlers were being met by the Crown purchases.

What should the Crown have done?

51. The Tribunal then sets out what, in its opinion, Māori were entitled to retain under the Treaty, and in light of Normanby's instructions and the arrangements Grey outlined at the komiti nui as the basis for Crown purchases of land in the Wairarapa.

52. The Tribunal states that:

    (a) Instead, the vision for Wairarapa Māori remains limited and implementation even more so;

    (b) In failing to reserve adequate land for Māori, the Crown breached its duty to actively protect their interests; and

    (c) Māori were prejudiced and the Crown's meagre provisions effectively precluded their engagement with the settler economy, except as wage labourers and subsistence farmers.

Protection for reserves and Crown responsibilities

53. Given the reserves were not surveyed for a long time; neither Māori nor the Crown could protect them.

54. The Crown's purchases of reserves were inappropriate, particularly given the fact that too little land was reserved in the first place. The Tribunal states that:

        (i) This militated against the likelihood that Māori would ever be able to engage in the new economy; and

        (ii) The Crown's actions greatly contributed to the subsequent dispossession of hapū and the growing problem of landlessness.

55. The Crown's ready resort to buying reserves as a means of sidestepping disputes about who owned land and in what proportion was particularly blameworthy as it appears that the Crown was profiting from its own misdeeds.

56. The Crown should have resolved the underlying problems, which were of its own making, and ensured that all those entitled were recognised.

57. Restrictions on the alienation of reserves were of limited long term effect, and although a long term system to protect the reserves might not have been necessary, the Crown failed to demonstrate when this occurred and to reconcile the promise of reserves as a permanent possession at the time of purchase, with later Crown thinking that reserves would not be required forever.

58. This kind of fundamental shift in conception should not have been a unilateral decision by the Crown; it was in a position to predict that continuing purchases of Maori land would render them landless – an outcome Māori would never have agreed to had it been brought to their attention.

59. The Tribunal concludes that the Crown breached the principles of the Treaty by failing to ensure that Māori were protected in the ownership of their reserves, and sets out the particular actions of the Crown that resulted in the breaches, which includes:

    (a) The vague defining of reserves and failure to survey;

    (b) The purchasing of reserves, including as a purported means of resolving disputes; and

    (c) Purchasing reserves from individuals when the Crown knew that the true ownership lay with a larger group. Māori were prejudiced because the Crown's breaches helped propel them towards landlessness.

Crown's response to Māori complaints about survey failures and other reserve problems

60. The Tribunal discusses this issue, including Crown efforts to investigate complaints and the lengthy negotiations that ensued, with the aim of finding a remedy.

61. The Tribunal notes that on too many occasions Māori were obliged to accept second or third best after a protracted process of negotiations with a succession of Crown officials. The Tribunal states that the Crown has conceded that this is prejudicial to the claimants, and that it considers this concession appropriate.

Finding

62. The Tribunal finds that the Crown's efforts to redress longstanding problems were too long delayed and too limited to mitigate the Treaty breaches detailed above.

CHAPTER 3C:

CROWN PURCHASING: THE BENEFITS OF SETTLEMENT IN TERMS OF EDUCATION AND HEALTH

1. The provision of health and education services to Māori was integral to the picture of the mutually beneficial Crown-Māori relationship that Grey unveiled at the komiti nui and which subsequently fell to the Crown to try and implement. The Tribunal considers how the Crown's commitments in these areas played out in practice.

Education

2. The Tribunal examines the Government's provision of education to Wairarapa ki Tamaki Nui-ā-Rua Māori from the 1840s until the 1990s. The Tribunal states that, in consideration of the evidence, the key themes running through its analysis are:

    (a) What were the government's promises to Māori with regards to educational provision, and were they fulfilled?

    (b) What educational aspirations did Māori express and how did the government respond?

    (c) What educational provisions did the Crown set in place for Māori in the Wairarapa ki Tararua district? Was that provision adequate? Could it have done more?

    (d) What were the issues surrounding Te Reo Māori and the use of English as the medium for education? How did the Crown handle them?

    (e) Were the standards of Pākehā and Māori education comparable within the Wairarapa ki Tararua district?

    (f) Did the Crown act in good faith with reference to the lands gifted to the Church for schools at Pāpāwai and Kaikōkirikiri?

3. The Tribunal then summarises the claimants' arguments, the important points being:

    (a) The Crown failed to provide them with access to education equal to that enjoyed by Pākehā communities;

    (b) There was no recognition of the Crown obligation to fashion education for Māori to equip them to participate in the new colonial arrangements;

    (c) The Crown's general promises of schools and education were instrumental in inducing Māori to sell land to the Crown in the first place, (referring to the submission from Counsel for Rangitāne regarding the interpretation of the koha clause), and the Crown failed to fulfil this promise;

    (d) There was particular concern about the Crown's refusal to intervene over the Church of England's response to the gift of land at Pāpāwai and Kaikōkirikiri as an endowment for schools;

    (e) The 1940s School Trusts Legislation failed to address claimants' grievances adequately. The Tribunal refers to the Rangitāne claimants' allegation of a special failure on the part of the Crown in their case due to the fact that the wording of the Pāpāwai and Kaikōkirikiri Trust Act 1943 gave preferential treatment to children of Ngāti Kahungunu; and

(f) The exclusion of Te Reo Māori from schools during the early to mid-twentieth century.

4. The Tribunal then summarises the Crown response to those submissions as follows:

(a) It is acknowledged that the claimants were entitled to expect a reasonable degree of educational provision by governments;

(b) The Crown had taken an active role in Māori education;

(c) The curriculum of the native school system and education board school system were comparable and allowed Māori equal opportunities for educational achievement. The Crown acknowledges that native schools emphasised English language instruction and actively discouraged the use of Te Reo Māori, however, it argues that these policies had the support of Māori leaders of the time;

(d) The Crown would have been fully aware that the Church of England had not complied with the terms of the gifting and that it had obligations of good faith towards Māori to see that any representations that the Crown had made were met; and

(e) That, in regards to Ōkautete School, supplies, resources, and support to the school were sometimes lacking and this negatively affected the school's operations.

Educational provision for Wairarapa ki Tamaki Nui-ā-Rua in the nineteenth century

5. The Tribunal begins by discussing the establishment of native schools in Wairarapa ki Tararua from 1882, noting the following:

(a) After the Native Schools Act was passed, Wairarapa ki Tamaki Nui-ā-Rua Māori repeatedly requested native schools, but, for the first 20 years, they were refused;

(b) Although there was an official perception that local Māori did not care about education, Rangitāne and Ngāti Kahungunu leaders went to great lengths to get the government (or Church) to establish schools within their respective kāinga and also had definite views on how best that education could be delivered;

(c) One of the reasons for ignoring requests for native schools was because Māori communities no longer predominated in Wairarapa ki Tararua – one official considering that local Māori should be assimilated as rapidly as possible; and

(d) The native schools that the government did agree to subsidise struggled in terms of funding, school roles and staffing.

6. The Tribunal then goes on to discuss the education board schools and notes the following:

(a) Although primary education was compulsory for Pākehā children from 1877, it remained voluntary for Māori children until 1894;

(b) The provision of board schools, rather than native schools, was not necessarily prejudicial to Māori, although the Tribunal acknowledges that it does not condone the assimilationist agenda behind the government's rejection of pleas for native schools; and

(c) Māori pupils encountered discrimination at the board schools, which was clearly a factor in Māori wanting their own schools.

7. The Tribunal then compares the two systems and, in doing so, makes the following remarks:

(a) The education board system did not require Pākehā to contribute land or money for the establishment and upkeep of schools, however, Māori had to lodge formal requests for a native school to be opened and then give land and other resources for that purpose;

(b) Each system was operated discretely, with separate administrative structures, funding arrangements, curricular and teaching requirements;

(c) Although board schools were run locally and regional education boards delegated many administrative responsibilities to elected school committees, the native schools were run from Wellington and committees had virtually no administrative power nor any role in decision making; and

(d) Board schools within the Wairarapa ki Tararua district were typically better resourced and funded than the district's native schools.

8. The Tribunal then goes on to discuss the native schools' curriculum, noting that one of the most significant issues throughout the 1880s to the 1960s was the schooling of Māori children in the English language, although it acknowledges that, overall, Māori leaders of the time seemed to share the view that this would improve the communication between the two races and ensure peace and social order in the colony; and

9. The Tribunal also discusses the Native Schools Code which:

(a) Set out requirements for establishing schools, the appointment and conduct of teachers for the curriculum and also emphasised the civilising role that teachers were expected to play in Māori communities;

(b) Required English instruction, however also permitted the use of Māori language, at least for the younger children; and

(c) Was revised several times over the next 50 years, each time bringing the curriculum closer to that of the board schools; however, despite this, in practice native schools maintained an emphasis on vocational training.

Government provision for education for Wairarapa ki Tamaki Nui-ā-Rua Māori in the early 1900s

Rural development and Māori education

10. Throughout the first half of the twentieth century, Māori education policies were shaped by the belief that Māori would (and should) remain predominantly rural people. This is despite Wairarapa ki Tamaki Nui-ā-Rua Māori leaders long arguing for their people to receive instruction in 'Pākehā trades' as well as agricultural training.

11. This did not change, despite Apirana Ngata calling, in the late 1930s, for a shift in the focus of education from agriculture to include trade and tertiary training so that Māori could compete on the same terms as Pākehā.

Post-1940 developments in the native school system

12. The post-1940 developments in the native school system that are discussed by the Tribunal include:

(a) The extension of the native schools system to include secondary schooling;

(b) The change from 'native' schools to 'Māori' schools. The Tribunal states that the focus was still on Māori people receiving vocational training and, eventually, vocational employment although it is

noted that there were growing numbers of Māori entering teacher training colleges and the nursing profession; and

(c) The disestablishment of the Māori schools system and the transfer of the remaining Māori schools to the control of the education boards. The Tribunal notes that, despite this change, the number of Māori receiving secondary and tertiary qualifications remained low nationally and that by 1988, considerable disparities persisted between Māori and non-Māori.

Ōkautete Native School – 1906-62

13. The Tribunal discusses the successes of Ōkautete Native School, despite high levels of absenteeism and lack of resources.

14. As it was the only native school operating in the Inquiry district up to the point where such schools became part of the general school system in 1962, the Tribunal uses Ōkautete Native School to consider the Crown's provision of education services to Wairarapa Māori and the experience of Māori within the education system of the twentieth century. The Tribunal discusses the following:

(a) The creation/construction of the school, including the delay experienced due to bureaucratic hold ups, which was typical for native schools and could last many years;

(b) The opening of the school, including the establishment of a school committee and the work of that committee;

(c) The inadequacies of the school, which included a lack of furniture, overcrowding and poor ventilation. The Tribunal states that socio-economic factors such as poor health, housing and under-employment, both directly and indirectly contributed towards low individual and community educational attainment;

(d) The administration problems encountered by the school i.e. forced closure of the school for lengthy periods due to teachers leaving and delays in filling the vacancies;

(e) The testimonies of claimants which give an indication of how the Māori community perceived the school and its educational standards. The main thing discussed here is the fact that Te Reo Māori was not allowed:

(i) Former pupils recalled receiving corporal punishments for speaking Te Reo Māori at school and being discriminated against. The Tribunal refers to the Waitangi Tribunal's finding in the Te Reo Māori Inquiry that corporally punishing children for speaking Māori was part of the Education Department's official policy during the first quarter of the twentieth century; and

(ii) Previous tribunals have concluded that the government, via its education policies, failed in its Treaty obligation to preserve and foster the Māori language and these findings apply in the Wairarapa ki Tararua district.

(f) The transfer of the school to the control of the education board and its eventual closure in April 2001 because of declining pupil numbers; and

(g) That, despite some positives, having more native schools in the district would not necessarily have been better as they were under-funded and focused on educating Māori for manual rather than skilled or professional work.

Secondary schools

15. The Tribunal makes the following points of note in regard to the District High Schools that were established in Masterton, Dannevirke and Greytown:

    (a) Secondary education was typically only available to those who lived in or near towns in the early twentieth century;

    (b) Rural Māori wanting to attend secondary school were generally at a disadvantage because of low family incomes, as they could usually only attend if their parents could afford for them to board. The Tribunal notes the effect of this on particular claimants, drawing from their evidence;

    (c) The few who were lucky enough to win scholarships to attend the District's Church boarding schools benefited from this, however, additional financial costs prevented some from taking up the opportunity; and

    (d) There was a low level of Māori secondary school attainment in the Inquiry district, compared with other parts of the country.

Māori education in this district in the late twentieth century

16. The Tribunal discusses how Māori underachievement can be attributed to past education policies - evidence from young Wairarapa Māori being that the public education system had not served them well.

17. The Tribunal then goes on to discuss the development by Māori communities of institutions for the delivery of education in Te Reo Māori, including:

    (a) Kōhanga Reo, noting the evidence of Marama Kahu Fox regarding the opposition she faced from Pākehā community and the lack of support from the Council; and

    (b) Kura Kaupapa, noting that they are the only schools in Wairarapa ki Tararua providing Māori language instruction at a primary school level and the only schools offering bilingual or full immersion education in Te Reo Māori.

18. The Tribunal notes that the number of Māori in the Wairarapa ki Tararua district who leave secondary school with sufficient qualifications to attend tertiary institutions was below the national average for Māori children, however, there is insufficient information regarding the possible causes for this.

The Crown, the Church and the gifted land at Pāpāwai and Kaikōkirikiri

19. The Tribunal discusses the following:

    (a) The Education Ordinance Act 1847, which provided for the government to give a financial subsidy to all mission schools. The Act was principally aimed at educating and assimilating Māori children; and

    (b) The gifting by Māori of two blocks of land – a 400 acre block at Pāpāwai and a 190 acre block at Kaikōkirikiri - to the Church of England for educational purposes. The requirement that the gifted land be used as an endowment for the education of local children was, however, not expressed in the grants the government issued to the Church. This meant that the Church was under no legal obligation to build a school on the site, or to use trust funds specifically to educate Wairarapa Māori.

St Thomas' College – 1860-65

20. The Tribunal then goes on to discuss the establishment of St Thomas' College after the government had allocated additional funding to mission schools through the Native Schools Act 1858. Important points noted include:

    (a) The subsidy the government agreed to provide was initially deducted from the koha/five percents fund without the knowledge or agreement of the owners of the koha blocks, let alone the iwi. Māori were not asked whether they consented to this arrangement until a year later, resulting in the deductions being ceased;

    (b) From the start, the school suffered both administrative and funding difficulties;

    (c) For reasons that are unclear, the college operated for only four years before the Church shut it down in January 1865; and

    (d) Wairarapa ki Tamaki Nui-ā-Rua Māori campaigned to have the college reopened or – if the Church was unwilling to establish a school at Pāpāwai – for the gifted land to be returned. However, the Church rejected both options and Pāpāwai remained without a school for several decades.

Pāpāwai and Kaikōkirikiri School Trust land

21. The Tribunal discusses the eventual opening in 1886 of the Pāpāwai Native School on a site obtained from the Church out of the gifted land. However, the Tribunal goes on to discuss how this did not address the grievance over the Church Trust and the failure to honour what had been originally envisaged. This includes:

    (a) In 1896 a petition was made to the government for the return of the lands. Despite a native affairs select committee considering that the grievance had merit, the government did not follow the committee's recommendations, which were to either introduce appropriate legislation or seek other ways to return the lands to the donors;

    (b) The Church's failure continued despite high-level assurances made directly to Ngāti Kahungunu and Rangitāne to the contrary; and

    (c) The Church and the Crown ended up litigating through the Court of Appeal and then the Privy Council. The Privy Council found that the gift of the land was not invalidated just because the purpose for which the land had been gifted had not immediately taken effect. The Tribunal states that the legal action seems to have discouraged the government from introducing specific legislation to deal with the trust land, and that this did not occur for another 40 years.

Hikurangi College – 1903-32

22. The Tribunal discusses:

    (a) The establishment of Hikurangi College for Māori boys in 1903, which was located on 150 acres owned by the Church and the college was required to pay £70 rental per annum out of income from the gifted lands;

    (b) The criticisms of the school from local Māori, including that it was not on the gifted lands;

    (c) The increase in boarding and tuition fees which prompted protest and a petition from Ngāi Tūhakeke in 1927, mostly because of the failure of the trustees to consult with them; and

(d) The fact that after a fire gutted Hikurangi College in 1932, it was not rebuilt - the Church stating that this was due to a lack of funds.

1905 Royal Commission of Inquiry into Māori school trusts

23. The points noted by the Tribunal in this part include:

(a) The report of the 1905 Commission supported Māori grievances, concluding that:

(i) The Church had promised them that schools would be built on the gifted land, providing particular types of training/teaching;

(ii) The Church's promises were why Māori were prompted to give the land in the first place; and

(iii) The Church had failed to fulfil its direct or implied 'undertakings';

(b) The Commission considered that the establishment of Hikurangi College had fulfilled the trust's obligations, however, it noted that Māori based at Masterton were dissatisfied at the Kaikōkirikiri funds (as well as those for Pāpāwai) being absorbed by the college; and

(c) The Commission's findings did not lead to any significant changes in the Church's provision of Māori education in the district, nor did it prompt the Government to address the issue.

Legislative developments, 1937-43

24. The Tribunal discusses the following developments:

(a) The Church's attempt to change the legislation that governed the Trust's operations so that the gifted lands at Pāpāwai and Kaikōkirikiri could be sold and the interest on the funds used for scholarships;

(b) Petitions in 1941 by Māori from various regions for new legislation to govern the trusts' operations, which came to the joint committee on Church trust lands. The committee's March 1943 report recommended:

(i) That Māori and the Church reach a compromise with greater Māori involvement in trust administration; and

(ii) A number of administrative changes, most notably the establishment of new Trust Boards with restricted powers.

(c) The Pāpāwai and Kaikōkirikiri Trust Act 1943, which followed the Committee's recommendations - despite the desires of local Māori that trust funds be reserved solely for the education of Ngāti Kahungunu and Rangitāne, the legislation stipulated that scholarships were available to all British subjects of all races and for children of Pacific Island inhabitants;

(d) Stirling's argument that, in practice, the Trust favoured the Church boarding colleges (Te Aute and Hukarere) over the local secondary schools. It was also noted that the lack of suitable accommodation at Wairarapa College meant that many rural Māori could not attend the district high school; and

(e) The 1943 Act and 1946 amendment, which failed to:

(i) Fully satisfy demands that benefits being generated by gifted lands go only to the donors and their descendants, and

(ii) Explicitly recognise those who had been involved in the original gifting, including Rangitāne.

Summary

25. The Tribunal reiterates the following important points:

(a) In the late nineteenth and early twentieth centuries, Māori requests for native schools in the Wairarapa ki Tararua district were regularly rejected, native school committee requests for increased funding and improved facilities were generally refused and native schools were encouraged to transfer to education board control as quickly as possible;

(b) Discrimination was faced by generations of Māori pupils in ordinary state schools, as well as by Māori educational facilities that encountered public, and often outright racist opposition to the commencing operation. The Tribunal notes that the education department could have taken a more active role in promoting the value of Māori educational initiatives; and

(c) The inactivity of the government and education officials in the Wairarapa ki Tararua district throughout the late nineteenth and early twentieth centuries, resulted in Wairarapa ki Tamaki Nui-ā-Rua Māori having to attend board schools that were often inaccessible and inhospitable.

Tribunal comments and analysis

Promises

26. The Tribunal considers the promises made by Crown officials to Māori in regard to education and makes the following remarks:

(a) It can be inferred that education was an important part of the mix of undertakings that, when viewed collectively, persuaded Māori that they should agree to let settlers come and make their land available to them;

(b) There is no doubt that the Crown failed to follow through on its commitments and that this was an opportunity lost; and

(c) Although Māori children were never excluded from the developing state school system, their needs were not met in either the native schools or the board schools.

Native schools in the district

27. The Tribunal notes the following:

(a) In the native schools, a less academic programme was considered suitable and they were the 'poor cousin' in every respect;

(b) Native school committees had a lesser role than committees of board schools, but direct financial contributions were still required; and

(c) Māori were expressly denied tuition in their own language.

Board schools

28. The Tribunal notes the following:

    (a) Māori children were probably not really welcome at board schools in this Inquiry district – or indeed elsewhere;

    (b) Māori children were usually at a disadvantage at board schools, as:

        (i) There were no special programmes to teach Māori children English as a second language;

        (ii) Most board teachers had a low opinion of the academic potential of Māori children; and

        (iii) Māori suffered racial prejudice from Pākehā teachers, pupils and parents.

    (c) Although the government cannot be held directly responsible for the prejudices of its citizens, it is accountable for some of the causes of that prejudice and for not trying harder to ensure that Māori had a real opportunity in the board school system.

Conceptual failure

29. The Tribunal discusses the various options that might have been pursued to ensure that the Māori children of Wairarapa ki Tararua received a better education than they did. These include:

    (a) Special training in Pākehā trades;

    (b) Māori co-management of schools funded by the gift of their lands;

    (c) The greater use of Te Reo for Māori pupils, the Tribunal noting that:

        (i) English was valued above Māori, however, this was not the central problem –the "real culprit" was the idea that a choice had to be made between English and Māori; and

        (ii) It seems that there was too little appreciation of, and too little concern for, the consequences for Māori culture and society of not speaking their language.

30. The Tribunal concludes that, although sanctioning only English-medium education had many negative consequences, it is difficult to see it in terms of Treaty breach because it was the result of genuinely mistaken thinking that this was the best way forward for Māori children.

Logistical difficulty

31. The Tribunal notes the logistical difficulties in supplying educational services to Māori in this Inquiry district, which contributed to the early closures of native schools.

Inadequate provision to larger Māori communities

32. The Tribunal states that there was clearly inadequate provision for sizeable Māori communities in places such as Pāpāwai, Te Oreore and Tūranganui, for reasons including:

    (a) The Crown's failure to pass legislation to make the Church of England fulfil the terms of the trust it had arranged;

    (b) The Crown's late responses to requests by Māori to set up native schools;

(c) The Crown's failure to resource the schools adequately; and

(d) Noting Stirling's evidence that the Crown was more willing to invest in the Pākehā community than in the Māori one.

The Crown's responsibility for the gifted lands

33. The Tribunal makes the following significant points:

(a) The Crown has conceded that Grey's direct involvement in persuading Māori to gift land for the school in the first place meant that it had an obligation of good faith to see that the terms of the trust were met, and clearly, the Crown failed in that obligation;

(b) Despite options for addressing the problem being presented to the Crown, nothing was done until the 1940s;

(c) Once Hikurangi College was opened, the Crown seemed to think the problems with the trust were fixed, however, clearly they were not as the school always struggled and had mixed support from the Māori communities that had donated the trust land;

(d) The government's passing of legislation in the 1940s and how, although this did not satisfy everybody, it was a reasonable compromise, given the difficulties of maintaining a boarding school in this location; and

(e) The question of entitlement to benefit from the scholarships remains an issue. The Tribunal refers to Rangitāne's specific claim regarding the operation of the trust and states that, although there may have been a misapprehension that all tangata whenua in Wairarapa identified as Ngāti Kahungunu, plainly, Rangitāne children in the Wairarapa today should also be eligible for scholarships on the same basis as Ngāti Kahungunu children, and the Act should be amended accordingly.

Conclusion

34. With respect to the promises made by the Crown regarding the provision of education, the Tribunal notes that:

(a) They created an absolute obligation on the Crown to set about educating Māori as soon as the Crown undertook its purchases in Wairarapa and opened up the district to settlement;

(b) Education was critical to Māori deriving what they needed from the colonial bargain, and failure in this area played a major role in why it went wrong for Māori;

(c) Both the board and native schools fell woefully short of what Māori needed to advance in the modern world; and

(d) The above failings breached the Crown's duty of good faith and active protection and may have also breached Article 3 rights of equal access.

35. The Tribunal notes the following regarding Te Reo Māori:

(a) The Crown's responsibility for language and culture loss is a complex matter for reasons that include:

(i) In a district where settlers so quickly outnumbered Māori, language and culture were always going to be under threat; and

(ii) The policy of delivering instructions in English enjoyed very considerable support from both Māori and Pākehā.

(b) Government support of Māori-medium education was significantly delayed and it would have been much less difficult to introduce if the process had started earlier.

36. The Tribunal recommends that the Crown, in partnership with the iwi of Wairarapa ki Tararua, continually review the degree of support necessary for Te Reo to be preserved and promoted in this region.

37. Regarding the Pāpāwai and Kaikōkirikiri gifted lands, the Tribunal makes the following findings:

(a) At the outset, the Crown failed to intervene to protect Wairarapa Māori from the wrongful implementation of their gift of land for schools;

(b) By the time the government passed the necessary legislation in the 1940s, needs had changed, and the establishment of Māori schools on the land gifted for that purpose was no longer viable;

(c) The Crown breached the principle of active protection when it failed to step in early in the life of the trust to ensure the Anglican Church handled the gift and the resulting trust properly;

(d) The Crown also failed to help establish the schools that both the Church and Crown promised (this failure being especially critical in the first 30 years when the children of Wairarapa Māori lacked a suitable school); and

38. On the basis of those findings, the Tribunal recommends that the Crown enter into discussions with the beneficiaries of the trust about implementing the original intention that the children of all Wairarapa tangata whenua are entitled to benefit.

Health

39. The Tribunal discusses the root of the Crown's obligation to provide health benefits to Māori, in addition to the Treaty obligation. This includes:

(a) Health benefits were among the specific undertakings made by government officials to Wairarapa Māori; and

(b) The koha/five percents clause in the early purchase deeds which provided that five percent of the on-sale price would be spent on, among other things, 'the establishment of hospitals and doctors for us'.

40. The Tribunal explores what became of those promises, drawing on the following resources:

(a) The study of Stirling, Irvine and Gilling, who explored health issues in the district by examining the records of health and school officials, plus a number of academic histories; and

(b) The personal experiences recounted by claimants.

What the claimants say

41. The Tribunal summarises the submissions made by claimants on the provision of health services as follows:

(a) The Crown had obligations to actively protect the health of Wairarapa ki Tararua Māori by reason of both the Treaty and the commitments made by its purchasing agents;

(b) The evidence shows that the Crown failed in this Treaty duty in Wairarapa ki Tararua, and also failed to follow through on its early promises made to Māori during purchase negotiations. The effects of these failings have been far reaching and long lasting;

(c) The statistics reflect the Crown's actions and omissions on Māori health;

(d) The poor health outcomes experienced by Māori were inextricably linked to Māori landlessness and poverty and Crown officials, at least by the twentieth century, recognised that link yet did not respond with appropriate protective or remedial health policies; and

(e) The particular failings in the area of health cited by counsel for Rangitāne, including the provision of only one doctor for the whole of the district, to whom Rangitāne, particularly those based in more outlying areas, had less access.

What the Crown says

42. The Tribunal then summaries the Crown's submissions on this issue, and the Crown:

(a) Acknowledges that it had made a clear commitment during purchase negotiations to provide health services;

(b) Agreed that there was 'disparity' for Māori on a number of social indicators, however, urged the Tribunal to consider the context of the time and the resources and knowledge available;

(c) Argues that the government had taken steps to address Māori health issues; and

(d) Acknowledges that the deduction of half of the expenses for the services of a native medical officer from the five percents raises problems as there was no earlier discussion, and Māori objected to the Crown using the five percents in this way.

The Crown identifies the problems, 1840-1900

Population decline, 1769-1901

43. The Tribunal discusses the following:

(a) The impact of the arrival of Europeans on Māori health and mortality, including the significant decline in the Māori population, largely as a result of introduced diseases;

(b) Although the sources did not allow the Tribunal to measure precisely the impact of European arrival on local Māori health and morbidity, the information available suggests that the Wairarapa region's Māori population was declining even before there was extensive contact between the two races;

(c) The rapid rise of the number of immigrant Pākehā between 1856 and 1880; and

(d) Although the census provided more consistent population figures after 1874, it is still difficult to describe with certainty what was happening to Ngāti Kahungunu and Rangitāne. The reasons for this include:

(i) The change in the boundaries of the census district; and

(ii) The census figures from 1901.

The Crown's duty to minimise the health consequences of colonisation

44. The Tribunal makes the following significant remarks:

    (a) Protecting Māori from the adverse effects of unsupervised and unregulated settlement, including worsening health, was a principle concern of the Crown at the time the Treaty was signed;

    (b) In the Napier Hospital Inquiry, the Tribunal found that the Crown had a responsibility to attempt to remedy the impact of introduced diseases and the effects of Māori health, even their causes were not fully understood; and

    (c) The Crown was constrained both by the limits of nineteenth century Western medicine and of its own colonial policy.

'Economy in Public Expenditure' limits health initiatives

45. The Tribunal discusses how economy in public expenditure limited health initiatives as:

    (a) Māori welfare provisions were bound to the success (or otherwise) of the land fund. Little was done to implement 'civilizing' or welfare policy because little land was on-sold and there were therefore no funds; and

    (b) In the early 1840s, the colonial treasury was virtually bankrupt, while the costs of the protectorate consumed what little funds were generated.

46. A basic system of subsidised healthcare was, however, established in the mid-1840s, largely through the appointment of native medical officers.

47. Public hospitals were later built in Auckland, Wellington, New Plymouth and Whanganui – justified on the grounds that providing hospitals based on the 'European system' would be a means of assisting in the civilisation of Māori.

48. £7000 was allocated for Māori purposes in the civil list budget under the Constitution Act 1852, intending to cover the costs of medical care, pensions and rations for the indigent.

How much was spent?

49. The Tribunal notes the following:

    (a) Despite Grey's initiatives of 1845-1853, special services were starved of funds well into the twentieth century;

    (b) When considering medical researcher Dr Derek Dow's breakdown of the 1860 figures:

        (i) Regional expenditure was erratic, possibly as a result of the upheavals of the war;

        (ii) Expenditure on Māori health gradually increased until it was given greater priority from 1905, doubling the minimum amount spent between 1893-1905; and

        (iii) The first hospital did not arrive in the Wairarapa until 1875, when Māori were increasingly marginalised and were, for reasons of racial prejudice, unwelcome in the general hospital system.

Provision of medical services in Wairarapa 1853-1935

Native medical officers, 1853-1914

50. In order to assess the Crown's provision of health services in this period, the Tribunal identified the five main categories of activity that it funded:

    (a) Native medical officers 1853-1914;

    (b) Native schools and distribution of medicines 1880-1910;

    (c) Public hospitals 1875-1910;

    (d) Māori councils and the Public Health Act 1900-1935; and

    (e) District health nurses 1911-1935.

51. For most of the nineteenth century, 'active protection' in terms of Māori health boiled down to the provision of native medical officers.

52. Occasional complaints by Māori in Wairarapa indicate that the service provided was not always adequate, although Māori did not reject it altogether, and in fact some argued for its expansion.

53. Only Māori living within easy reach of townships or those prepared to make their own journey into town from further afield could be reasonably assured of 'free' medical treatment. This was the case in Wairarapa ki Tararua, except for occasional attention for those in outlying districts when there were outbreaks of communicable diseases.

54. As state funding of health for Māori became more closely tied to assessments of indigence, Wairarapa ki Tamaki Nui-ā-Rua Māori tended to miss out because they were seen as comparatively 'well-off' and their low population also militated against their receiving special attention.

55. There were never more than 30 subsidised doctors before the mid-1890s and coverage remained very uneven. The native medical officer in the Wairarapa, Henry Spratt, based himself at Greytown and rarely visited coastal kāinga or more remote areas.

56. There were two petitions that were filed calling for Spratt's removal. One was from 153 Māori calling for Spratt's removal; the other was from 74 Māori calling for his retention. A third petition filed shortly thereafter referred to Spratt's 'unsatisfactory treatment of those requiring medical aid' and again asked the Government to discontinue his services.

57. There were issues surrounding payment of Spratt's salary out of the five percents fund despite protests, and all the lands generating the five percents were outside Spratt's medical circuit.

58. Eventually, Spratt's employment was allowed to lapse and he was not replaced for the next two decades. Any extra assistance for Māori came through the native schools, unless there was an outbreak of serious communicable disease, when the Government paid the local practitioner of Greytown to attend affected kāinga. Otherwise, those who needed medical attendance had to pay for it themselves.

59. A number of Māori had to sell land to cover medical expenses as the government increasingly confined its funding of health services to 'indigent natives' (aged, poor, infirm, crippled and without relatives to support them). For reasons that are now difficult to discern, Wairarapa Māori were not seen as falling into this category.

60. During this period, Wairarapa Māori sent numerous petitions and requests to the Government for more and better medical services. The medical services were briefly expanded to Wairarapa. Although Dawson maintained that Māori in the District only had money to pay for doctors or medicine at shearing time, the Chief Health Officer told the Minister of Public Health that he did not think the District needed a medical attendant for indigent natives because the natives were few and fairly well-off.

Native schools and the distribution of medicines

61. In the 1880s, the teachers at the local native schools stepped into the vacuum created by the removal of the doctor's subsidy, and became recipients of some minimal State assistance. This arrangement continued into the twentieth century.

62. The Tribunal discussed:

    (a) The role that teachers played in Māori health work between 1880-1900, noting that native schools were few so health assistance through this channel was extremely limited;

    (b) Native school reports, noting that ill health was a significant cause of school absences and there were a number of epidemics; and

    (c) Medical supplies – these were limited and had to cover the wider whānau as well as the school-children. Pleas for Government assistance were often refused because they fell outside the rules, or the matter was not seen to be pressing.

Public hospitals

63. The Tribunal makes the following important points:

    (a) The building of public hospitals was of little immediate benefit to Wairarapa Māori;

    (b) Māori were often seen as ineligible for hospital care as customary land was not liable for rates, and the issue of title and multiple owners made rates notoriously difficult to collect (hospitals being funded by a mixture of government subsidies, local rates, voluntary contributions and patient payments);

    (c) The first Wairarapa hospital opened at Greytown in 1875 and was largely funded locally - Stirling stating that this made it unlikely that Māori would have been encouraged to use the facility since they would not have been able to contribute to revenue; and

    (d) Māori were reluctant to use European hospitals due in part to a growing social divide. There was also a reluctance of many hospital boards to admit Māori patients.

Māori Councils and the Public Health Act 1900

64. Although there was increasing interest in preventative health measures for Māori, what was missing was a broad-based political will to underwrite policies favouring Māori institutions or individuals as recipients of state-funded welfare.

65. In the Wairarapa, Hēnare Parata, a respected leader from Pāpāwai, took up the position of native sanitary commissioner. Parata, Carroll, and Tamahau Mahupuku, another leading Wairarapa rangatira who acted as honorary sanitary commissioner, travelled to hui where they discussed sanitary improvements and the proposed Māori Councils Act. Parata inspected the kāinga visited by the ministerial party and gave advice on sanitation and health.

66. The Māori Councils Act passed in October 1900, which empowered councils at a tribal community level to enforce sanitary regulations for Māori houses and wharenui, and the subsequent appointment of sanitary inspectors to oversee the regulations and educate Māori in health and hygiene matters. However, it was also noted that the Māori council system was handicapped from the start by inadequate Government funding and the scheme never got off the ground.

District health nurses

67. In the early twentieth century, a system of district health nursing was introduced that was extended to Māori in 1911. The Health Department appointed native health nurses to take over from subsidised doctors the task of educating Māori on matters of sanitation.

68. Lack of funding delayed implementation and it was 20 years before a combined school and district nurse was appointed in the Wairarapa.

69. Stirling made the comment that a more comprehensive scheme of district and Māori nursing could have 'made the difference in health conditions and health education in poorly served communities'.

Why did Māori health improve?

70. According to Stirling, changes for the better may have occurred due to a number of medical developments post-1920 (such as penicillin and x-ray machines) and a better understanding of public health.

71. Special measures for Māori continued to be mooted; some were attempted, then starved of funds and soon withdrawn.

72. There were funding issues for Māori health – as for public hospitals, the dominant philosophy by the end of the 1950s being that one universal law applied in regard to contribution to healthcare. There was no reason for the Native Department to contribute to Māori care costs at all.

73. Stirling also pointed to the subsequent increase in health services for Māori, and how health management was still vested in Pākehā professionals as contributing factors to the improvement of Māori health.

74. Stirling also made the comment that Māori suffered disproportionately due to the high rate of diseases linked to their low socio-economic position.

Adverse conditions persisted too long

75. The Tribunal's discussion in this part includes:

    (a) Drawing from Stirling's research, health conditions remained far worse than they could have been. Stirling relies on the 'intermittent' reports of medical professionals, welfare officers and the last remaining teacher at the local native school (Ōkautete); and

    (b) The particular issues discussed by Stirling, which include:

        (i) Sub-standard housing;

        (ii) Poor diet;

        (iii) Inadequate clothing;

        (iv) Respiratory ailments; and

(v) Typhoid and tuberculosis – it being noted that both typhoid and tuberculosis were much greater problems for Māori than they were for Pākehā.

Inequality in housing standards and policies

76. Records for Wairarapa had indicated that by the end of the nineteenth century Māori were often living in substandard and overcrowded housing with poor water supplies. Shearers and farmhands were particularly vulnerable as they were not classed as indigent so received minimal state assistance in health, housing and sanitation.

77. Although people were aware of the substandard living conditions of Māori, Stirling notes that, until the 1930s there was a general unwillingness to finance improvements in Māori housing.

78. Pāpāwai had deteriorated due to lack of funds and conditions in town were apparently not much better.

79. National statistics also showed that a large number of Māori were living in substandard and/or grossly overcrowded conditions. This was much more than the Pākehā population - a gap that did not close substantially until 30 years later.

Government housing assistance

80. The Tribunal discusses:

(a) The 1905-1906 government initiatives to help workers on limited incomes with state housing rentals and obtaining state housing loans. The Tribunal notes, that there were problems with the loan criteria that was applied and that the lack of adequate finance hindered the effectiveness of the programme;

(b) Stirling's criticisms of the Crown's first efforts, prompted by Ngata, to provide a measure of financial assistance specifically to Māori through the Native Housing Act 1935. The issue was that relatively few Māori qualified for the loans, and those who did, had houses built that were of a lesser standard than those for Pākehā in order to keep costs low and loans easily repayable;

(c) The gradual improvements from the late 1930s onwards – the Tribunal notes that a far greater budget appropriation was made for Pākehā housing, even though the problems facing Māori were more pressing;

(d) How, after the second world war, the gap in housing standards between Māori and Pākehā narrowed due to a number of factors, including benefits for Māori ex-servicemen being on par with those for Pākehā; and

(e) That, despite the improvements, policy still failed to adequately address identified needs – the proportion of Māori living in substandard and overcrowded conditions still remaining significantly more than that of Pākehā, both nationally and in the Wairarapa.

Tribunal analysis and findings

81. The Tribunal finds that the Crown undertook, in negotiations to purchase land, to provide for Wairarapa Māori hospitals and doctors – noting the Crown concession that Māori had the right to expect medical benefits and the Crown's acknowledgement of its obligations to its Māori citizens.

Did the Crown fulfil its promise?

82. The Tribunal makes the following findings:

(a) The Crown's early promises of hospitals and doctors were palpably not fulfilled – certainly not within any timeframe that those to whom the promises were made would legitimately have expected;

(b) The service of native medical officers, although being better than nothing, did not contribute significantly to Māori health and wellbeing;

(c) The Crown did not assume responsibility for funding even the first medical officer appointed, resorting instead to the five percents for part payment; and

(d) The hospital promise only came to fruition in the 1870s and that serving the Māori community never seems to have featured to any extent.

83. The Tribunal does not find it difficult to conclude that not only did the Crown fail to fulfil its promises about healthcare, namely the provision of hospitals and doctors for Māori without significant delay, but also that the services of one native medical officer did not suffice.

Did the Crown provide Māori with health services equivalent to those provided to Pākehā?

84. The Tribunal makes the following important remarks:

(a) Unfortunately, during much of the period under consideration, Māori did not enjoy an equivalent level of care within the general system;

(b) The Treaty requires active protection against adverse effects of settlement and, whenever general provision of services was not giving sufficient protection, additional resources had to be specifically devoted to Māori communities;

(c) While the situation improved with the appointments of the late 1890s, and the tentative development of a Māori grounded infrastructure of health advice and care, the political will did not really exist for its support;

(d) By the time the first hospital had opened in Wairarapa, the public health ethos had already changed from Grey's early commitment to ensuring Māori could access the best levels of medical care available, to providing for the settler population. This resulted in a change from there being no expectation that Māori would pay for their medical care to Māori having to contribute, and their contribution being linked to their entitlement; and

(e) In Wairarapa there is only one recorded instance where a specific attempt was made to provide for the needs of Māori patients: a contribution for a separate ward at Masterton, an eight bedroom room being put aside for Māori use.

85. With regard to services to outlying areas, the Tribunal discusses:

(a) The unfairness suffered by Māori living in outlying districts, including the fact that they were subsidising care that only really benefited those based near the Pākehā towns; and

(b) The positive steps taken regarding the provision by native schools in the district of medicines and medical advice, noting however, that funding was lacking and only a small percentage of the Māori population was likely to have benefited from its provision.

86. The Tribunal discusses the 'indigent' requirement to qualify for subsidised services and notes that:

(a) The application of this policy consistently went against the interests of Wairarapa Māori, who, for reasons that are difficult to discern, were not considered poor enough to qualify;

(b) The 'indigent' label – or, in the case of the Māori in this district, the non-indigent label – seems to have applied impressionistically rather than in any standard or consistent way, or by reference to criteria. There is no evidence at all that those seeking medical assistance were affluent, especially those in more remote coastal areas; and

(c) The threshold for qualification as 'indigent' must have been extremely low for Māori communities in the Wairarapa to be legitimately deemed ineligible, and the Tribunal finds that the subsidised services were wrongly limited to exclude them.

87. The Tribunal concludes that:

(a) By adopting the articulation of the Crown's Treaty duty as to Māori health set out in the Waitangi Tribunal's *Napier Hospital and Health Services Report* – three general obligations flow from the duty actively to protect Māori health, the first being protection against the adverse effects of settlement;

(b) The evidence presented suggest that, until at least the latter part of the twentieth century, Māori did not receive equivalent healthcare to Pākehā; and

(c) In its opinion, the Treaty, the land fund and the Crown's specific undertakings to Wairarapa Māori together meant that tangata whenua of this district were – and are – entitled to receive good healthcare without extra costs to them, and that, by not fulfilling its obligations to Māori, the Crown breached the Treaty.

CHAPTER 3D:

CROWN PURCHASING: KOHA/FIVE PERCENT

1. In order to give Wairarapa Māori a direct stake in the settlement, Grey introduced the idea of using a percentage of the on-sale price of land Crown purchased from Māori to create a fund directly benefiting its former owners.

What the Claimants say

2. An important element of Gray's proposal was the involvement of Māori in the management of the fund.

3. The failure to utilise the fund for infrastructural development in the aftermath of the Crown purchase transactions, diminished any possible value of the fund.

4. It is also noted that the guarantee to Māori of citizenship should have meant that social services did not need to be paid for out of the fund.

What the Crown says

5. The Crown conceded that the implementation of the five percents clause breached the Treaty.

What Issues do the Koha/Five Percents Raise?

6. The Tribunal focuses on how the Crown conceived and implemented the koha/five percents and whether – both in their conception and implementation – the koha/five percents supported the Crown's effort to make suitable provision for the long-term welfare of Wairarapa Māori.

The Language in the Deeds

7. The Tribunal closely analyses the language in both versions of the deeds, the Māori version referring to koha.

The Deeds that contain the clause

8. The clause was included in only 12 of the deeds signed.

Why was the clause in some deeds and not in others?

9. This is unclear; however McLean seems to have used the promise of the five percents as a negotiating tool.

Were the Koha/Five Percents of General Application?

10. The Tribunal accepts that the Crown did not see the koha/five percents clauses as having application beyond the particular deeds in which they were included.

Administration of the Fund, 1853-70

11. Evidence shows that the fund was drawn upon most frequently for *"koha"* – meaning cash payments to, or through, individual chiefs.

12. From the early 1860s, the five percents fund was an administrative burden for the government which they would rather be rid of.

Kemp's Distribution, 1870

13. In order to divulge their responsibilities the Crown called a hui at Greytown in order to arrange a final payment.

14. Some of the attendees expressed a sense of disempowerment – of having been taken advantage of, rather than advantaged as promised.

15. Attention was also drawn to the fact that Wairarapa Māori had been kept in the dark about the state of accounts.

16. The chiefs agreed to accept the £2,000 on offer on the condition that returns (which they requested) would be produced at a later date.

17. A hui was convened on 7 and 8 November to decide how to distribute the monies.

18. Overwhelmingly, Māori were disappointed by the neglect they had experienced over the past 17 years.

Heaphy's Allocation, 1873

19. The subsequent payout was a mess, some blocks preferred over others. The new Native Reserve Commissioner for Wellington Province, Charles Heaphy, began making inquiries.

20. Money was held against the individual block, however Māori did not trust the figures and formed a committee to scrutinise the accounts.

Winding up the Koha Fund, 1880-1900

21. At a third public disbursement hui in 1881 there were many complaints about the governments general neglect of the koha fund, including payments towards half the salary of a doctor in the region who was not used by the local Māori.

22. Heaphy recommended that funding for the doctor should stop until the doctor furnished a report on what services he actually provided.

23. In its final years, the fund was transferred to the Public Trust Office. The Tribunal state that they have not been able to trace whether a payout was actually made in 1899 or in the years following.

Tribunal Findings and Recommendations

24. The Tribunal accept the Crown's concessions that they had failed to consult, set up adequate administration and failed to act in a timely manner, however the Tribunal goes further to suggest a failure in conception by the Crown.

25. The Crown never really committed to the koha/five percents as a means of delivering a social endowment and officials never consistently applied to it the effort it required.

26. In both process and substance, the Crown breached the Treaty and its interpretation and management of the koha/five percent clauses and the fund.

27. It breached the contracts it entered into in the deeds, breached Article 3 by using fund money to pay for services Māori were entitled to as citizens and also breached Article 2 as Grey's promises persuaded Māori to consent to the purchase of their land.

McCaw Lewis
LAWYERS

CHAPTER 4:

THE NATIVE LAND COURT AND LAND PURCHASING, 1865-1900

1. The Tribunal considers the operations of the Native Land Court in the Wairarapa ki Tararua district, along with issues pertaining to land dealings in the period between 1865 and 1900.

What the claimants say

2. The claimants base their case on a view of the Native Land Court as a Crown-imposed and alien institution in which Māori had no substantive role.

3. The type of title made available through the land court regime undermined the capacity of Māori communities in Wairarapa ki Tararua to retain and utilise the land remaining to them after the Crown's extensive purchases pre-1865. Neither did the introduction of the court bring with it the protections that were needed to shield their remaining landholdings from further purchasing.

4. Māori communities in this inquiry district were not consulted about the court and the radical tenurial reform it brought, and nor was the concept of individualisation of title and its consequences ever explained. This was unreasonable, both because Māori throughout the North Island had been seeking mechanisms to give them more control over the lands and resources and because the court was not a 'take or leave it' option for Māori. If they did not engage with it they risked missing out altogether.

5. Submitting lands for investigation by the court was also seen as a mark of loyalty and friendship to the Crown, which increased the pressure to follow such a course.

Loss of community control

6. When Māori took lands to the court, its system of tenure conversion either dispossessed right holders, or resulted ultimately in an individualised, fractionated title that was commercially unusable except as a transferable paper interest. The result was the loss of community control over the land.

7. The introduction of the Native Land Court had a profound impact on customary practices and the deconstruction of traditional tribal structures. Ultimately, the court came to usurp the traditional role of communities in allocating lands according to tikanga.

8. The effect of individualising titles was exacerbated by a land purchase system that enabled undivided individual interests to be acquired piecemeal without reference to the remaining owners.

9. At the same time, lands held under multiple title suffered under commercial liabilities, which disadvantaged Māori in their engagement with the modern economy.

Crown purchasing in the land court era

10. The individualisation of rights to Māori land meant that Crown purchasing efforts now focused on individual owners, which was in clear breach of the Crown's obligation to recognise tino rangatiratanga, or the customary authority of Wairarapa ki Tararua Māori over their lands as guaranteed under Article 2 of the Treaty.

11. The 1865 Native Lands Act removed the Crown's monopoly in land purchasing, and this increased competition.

12. Crown purchase agents used 'bounty hunters' to collect signatures on a deed of sale

13. Peter McBurney's evidence included tables setting out date on land purchases and the Tribunal notes that "Counsel for Rangitāne told us that, in Tamaki Nui-ā-Rua these tables [table setting out data on land purchases] confirm that up to 1900 the Crown was easily the largest purchaser of Māori land".

14. The Crown denied that its policy was to 'acquire all of the land between Hawkes Bay and Wellington by 1900', but Rangitāne counsel contended that, in reality, by the 19th century that is exactly what the Crown achieved.

Court costs and survey charges

15. In order to get determination of ownership and a commercial title, Māori had to pay fees and expenses that contributed to their indebtedness. The claimants identified debt as one of the major inhibitors to Māori in this inquiry district developing the land they retained. It also directly contributed to the need to sell land. This was Te Kooti Tango Whenua, the land-taking court.

16. Survey was a significant expense. Counsel accepted that a survey was a necessary part of title determination and that the accurate recording of land was required to bring it within a western tenure system.

17. It was argued that Māori could have expected accurate surveys and that the Native Land Court let Nireha Tamaki "badly down". He was then denied his day in court because of legislative intervention. 'In so acting the Crown acted unfairly, unjustly and in breach of the duty on it to act honourably and with the utmost good faith.'

Two patterns of title history

18. The claimants described two distinctive patterns of title history:

    (a) In the first, prevalent in the Wairarapa-Cape Palliser area, the first blocks to be brought through the court were relatively small with relatively well-defined rights and boundaries. The larger Ngā Waka ā Kupe block was investigated much later (in the 1890s), and was an exception to this pattern. Purchasers of the land in this part of our inquiry district were mostly private individuals – pastoralists (often lessees), speculators, and local entrepeneurs.

    (b) The second pattern of title histories prevailed in the Tāmaki-nui-ā-Rua district, where the blocks that went through the court were much larger. Here, the Crown monopolised the land purchase market, and passed legislation to advance its position as purchaser. Crown agents in this area pressed Māori to take lands to the court. Once the court named the owners in a block, the Crown relentlessly pursued individuals for their signatures to sell block after block, including land initially reserved for present and future Māori requirements.

Issues raised

19. The claimants raise the following issues that apply across the inquiry district:

    (a) The Crown's failure to consult with Wairarapa ki Tamaki Nui-ā-Rua Māori prior to introducing the land court to the district, and in advance of subsequent important changes in the land laws;

    (b) The inability of Māori communities to keep their lands out of the court if they so chose;

    (c) The failure to provide for any form of viable title that allowed ongoing communal management and control of lands awarded through the court;

(d) The costs (social and economic) involved in obtaining surveys and defining title, and the extent to which these crippled Māori endeavour and contributed to further land losses;

(e) The extent to which the legislative framework furthered the interests of the Crown and settlers at the expense of Māori;

(f) The impact of partition, succession, and fractionation rules on Māori tenure and future economic development; and

(g) The failure of the protective mechanisms that the Crown instituted to prevent excessive or inequitable land alienations.

Communal Title

20. It was submitted that the question of whether communal title was available to Wairarapa Māori through native land legislation raises a key question: what is communal title?

21. Counsel submitted that communal title in this context can be defined as a title owned by a community in a manner consistent with tikanga Māori (traditional rules and practices).

Prejudice

22. Rangitāne (together with Ngāti Kahungunu) claimed they were adversely affected by land laws that dispossessed many, besides undermining their collectivity and the authority of their leaders and Tribunal institutions.

What the Crown says

23. The Crown's interpretation of the Native Land Court and its effects was quite different. The Crown say that the Court's importance as a catalyst for social change and land purchase in this district has been exaggerated and they say it was a necessary institution that Māori desired.

24. The Crown also raise the issue of whether the examples cited in the various claimant reports filed with us were not exceptional instances, rather than reflecting more general patterns of title adjudication and land alienation.

25. Crown counsel also questioned whether the political objections to the Native Land Court and land dealings detailed in claimant evidence could be fairly seen to reflect all Māori opinion in Wairarapa ki Tāmaki Nui-ā-Rua.

26. Crown counsel specifically addressed the Nireha Tamaki case. The Crown does not consider that the evidence is sufficient to support an acknowledgement of Treaty breach.

The Court Comes In

27. Between 1860 and 1862, as a result of the Native Lands Act 1862, the Crown held out to Māori a series of proposals for land title adjudication including a court more attuned to Māori aspirations. However, as a result of the military success in the Waikato, the Crown adopted a more formal body controlled by Pākehā judges.

Māori Land Legislation, 1865-73

28. Māori land legislation over the period 1865-1873 is considered. Both Acts had two primary shortcomings:

(a) Māori were excluded from the process of determining title; and

(b) The Crown failed to provide appropriate forms of title for Māori land.

29. One important feature of the Court after 1865, which was critical in this inquiry district, was the *"10-owner rule"*.

30. The Tribunal notes that in Tamaki Nui-ā-Rua large blocks were regularly awarded to a few owners only, even when under the 1867 Act the Court was obliged to list the names of all the owners on the back of the title.

31. A major petition signed by Rangitāne and Ngāti Kahungunu asking Parliament to do away with the *"evil laws"* in 1873 is set out and discussed. The resulting Native Land Act 1873 included little in the way of allowing for Māori concerns regarding title.

32. In the Tribunal's view, the intention of the Māori land legislation over the period 1865-1873 was to circumvent and undermine communal control of lands, including the decision to take a block before the initial Native Land Court for title determination in the first place.

The Court and Land Purchasing in the Wairarapa Valley, 1865-80

33. The Tribunal makes the following observations about private purchases in the Wairarapa between 1865-1880:

(a) Given extensive Crown purchasing prior, private land deals must be assessed not solely in terms of quantity but also quality; and

(b) Given an enormous amount of land had already been alienated, the remaining land had been deliberately set aside for future Māori needs.

The Land Court and Land Purchasing in Tamaki Nui-ā-Rua, 1865-80

34. The Tribunal examines the Land court and its purchasing in Tamaki Nui-ā-Rua over the period 1865-1880 and found that the diverse, multiple and overlapping customary interests in the district meant that blocks could not be readily or appropriately divided under the 10-owner rule. Yet, this is what happened in almost all of the Tamaki Nui-ā-Rua blocks, most of which exceeded 5,000 acres.

35. In order to purchase the blocks, the Crown attempted to get the consent of secondary right holders such as *"Western Rangitāne"* chiefs. Whilst these chiefs had some rights to the land through whakapapa connections, they did not have the primary rights. Also, they were more likely to sell because their main interests lay to the west of the mountains.

36. The first five Tamaki Nui-ā-Rua blocks awarded titles by the Native Land Court in 1867 totalled about 65,555 acres.

37. In September 1870, another large and important hui took place at which over 300 Māori were present, including Rangitāne from Manawatu.

38. At this hui to discuss the proposed Court investigation of lands, Ngāti Pakapaka, Ngāti Parakiore and some other hapū stated that Rangitāne did not *"come into the land"* and that they opposed a generic Rangitāne claim which would admit chiefs from west of the ranges.

39. Whilst investigating the *"Tamaki lands",* witnesses named many right holders in the blocks. One witness named all the principal chiefs of Rangitāne from both east and west of the mountains.

40. The Crown purchase agents preferred to deal with a wider class of pro-sale Rangitāne claimants who did not reside on the land.

41. In September 1870, Paora Ropiha wrote to the court expressing strong disapproval of the Court procedures concerning the lands that had been through the court. Although seeking to limit the owners to descendants of Rangitāne hapū could be seen as being motivated by self-interest, on another level, Ropiha's complaints are about the adequacy of the court investigation in the short time available and with the external pressure of the Crown's purchasing agenda.

42. Once the land had passed through the Court, the Crown sought to conclude its purchases. However, the sale was strongly opposed by influential people claiming the grantees had no right to sell, whatever the entitlement conferred on them by the Court.

43. Extensive alienation proceeded even though Tamaki Nui-ā-Rua Māori had – and had expressed – concerns about the title awarded, the process of purchase, boundaries and price.

44. In summary, initially officials seemed to recognise the need for Māori to be able to manage their lands collectively, encouraging hui to make careful decisions, to take present and future needs into account and only then to seek ratification from the Native Land Court. However, later, when owners did not want to sell, Crown officials applied huge pressure on them to comply without regard for Māori rights or needs. The Crown's purchases and needs of settlement always came first. This, the Tribunal concludes, was a far more serious breach of the Treaty than the Crown has conceded.

45. In September 1871, Court hearings in relation to the southern part of the Tamaki Nui-ā-Rua lands (southern Bush) were completed quickly. One objector named Piripi told the Judge that Manawatū Rangitāne had *"crossed over"* and that they had not considered him in the lease. He went on to say "*I have a claim to this land. I do not wish my name to be written down"*.

46. Mangahao No 1 was awarded to Peeti Te Aweawe, Hoani Meihana and eight others: *"[T]he persons whose names have been mentioned by Hoania Meihana as members of the Rangitāne tribe were the owners of the block".*

47. Huru Te Hiaro claimed the large Kaihinu block on behalf of Rangitāne but accepted that Ngāti Raukawa could justifiably mount a joint claim. It was finally agreed to admit Ngāti Raukawa and the Judge divided the block accordingly.

48. Hoani Meihana told the court that Rangitāne wished the Mangatainoka block to be investigated and made a tribal claim, *"that the whole tribe claimed and owned the land and would divide it amongst themselves in some future time."* When asked to present a list of 10 names, the people placed a single list of 56 names before the Court. The title to the block listed the 56 owners. The Tribunal notes that the Court *finally* deployed the 1867 amendment.

49. Factors such as the quality of land, the value of its timber and its location (adjacent to other Crown purchases on the proposed rail line linking Hawkes Bay to Wellington) meant the lure to purchase the Mangatainoka block was irresistible to the Crown. These factors were the very features that made it vital for Rangitāne to retain this block.

50. A case study of the case that Nireaha Tamaki pursued through the Courts in New Zealand and the legal developments that ensued is set out.

The Court and Purchasing in Wairarapa ki Tararua, 1880-1900

51. The changes to the law concerning Māori land purchase in the 1880s and 1890s made it easier:

(a) To partition;

(b) For individuals to sell their undivided interests with or without the agreement of the other owners;

(c) To remove restrictions on alienations; and

(d) To acquire individual interests without the consent of a majority of owners.

52. In addition, the Crown conditions imposed on private lessees or purchases that were intended to protect Māori did not apply to the Crown.

53. Throughout the 1880s and 1890s, the various legislative changes proceeded in a one-step-forward-two-steps-back fashion as governments responded first to Māori criticisms, then not long after to Pākehā pressure to make more Māori land available for settlement.

54. One of the most important legislative reforms of the 1880s in this Inquiry District was the Native Equitable Owners Act 1886, which sought to remedy the effects of the 10-owner rule and those who had been left off the title. This Act proved to be ineffective.

55. Re-hearings were granted for the three blocks Piripiri, Tamaki and Tahoraiti No 2. In the three individual cases for each of the blocks, the Judges condemned the past insistence on the 10-owner rule and suggested that the court should have made orders under clause 17 of the 1867 Act (this section obliged the court to ascertain all beneficial owners in each block and enter their names on a register).

56. A close examination of the costs of the court process and the associated debt is undertaken by the Tribunal.

57. The extent to which protections were provided for Māori under the Native Land Court system is examined. In particular, the court was required to protect Māori land owners from unfair or inappropriate land transactions and to prevent Māori landlessness.

58. Lands in the Ngā Waka a Kupe block began to pass through the Native Land Court in the 1890s. It was the last large area of Māori land in this district to do so and is examined by the Tribunal.

59. With regards to land restricted from alienation in Tamaki Nui-ā-Rua, despite the Crown's main Purchase Officer in the district (Locke) undertaking the necessity for Māori to retain sufficient land for their immediate and future use, the Crown made small purchases and public works takings in the blocks reserved out of its purchases under the Native Land Court system. It also purchased aggressively in areas that Māori had explicitly sought to retain by excluding them from purchase negotiations and by getting the Court to put alienation restrictions on titles.

60. Despite Rangitāne carefully choosing to keep the Mangatainoka block as a kind of tribal reserve (the court issuing a title to 56 owners under section 17 of the Native Lands Act 1867), the Crown quickly set about the purchase of the block in 1872, only a year after its special tribal title was confirmed. It made purchase advances in the form of payments of food and provisions, and Rangitāne, very needy at the time, accepted them. Purchase of the whole block was soon underway.

61. In 1870, the Tamaki block went through the Court. Ihaia Ngarara stated that the block belonged to Rangitāne who resided on this land and at Tahoraiti. Although there were many owners, three were named, including Karaitiana Takamoana. When Takamoana passed away, his estate began to go into debt. In later years, lawyers for his estate set about settling his share in the block in order to cover estate debts.

62. The need for Māori to retain sufficient lands for customary use and to play a full part in the new economic order was signalled in the Crown's negotiations in 1870; and Māori signalled in Court their desire to keep large expanses of land for the long term. Various strategies to retain the land as a community asset were tried, but none proved particularly successful because this was never a policy goal for settler governments, and they passed no adequate mechanisms into law.

63. In particular for Rangitāne, an attempt to retain a collective tribal title to Mangatainoka was flouted, primarily by the Crown's unwillingness to represent the choice Rangitāne had made not to sell this land. Listing 56 names on what everyone knew was intended to be a tribal title, provided a means for its piecemeal purchase. The owner's debt and the Crown's cunning purchase tactics did the rest.

The Response of Wairarapa ki Tamaki Nui-ā-Rua Māori to the Court

64. In the early 1870s, Māori attempted to oppose the Native Land Court by boycott; however, after 1875 this movement broke down as the Crown exerted pressure to further settlement in the area. Various other options were proposed by Māori including committees.

65. At a large repudiation hui in Hawke's Bay in 1876, at which a number of prominent rangatira attended, resolutions were called for an end to the Court and land sales. These were passed.

66. Calls were made from wide and far that the Court, with its formal European legal norms, was an utterly inappropriate body to interpret Māori custom.

67. Finally, in 1883 a bill was passed, which permitted Māori committees to *"assist"* the Court. This was described by the Tribunal as a *"toothless measure"* which gave Māori no more right of decision-making or influence than they had already.

68. The Reese-Carroll Commission met with Māori in many parts of the North Island, including Waipawa and Greytown, in order to gather evidence regarding Native Land laws. Witnesses were virtually unanimous in condemning the past and present system of land title adjudications, and sought a far greater degree of Māori input and control than legislation had provided.

69. The Kotahitanga movement and its associated Paremata (Parliament) increased its influence during the 1890s.

70. Rangitāne based in Wairarapa ki Tararua presented a petition to the Paremata meeting at Rotorua in 1895 seeking the demise of the Native Land Court, and wanting to put an end to leasing, mortgaging, selling and surveying their land.

71. Although the Māori Lands Administration Act provided for the establishment of Māori Land Councils, with a potential majority of Māori members, which were empowered to undertake title investigations in respect of the little Papatupu land that remained, dissatisfied claimants might still appeal to the Court. As well as this, land sales were not halted and land owned by individual Māori could still be sold.

72. In summary, the Tribunal conclude that while Māori of Wairarapa ki Tamaki Nui-ā-Rua responded in various fashions to the Native Land Court in the late nineteenth century, it is safe to say that a very significant body of opinion consistently and overwhelmingly sought major reform of the Native Land Court and the Native Land laws.

73. These sentiments were expressed in a plethora of petitions, letters, and speeches and in evidence to the Reese-Carroll Commission in 1891. They were also manifest in the Kotahitanga movement. But the Crown did not take Māori demands seriously, and it was not until 1900 that it took action that could really be described as remedial.

Findings and Recommendations

74. Although the Tribunal recognises that there were good reasons for the Crown to establish a body, independent of the Executive, to determine intersecting and disputed claims to Māori customary land and to administer legislative modifications to customary tenure to meet new needs, it was not necessary for all customary lands to be converted.

75. The Tribunal finds that it was incumbent on the Crown to find some means of involving Māori in, or at least informing them about, legislative changes that would affect them profoundly i.e. through the Kohimarama hui.

76. The Tribunal notes that the Inquiry illustrates how kōrero in an environment where there is fair participation and an overlay of tikanga can settle competing customary claims. They refer to counsel for Ngāti Kahungunu who said: *"It would be unreal to ignore the competing claims to tangata whenua status of large sections of the Tararua District by Rangitāne and Kahungunu. At their highest and somewhat emotional level, each tribe claims that the other has no rights. However, over the course of this inquiry the more extreme positions of some participants have evolved and to a significant degree there is, at least from the Kahungunu claimant's perspective, an acceptance of a real and customary place for Rangitāne in the Tararua District."*

77. The Tribunal also notes that despite clear acknowledgements that Māori were becoming landless, Crown agents set about purchasing *"inalienable"* lands as cheaply as possible. Such behaviour was the antithesis of active protection.

78. The Crown's chief failure was that it did not legislate to empower the Māori collective to hold and manage their lands. As the Tribunal see it, this failure goes a long way to explain why land sales were both unmanaged and unmanageable.

79. In the Tribunal's opinion, the Crown advantaged the purchase process and purported settlement needs over reasonable and necessary protections for Māori and indicate that this was a far more serious breach of the Treaty than the Crown has conceded.

CHAPTER 5:

SUFFICIENCY: HOW MUCH WAS ENOUGH?

1. The claimants say that the Crown should have ensured Māori retained land sufficient in quantity and quality to give them a real choice about how to participate in the new economy. Even in the northern part of the Inquiry District, where land alienation came later in the nineteenth century, by the beginning of the twentieth century, Rangitāne o Tamaki Nui-ā Rua retained only 11% of their land.

2. In comparison, counsel for the Crown tendered arguments to mitigate the breach and resulting prejudice, including emphasising the Crown's inability to control the process of colonisation and looking at how much land was thought to be sufficient for the time.

3. Maps displaying the Māori land holdings in the District in 1860, 1890, 1910, 1939 and 2003 are set out.

The Waitangi Tribunal on "Sufficiency"

4. In order to examine the *"sufficiency"* question in this Inquiry District, the Tribunal refers to its previous approaches in other Inquiries, including the Ngāi Tahu and Hauraki Tribunal Inquiries.

5. For this Tribunal, the requirement in regards to sufficiency is stated as: *"the location and extent of retained land would be such that Māori communities could engage fully with the colonial economy if they so wished".*

Government Policy on "Sufficiency" 1860-1909

6. Well before 1860 the Crown acknowledged it had a duty to ensure enough land remained in Māori hands to meet their own needs.

7. Over the following decades, legislators and legislations spoke the language of protection, but in practice leaned towards flexibility. The preference was always for discretion to be available to allow land to be sold.

8. Although successive governments enacted formal requirements for Māori to retain sufficient land in statute, their focus was largely on preventing absolute landlessness. Over time:

   (a) Sufficiency was assessed in terms of an individual's minimum requirement, with no consideration for the needs of the community; and

   (b) The need to protect additional land for future opportunities was no longer recognised.

What Compromised "Sufficient Land" in Wairarapa ki Tararua

9. For Wairarapa Māori, for a number of blocks by 1900, there was very little utility for the owners to keep them. This might be because the blocks were too small, too isolated or too marginal in quality.

10. The real question, the Tribunal state, about sufficiency in the nineteenth century should have been whether Māori retained enough land and resources to enter the sheep farming industry.

Developments in Small Farming and the Need for Capital

11. Refrigeration and modern farming practices that came with it generated major new economic opportunities for small land owners.

12. The government assisted small land owners by instituting the Government Advances Scheme from 1894, however Māori were not in a position to reap the benefit of many such improvements.

13. In this District, the evidence shows that lending on Māori land came through the Public Trustee rather than the Government Advances to Settlers Office.

14. The Whatarangi Estate, a case that appears to have led directly to the Native Land Laws Amendment Act 1897 is examined.

15. Under the Native Land Laws Amendment Act 1897, it was possible for the State to lend on multiply owned Māori land but with conditions.

16. The Crown justified the differences in lending on Māori land by reference to the problems with Māori land title and the poor record Māori had generally in managing finance and debts.

17. The Tribunal conclude that it would have been Treaty-compliant for the Crown to have offered a controlled and monitored system of providing lending finance to Māori land owners.

18. The criteria set for lending on Māori land set up substantial barriers and restrictions to owners who were already often at a disadvantage from the poor quality of their land.

Tribunal Analysis and Findings

19. In the Tribunal's view, it is not unrealistic to expect the Crown to have done more for Māori. Overwhelmingly however, the government intervened to protect the interests of settlers but neglected those of Māori.

20. Law-makers and officials chose to interpret *"sufficient"* as a bare minimum, not as sufficient to provide Māori with a real opportunity to engage in economic opportunities on a basis of equality.

21. The Crown undertook an early and rapid purchase of the greater portion of the Wairarapa District under pre-emption, closely following by a concerted buy-up of Tamaki Nui-ā-Rua under the Native Land Court system leaving iwi with inadequate land holdings.

22. The Tribunal find the Crown breached its duty of active protection by failing to take the necessary steps to ensure that iwi in the Wairarapa ki Tararua District had a real prospect of retaining sufficient land to enable them to participate in the colonial economy on terms of reasonable equality, and to provide for their own cultural needs.

23. The Tribunal also finds that the Crown, in implementing policies which assisted smallholders, breached the guarantee to Māori of equal treatment as British citizens under Article 3.

CHAPTER 6:

THE MANAGEMENT OF MĀORI LAND IN THE TWENTIETH CENTURY

1. In this chapter, the Tribunal considers claims about the administration, alienation and utilisation of Māori land in Wairarapa ki Tararua in the twentieth century – the distinctive feature in this district being that the Crown accepts that by 1900 there was already too little Māori land left.

2. In the introduction, the Tribunal notes:

   (a) Wairarapa ki Tamaki Nui-ā-Rua Māori are no longer landowners in their own rohe;

   (b) That it disagrees with the Crown's contention that economic success is not determined by landholdings in consideration of the position during much of the period covered by the Tribunal. The Tribunal states that the Crown should have been focused on ensuring that Māori retained enough land to partake in whatever prosperity was going on;

   (c) The cultural loss suffered by tangata whenua in this Inquiry District due to their severance from their ancestral land; and

   (d) The ramifications of the lack of a formal process of managing communally owned Māori land. This includes the fact that Māori owners mainly ended up with lots that were small, uneconomic and in barely useable configurations.

Keeping Sufficient Land

1900 – 30: The Last Chance to Get it Right

3. Despite the 1907 findings of a Royal Commission, which showed that Māori in the district had little land surplus to their immediate requirements and identified the urgent need for practical assistance in utilising the remaining lands, the legislative and other changes that ensued did not respond to these concerns and in fact made things worse.

4. The Māori Land Council era, pursuant to which Māori had a measure of self-government, was short lived due to settlers pressing hard for land to buy. In their place came the Māori Land Boards in which the Native Minister could compulsorily vest land for subdivision and thereafter grant allotments to owners and lease the remainder.

5. The Tribunal discusses the findings of the Stout-Ngata Commission, which included the following:

   (a) Few Māori owners were farming their own land and this was not what they wanted;

   (b) Blocks remaining in Māori ownership tended to be concentrated together and were important areas of occupation; and

   (c) The largest areas remaining in Māori ownership were remote coastal areas of hilly scrub country and a few other large blocks comprising valuable agricultural land. However, these blocks were soon subject to extensive purchasing.

6. In consideration of the Commission's findings, Māori were in no position to set themselves up in the pastoral industry, however, agriculture did provide an income for younger Māori.

7. The Stout-Ngata Commission thought that emphasis should shift to ensuring that Māori were taught how to farm their remaining land effectively. However, it was more than two decades before the Crown

provided any such assistance, and the Commission's general recommendations were not reflected in the new Native Land Act 1909 and it's Amendment Act in 1913, which together made it increasingly easy to purchase Māori land.

Land Alienations

8. A total of 12,376 acres of Māori land was sold in the Wairarapa district between 1900 and 1909, and 30,000 acres in the Tararua district in the same period.

9. Approximately 48% of the land still owned by Māori in the Wairarapa in 1910 (around 75,879 acres) was sold between 1911 and 1930 and that, in Tararua, roughly 44% of the Māori land remaining in 1910 was sold (around 36,859 acres) over the subsequent two decades. The Tribunal notes that levels of land sales in this period may have been even higher, as there are gaps in the surviving records.

10. Although land sales levelled out during the 1930s and 1940s, they increased again during the 1950s and 1960s. It was submitted for Ngā Hapū Karanga that Wairarapa Māori landholdings halved between 1953 and 1993. The Tribunal states that, as far as they are aware, the bulk of the sales were to private buyers. Walzl attributes the increase in Māori land sales in the post war period to two factors:

    (a) The demand for marginal farmland strengthening; and

    (b) Wairarapa ki Tamaki Nui-ā-Rua Māori continued to sell land because they needed the money.

11. Partitions after the 1960s had relatively small blocks of land with a large number of owners. Most individual purchases were of less than 100 acres and many were less than 50 – in some cases the small parcels of land being inaccessible or scrubby and vendors were not making profitable use of the land, other than by leasing.

12. Private sales of Māori land in the Inquiry District continued throughout the 1970s, but by the late 1980s and 1990s it had dropped away to virtually nothing.

13. In the 1970s, typically, sale blocks had been leased for many decades and were sold to lessees and other Tararua purchases saw farming families accumulate additional blocks.

14. In the Tararua District today, approximately 21,885 acres of Māori land remains.

The Problem of Succession in the Twentieth Century

15. Through succession, landholdings:

    (a) Became fragmented and were owned by more and more people; and

    (b) Passed by succession to persons who had no whakapapa connection to the land.

16. The experiences of the Anaru whānau and the Randell whānau are discussed, whose ability to connect to their Tūrangawaewae has been severely comprised by the operation of succession laws.

Using the Land

17. Remaining landholdings became increasingly hard to develop because of

    (a) The large number of owners;

    (b) The lack of any coherent management structures; and

    (c) The unavailability of development finance.

18. The Tribunal then discusses the development of strategies by successive governments that were aimed at helping Māori to use their land more productively, including:

    (a) Development schemes i.e. the establishment of the Land Development Board. The scheme developed by Ngata was that the state would take control of the land for an initial period in order to bypass title problems, develop it for farming and then return it in a condition where development debts could be repaid. The perceived benefits of the scheme included:

        (i) The provision of rural employment and training, while selected owners would be able to continue farming and provide an ongoing livelihood for the community;

        (ii) The bringing of marginal and under-utilised Māori land into production; and

        (iii) The improvement of prospects for communities already in a vulnerable position due to the worsening of economic conditions.

19. The Tribunal then goes on to discuss five of the six land development ventures that were initiated in the Wairarapa ki Tararua District during the 1930s and 1940s. In discussing the schemes the Tribunal considers the long term implications for the land and its owners. At the outset, the Tribunal notes that:

    (a) They varied in character and were all to varying degrees hampered by both the scarcity of substantial areas of good quality land and by confusion as to objectives; and

    (b) None of them were particularly successful in terms of sustainable production, employment or training in farm technology and management, however, they did ensure that land remained in Māori ownership.

Aohanga Station

20. Aohanga Station was developed on the 18,000 acre Mātaikona Block, and was vested in the Native Trustee as a development scheme in the late 1920s.

21. By 1934, over £140,000 had been spent on the block, including almost £13,000 to provide work for the unemployed of Wellington City, instead of providing additional work for local Māori. By the end of the decade, the debt on the block amounted to £80,000, however, its productivity had at least tripled.

22. While some dividends were paid to beneficiaries during the earlier part of the decade, nothing was paid between 1936 and 1938 despite the trustee receiving appeals from many owners for funds to cover food, clothes, medical expenses and other expenses.

23. Through the 1940s and 1950s, the station experienced serious problems which halved production. Despite this, farm productivity allowed the debt incurred in improving the station to be repaid by the early 1950s.

24. By the mid-1950s, further debt needed to be incurred in order to bring the station back into productivity, which had decreased due to poor management. By 1970, the station had a relatively modest debt of $59,000 against a current market value (land and stock) of $545,000 by 1972.

25. The property was re-vested in the owners in 1973 after they agreed to incorporate the station. Today, the land remains in Māori ownership and is managed by the Incorporation, with around 1,200 shareholders. The owners, however, do not get many returns from the land.

26. The Tribunal notes that, although they kept the land, the experience of owners was not what Apirana Ngata had hoped for. For instance:

    (a) They had no role at all in management or decision making;

(b) There was no priority to employing owners and their families nor to recognising the owners' cultural need and right to connect with their land; and

(c) It seemed that the goal of running the farm profitably was regarded as incompatible with recognising the owners' needs as tangata whenua.

Tiratū Station

27. Tiratū Station was yet another development scheme, the property being vested in the Māori Trustee in 1931.

28. It took a very long time for the Station's debt to be paid off and, meanwhile, the owner, Nireaha Paewai, received only a small gratuity despite significant funds being spent on farm assets.

29. Tiratū Station was brought into profitable operation while under the administration of the Māori Trustee, despite Nireaha's efforts to apply his newly acquired farm management skills to his own property. The Tribunal notes evidence from Nireaha's son of the whānau's loss of their connection to the land.

30. By the time the Station was returned, Nireaha had passed away. The land remains in whānau ownership today but is owned under general title rather than as Māori land, with the result being that there are no legal restrictions on its alienation.

Mākirikiri Development Scheme

31. Located on land near Pukaha Mount Bruce, the Mākirikiri development scheme was gazetted in 1937, comprising 806 acres divided into six farms. The Tribunal notes the initial improvements made to this land.

32. Initially, returns from mainly dairy production were 'quite satisfactory' however within a few years the properties were in bad condition and the Native Department was doing little or no development work, according to Walzl;

33. Ten years after it began it was estimated that the scheme still needed £7,000 to put the land right and another 12 years of production to repay the debt.

Tahoraite Development Scheme

34. The 144-acre Tahoraite development scheme was established in 1938. It was the only scheme that was set up under Ngata's legislation in this northern part of the hearing district.

35. Evidence on this development scheme was very sparse. It involved the Kaitoki 2K2A block, and was apparently created for one family. The land, which was hilly but of relatively good quality, was fenced and stocked, and a house and cow shed were built. One additional worker was employed, and in the early 1940s the scheme received an additional £380 in Māori employment grants. This is the extent of the record.

36. By 1960, the scheme had been wound up and the land was leased to Herbert Tewa-Kite-Iwi Chase, his evidence given before the Tribunal being summarised in this part, including that neither he nor his parents ever received any financial or professional assistance from the government to develop the Kaitoki land and that he therefore had to raise a mortgage to improve the land.

37. The status of the block was changed from Māori to General Land in 1967 by operation of the Māori Affairs Act.

38. The Tribunal notes that it would have been much more in keeping with the original concept of development schemes if the Department of Māori Affairs had provided training for Herbert's father so that he was able to farm the land more successfully.

Homeward Development Scheme

39. The Homeward development scheme centred on approximately 2,500 acres of land on 26 Ngāpuketūrua and Te Maipi Blocks. The Tribunal discusses the detailed evidence given in regard to the scheme including the following matters of note:

    (a) The problem of a shortage of labour for breaking in the land;

    (b) By 1953, in the face of marginal prospects and rising debt, the owners and the Department decided to cease development;

    (c) In 1957, a decision was made by the owners that leasing the land was the best way of providing some revenue to repay debt and assist owners with housing costs; and

    (d) The requirements included in a 1973 lease to Hemi Morris and how he suffered due to those requirements resulting in the need for him to sublet the land. The Tribunal then discusses how, due to changes in departmental policy, the sublease was not subject to the same requirements, resulting in further loss to the whānau.

The many obstacles to using the land that was left

40. Those who owned the district's remaining Māori land in the twentieth century faced many barriers to using it productively, profitably, or in ways that allowed them to maintain their cultural and whānau connections. Those barriers included (drawing from the evidence of Punga Paewai):

    (a) The continual fragmentation of the land, which caused an increase in multiple ownership;

    (b) The low quality of the Māori land that was left, at least partly because early partitions left many owners with land that was not viable for development as some were too small to be economic, others had access problems or were irregular in shape;

    (c) Although, theoretically, owners could now arrange amalgamations or exchanges to correct the situation, most owners' shares are too insignificant to provide an incentive for them to invest the necessary time and effort to apply to the Māori Land Court to do so; and

    (d) Some of the land was landlocked as there were remnants of Māori land that had ended up being surrounded by land owned by others and with no provision made for access - the frustration associated with dealing with landlocked blocks often ultimately leading to their sale.

Tribunal Analysis and Findings

41. The Tribunal adopts the analyses of other Tribunals where relevant and applicable. The Tribunal notes that, sadly, the experience of Māori landowners in this district is all too similar to those of others.

Retaining Land in the Twentieth Century

42. The Tribunal summarises what the claimants have said about the retention of land in the twentieth century and then canvasses what the Crown has said in response. They then go on to outline their analysis and findings as to the particular issues arising. To follow is a summary of the important matters noted by the Tribunal.

Sufficiency and landlessness

43. The Tribunal's analysis and findings on sufficiency and landlessness in Chapter 5 apply also to the twentieth century. The Tribunal notes that it follows the reasoning and findings of the Ngai Tahu Tribunal set out in Chapters 4, 5 and 6 of the *Ngai Tahi Report 1991*. It also endorses the findings of the *Mohaka ki Ahuriri Report* regarding the Ngai Tahu Tribunal's finding that Article 2 of the Treaty imposed on the Crown a duty to ensure that Māori in fact wished to sell their land, and secondly that each tribe maintained a sufficient endowment for its foreseeable needs.

44. The Tribunal is much aided by the Crown's acceptance that Wairarapa Māori had insufficient land to enable them to participate equally in the pastoral economy at the turn of the twentieth century, and therefore states that the Crown had a duty to exercise special care to ensure that Māori could keep all the land they had left and put it to good use. The Crown accepts that this did not occur.

45. The Tribunal rejects the Crown's contention in mitigation that economic prosperity was no longer land based in New Zealand by the turn of the century.

Crown failure to act to keep Māori land in Māori hands

46. By the beginning of the twentieth century, Māori land and its owners were mired in a morass of complicated laws that did little or nothing to serve their interests, and still lacked a form of land title option that would enable collective control of multiply owned land.

47. The year 1900 saw the apparent acceptance by the Liberal Government that Māori should be protected in the retention of their land, and should be enabled to manage blocks for themselves – an acceptance brought about in no small part by the lobbying of the Kotahitanga movement from its Wairarapa base at Pāpāwai. As has been discussed, a system of Māori land councils was introduced – for the first time, bodies with power and influence that had the potential for majority Māori membership.

48. After five years, the Māori land councils were abolished resulting in the government opening up Māori land to purchase once again under the 1905 and 1909 Native Land Acts. The result was that, of the land in Māori hands in 1900 in this Inquiry district, just over half was gone by the end of the Land Board era in 1953.

49. The Tribunal views that development as especially deplorable because it took the place of another system (the land councils) that had much more potential to stem the flow of land from Māori tenure.

50. Moreover, the more permissive land board regime was enacted after Stout and Ngata had clearly warned in the Royal Commission report that there was no 'idle' land in the district available for purchase.

51. The Tribunal also criticises the 1913 legislation where the Crown once again gave itself the power to purchase undivided shares when it had been stated only a few years before that a great injustice would be caused if that system continued and that Māori would almost certainly be rendered landless.

Mid-century changes too little too late

52. There was no sustained interest in enacting a land-owning regime that provided for Māori preferences and control. While steps were taken in this direction after the Second World War, the small landholdings remaining to Māori in our Inquiry District meant that they were no longer in a position to take real advantage of them. It was not until the enactment of the Te Ture Whenua Māori Act in 1993 that a real Māori flavour was discernible.

53. That legislation, though, was arguably too little too late. The damage done by the Native Land Acts and succession laws that applied during the nineteenth and twentieth centuries cannot now be undone. Similarly, the land that Māori sold cannot now be regained.

54. The Crown was greatly at fault for not intervening earlier to prevent the whittling away of Māori land and that its breach of the Treaty in this regard is as serious as the breaches of the nineteenth century because, by the twentieth century, it was so much more critical to ensure that tangata whenua kept the little whenua they had left.

55. Also, by the twentieth century, the Crown knew more and could do more because New Zealand was a fully developed state with resources at its disposal.

56. That which whānau lost is gone forever, because the Tribunal has no jurisdiction to make recommendations for the return of land in private ownership. Compensation is of course an inadequate remedy for situations where the prejudice to tangata whenua concerns their mana, culture, identity, and tūrangawaewae.

Non-whānau succession

57. The ability for non-whānau to succeed to Māori also contributed to the dwindling of Māori land held by its traditional owners in the twentieth century. Although the extent of land loss through succession in this way possibly cannot be quantified, the real problem was that there was hardly any land left, so the small amount lost was of great significance.

58. The Tribunal agrees with the Hauraki Tribunal's finding in this regard that the Crown caused the patrimony of the hapū to be eroded by the provisions relating to Wills and that this caused significant injury.

59. The legislative regime breached the Treaty because it eroded Māori land tenure, whakapapa and whanaungatanga, all guaranteed to Māori under the rubric of Article 2, and prejudice certainly resulted.

Fractionation of interests caused by the nature of title

60. Although the Te Ture Whenua Māori Act 1993 effectively ensured that land could not be willed outside the bloodline, it did not fix the other major problem of succession - fragmentation and fractionation of titles.

61. The Tribunal noted and agreed with the Hauraki Tribunal's observation about this that really the law failed to provide for the corporate management of land by owners, particularly to those who lived on or near it. The Tribunal went on to say that it is probably too late now to rationalise interests in Māori land so as to overcome the problems addressed, and that regretfully, a solution to the problem of fractionation of interests probably no longer exists.

The Principle of Options

62. From 1909 until 1993, the laws governing Māori land tenure reflected two things:

    (a) The needs and desires of settlers for easy purchase of Māori land; and

    (b) The belief and desire that Māori would ultimately be assimilated into English society and become subject entirely to the common law.

63. In the Tribunal's view, the Crown was not entitled to impose its assimilationist views on its Treaty partner, so that effectively there was little or no choice to be had. With regards to their land, the choices of Māori in the twentieth century were far too often forced. The principle of options, first being expressed by the Muriwhenua Tribunal, was therefore breached.

Using the Land

64. As new opportunities emerged due to technological developments, including advances in refrigeration in the 1880s, the Crown should have taken reasonable steps to ensure that the barriers to Māori utilising their land were removed.

65. At the least, Māori should have been offered similar assistance to that made available to other sectors of the community. Instead, and despite the clear warnings of the Stout-Ngata Commission, Wairarapa ki Tamaki Nui-ā-Rua Māori had to wait until the 1930s for any sustained and concerted assistance to be attempted and, by then, there had been considerable further loss of land.

66. Māori continued to be greatly hindered by their lack of access to finance due to the requirements for lending on Māori land being effectively incapable of fulfilment. Also discussed is the lack of developments in farm education, despite the fact that access to education was one of the central promises made during purchase negotiations and calls for practical training in farming techniques were ongoing, the Stout-Ngata Commission highlighting the issue.

67. The Tribunal also discusses development schemes, noting that although they were a major Crown initiative for Māori, they were one that really came too late in this Inquiry District. The Tribunal notes that they were a well-intentioned attempt to remedy some of the problems afflicting Māori land, and that if their implementation had accorded with the original conception they might have succeeded rather better. The Tribunal also notes that:

    (a) The schemes initiated pre-1945 were not well thought out;

    (b) The schemes tended to be run by Pākehā whose focus was on making 'idle' land productive so that debt could be repaid, rather than on growing a population of knowledgeable Māori farmers;

    (c) Māori input seems to have been limited to an annual meeting of the owners, apart from initial discussions about whether land was to be handed over for development and decision making at the very end of the schemes;

    (d) Government intervention and a reasonable degree of control was necessary for the schemes to succeed, but Māori still needed to participate more in overall management;

    (e) The properties yielded in the way of income for owners and that debt repayment should not always have been prioritised over owners' needs; and

    (f) A flexible approach was justified by a broader view of the development schemes as projects serving the national interest and that, considering this context, the sacrifices made by owners for the schemes to be carried out should have been taken into account in formulating policy on debt repayment.

68. The Tribunal also discusses the issue of access to and viability of the remaining Māori land and notes that:

    (a) The unsupervised partitioning out of Crown interests in the past and the general failure to ensure that the landholdings remaining to Māori were viable in any sense, has led to a chaotic situation where many blocks of Māori land are inaccessible and uneconomic.

    (b) Although under Te Ture Whenua Māori Act 1993 there is potential for processes to be undertaken within the Māori Land Court that could ameliorate the situation of some of these blocks, such changes would take a lot of energy, time and money and funding would be required.

    (c) The Crown should now make available the funding to allow the claimants to find a way out of the bind they are in.

Recommendations

69. In addition to general redress for the breaches committed and the prejudice suffered, the Tribunal recommends that:

(a) The Crown works with Wairarapa ki Tamaki Nui-ā-Rua Māori to design a means whereby the Crown either:

(i) Lends money to owners of Māori land on the security of that land; and/or

(ii) Guarantees lending to owners of Māori land by other institutions unwilling to accept Māori land as security.

(b) The Crown engages with Wairarapa ki Tamaki Nui-ā-Rua Māori to explore the feasibility and desire for a Crown-funded project:

(i) That explores with Māori landowners the possibilities available;

(ii) That funds the necessary expertise to assist Māori to engage in the level of Māori Land Court activity that would be necessary to:

(A) Effect amalgamations and exchanges to ameliorate the effects of the poor partitioning of titles in the past; and

(B) Apply for the Court to exercise its new jurisdiction to facilitate access to landlocked land.

(iii) Whereby the Crown provides financial assistance to enable Māori owners to enforce Court orders in respect of their land; and

(iv) Whereby the Crown assists the owners of Taueru Urupā to work with local bodies to form the roads that will afford access to their urupā. If this avenue does not succeed, assistance to invoke the Maōri Land Court's jurisdiction with respect to landlocked land will be required.

CHAPTER 7:

WAIRARAPA MOANA AND POUĀKANI

1. The story of what happened to Wairarapa Moana (more precisely the wetland system comprising lakes Wairarapa and Onoke and their surrounds) is in many ways an analogue of the colonial experience. The Tribunal's careful treatment of this topic is in response to the claimants' emphasis in evidence and argument. That emphasis no doubt arose from a number of factors, including:

    (a) The enormous historical importance of the lakes as a food resource and repository of local lore and spirituality; and

    (b) The fact that a good many of the key events happened as recently as the twentieth century.

2. The Tribunal discussed the transfer of land at Pouākani and its total inaccessibility meaning that it remained untouched.

3. A list of hapū of Rangitāne and Ngāti Kahungunu occupying areas around the lakes is set out.

4. From the earliest days of colonisation, potential purchasers were lining up to buy land adjacent to the lakes given it was highly productive farm land.

The 1876 "Purchase of the Lakes"

5. As a result of tensions between Māori and Pākehā regarding the opening of the lake on 14 February 1876, Te Hiko and 16 others signed a deed ceding to the government their rights in the lakes for £800. This was met by immediate opposition by other chiefs.

The Struggle for Control of the Lakes

6. Through court action, 139 Māori were recognised as owners of the lake; however the Crown resumed its efforts to acquire the lakes. This was vehemently opposed mainly due to the influence of Te Maari.

7. In June 1888, proceeding without the consent of the lake's Māori owners and in defiance of a Crown opinion against its authority, the South Wairarapa River Board opened the lake mouth for the first time. Te Maari served the Chairman of the Board with a £200 fine.

The 1891 Royal Commission

8. In 1891, a Royal Commission was appointed to look into the matter. The recommendations strove to find a compromise that would meet the needs of both the lakes owners and the Crown however these gained no traction.

The Gift of the Lakes

9. In 1896, after four decades of concerted efforts not to sell the Wairarapa lakes, they were transferred to the Crown in a transaction generally described as a "gift".

10. The agreement signed at Pāpāwai Marae is set out and discussed.

11. The Tribunal concludes that the transfer of the lakes was a gift and not a sale, or in Māori terms, a tuku, with all the implications for enhancing the mana of the parties and for utu that entails.

Ka Ata Rahui tia to Tika hei Oranga mo ngā Māori Whai Take ni aua Moana ... ngā Whenua ... i roto i tānei Takiwa

12. Following the agreement, the Crown completely failed to provide reserves that were ample, suitable or in the district. What the Māori owners got was 30,000 acres of pumice land at Pouākani, more than 300 miles away from southern Wairarapa and, in those days, not accessible by road.

13. By mid-1909 there was disagreement between the lakes former owners on how the government might best honour the 1896 agreement. By this stage, the Pouākani proposal was gaining impetus.

The Customary Fishery of Lake Wairarapa

14. Twenty years after the gifting of the Wairarapa lakes to the Crown, the lakes former owners became the owners of a large tract of poor quality land, far from their rohe and inaccessible by road or rail.

The Compulsory Acquisition of Land at Pouakāni

15. A case study of 200 acres adjacent to Lake Onoke is set out. Research indicates that this land was Māori land but that the Crown presumed ownership. The Tribunal recommends that compensation (with interest) be paid to the lands traditional owners for the "lost 200 acres".

16. Initially, owners in the Pouākani land were not given notice that a hydro scheme was proposed on their land. Eventually notice was given in 1947. Compensation for the Maraetai Dam at Mangakino took a number of years to finalise.

Leasing the Land for Mangakino Township

17. Although initially proposed as a temporary town on a leasehold basis to the Crown, during the 1950s pressure by locals mounted to establish Mangakino as a permanent town.

18. In 1956, the owners agreed and formed an incorporation to administer future leasing of the Mangakino sections.

19. In 2002, as a result of advice that the leasehold arrangement was financially untenable, a number of sections at Mangakino were sold. The Tribunal comments that despite optimism in the 1950s the township provided very little, if any, financial return.

The Development Scheme at Pouākani

20. The development schemes at Pouākani whereby Wairarapa people were to settle on farms is discussed.

21. In September 1970, frustrated that the scheme had failed to show any returns, the owners called for an inquiry into the administration of the scheme.

22. In 1977, the owners moved to have the scheme transferred into their control. In February 1983, the Māori Land Court vested the Pouākani scheme land in the Mangakino owners, who established the Pouākani 2 Trust.

23. Despite a number of debts, in 1999 and 2000, the Trust's net operating surplus exceeded $800,000.00.

Tribunal Analysis and Findings

24. The Tribunal found that the story of Wairarapa Moana and Pouākani is a story of Māori property rights being overridden, disregarded, and dishonoured.

25. The failure of the Crown to support Māori in their desire to keep ownership of the lakes and lands adjacent to the Wairarapa Moana was a breach of the most fundamental Treaty guarantee.

26. The Tribunal is also critical of "Hiko's sale" whereby the government attempted to purchase the lakes from a group of Wairarapa leaders.

27. In examining the gift of the lakes to the Queen and the offer of land at Pouākani to Wairarapa Māori, the Tribunal concludes that the Crown's conduct breached its obligations to act towards its Treaty partner with the utmost good faith and to actively protect their interests.

28. The Tribunal is also scathing of the compulsory acquisition of land at Pouākani for the construction of the hydro dam at Maraetai.

29. With regard to the development scheme at Pouākani, the Tribunal concludes that it is not possible on the evidence to find that there was a Treaty breach in the operation of the scheme.

30. The prejudice to Wairarapa Māori caused as a result of the Crown's conduct in respect of Wairarapa Moana and Pouākani is set out.

31. In addition to general redress, the Tribunal recommends that the Crown:

    (a) Return to Wairarapa Māori the ownership of the bed of Wairarapa Moana;

    (b) Gift as Reserve any land in Crown ownership adjacent to the lakes;

    (c) Work with tangata whenua to design a special arrangement for management and control of Wairarapa Moana that recognises the status of Wairarapa Māori as its rightful owners and kaitiaki;

    (d) Compensate the Pouākani owners for the opportunity cost of the burden of administration of the Mangakino leases;

    (e) Reassess the compensation to be paid for the Maraetai dam in light of new Treaty criteria;

    (f) Compensate the owners of land at Pouākani for the loss of productivity occasioned by the power line corridors; and

    (g) If the conclusions of the Crown's witness are correct, compensation, with interest, should be paid to the owners for the "lost 200 acres".

32. An in-depth public works timeline listing events relating to public works takings both nationally and in the inquiry district is set out.

33. A map of the public works takings in the inquiry district is shown.

CHAPTER 8:

PUBLIC WORKS

1. A timeline is included at the beginning of the report setting out the major events related to public works takings at both a national and local level. Although compulsory public works acquisitions did not begin until the early 1860s, Māori land was certainly deployed for roading quite extensively before then. The Tribunal's focus is on land that was expressly taken compulsorily.

2. Various Tribunals have previously found that the compulsory acquisition of Māori land for public works is only justified in Treaty terms in exceptional circumstances, that is, where the national interest is at stake and there is no other option. This is the test that every compulsory acquisition must meet in order to be legitimate by Treaty standards.

3. In this Inquiry District, the Tribunal identified the following three questions:

   (a) Was the compulsory acquisition of Māori land for public works in Wairarapa ki Tararua consistent with Treaty principles?

   (b) When local authorities exercised statutory powers to acquire land compulsorily for public works, what is the Crown's responsibility?

   (c) Even if the public works taking regime implemented by the Crown was in breach of the Treaty, was the public works regime procedurally fair and were takings carried out in accordance with that regime?

The compulsory acquisition of Māori land to 1928

4. Early takings in Wairarapa ki Tararua were limited to land for roads. In the first twenty years of colonisation, it would have been possible for Māori and Pākehā to create a mutually acceptable basis for developing community assets as it worked in with traditional Māori concepts. Such an arrangement would have been fairer than the imposition of legal norms that were foreign to Māori understanding.

5. The Land Clauses Consolidation Act 1863 and the Public Works Lands Act 1864 increased the power of authorities to take Māori land for public works. Soon after the Government also began using the 5% rule to take Crown granted Māori land for roads without compensation. It was a common perception that taking Māori land for public purposes was the cheaper and easier option.

6. In 1866, legislation enabled provincial governments to take land for general public purposes without requiring separate legislation each time. Those wider powers for local authorities were barely supervised by central government. In the Wairarapa, conflicts began in the 1870s and tensions continued into the twentieth century, in particular, at places like Castlepoint and Palliser Bay.

7. The Public Works Act 1882 crushed the Māori passive resistance movement at Parihaka and reflected a more uncompromising attitude to be applied in the coming decades. The kinds of works for which land could be taken was extended. Legal provisions were increasingly limiting the duty to offer land back in situations where surplus land was not required for other public purposes.

8. The report provides case studies showing how this legislative regime shaped the taking of Māori land for public works in the Wairarapa ki Tararua District pre-1928.

Te Ore Ore road takings

9. This block, on the Ōkurupatu Block near Masterton, had a track known as Luxford's Line, which was used by Upper Taueru and Moroa settlers from the 1850s. In 1870, Māori threatened to cut down the bridge over the Whangaehu just beyond Te Ore Ore. Surveyors were sent in to plot the road line and met opposition from Māori. Only the intervention of local rangatira, Manihera, Rangitakaiwaho and Ihaia Whakamairu prevented the conflict escalating.

10. Despite fierce dispute between Māori and local authorities, the roads eventually passed through the Te Ore Ore blocks. The owners did receive compensation for their land, in a time when compensation for road takings was the exception rather than the rule. Thus even when Māori owners were clearly opposed to land takings, their rights were not respected. This was a breach of the Crown's promise to Māori of tino rangatiratanga under the Treaty.

Kōpuaranga road and rail takings

11. In the late 1880s, the Crown sought to purchase 16 acres of customary land at Kōpuaranga to expand railway and roads. In order for the Government to pay compensation to owners of the 16 acres, the Court ordered the Kōpuaranga Reserve to be surveyed. Ngāti Noti and Ngāti Pōhatu were given title over the block. Compensation was paid to the owners, however, costs of surveying and partition were charged against the block.

12. Although the Māori owners did not wish the block to go through the Court, as a consequence of the Government's taking of the land, the large parent block went through the Court and was more easily available for purchase.

Seventy Mile Bush railway takings

13. The taking of land in the 70 mile bush area was governed by the construction of the railway from Wellington to Napier which began in 1871. The proposed route for the railway in the 70 mile bush area was through several reserves still in Māori ownership. These lands were taken for public works and, for most, it appears compensation was paid. Throughout the latter part of the 19th Century, land in 70 mile bush was steadily taken, including particularly fertile land favoured for retention, such as the Mangatainoka Block.

Castlepoint road takings

14. Māori land within the Castlepoint reserves was first taken for roads in the 1880s and was still being taken for road realignments 100 years later. The 1853 Deed specifically envisaged roads being laid over the reserves set aside for Tangata Whenua. The public taking of roads through the Castlepoint reserves shows that local boards could take Māori land over a long period with "casual ease", with poor records and owners not being engaged in the process.

15. There is now no way of knowing what owners thought as the public works regime "simply denied owners of multiply owned Māori land the dignity and authority accorded owners of general land."

The Compulsory Acquisition of Māori Land since 1928

16. In the twentieth century, central government was rarely the initiator of public works activity in the Wairarapa ki Tararua District, however, the public works department did work behind the scenes in support of local authorities.

17. In 1927, Ngata was able to repeal the 5% provisions so that Māori had the same right as Pākehā to claim compensation for land taken for public works. Although the 5% provisions were removed, the Public Works Act 1928 didn't change much. By the time the 1928 Act was passed there was little Māori land left in New Zealand and in the Wairarapa. The Public Works Act 1954 further complicated matters by

removing the offer back provisions altogether. The offer back principle was, however, re-introduced by the Public Works Act 1981.

18. The report also provides case studies showing how the public works environment since 1928 operated for owners of Māori land in Wairarapa ki Tararua.

Palliser Bay road takings

19. Prior to the road being legalised, the track went around the Palliser Bay coast to the lighthouse and crossed Māori land. In the 1930s, the Government moved to formalise the route. It is unlikely that Māori would have wished for a formal road here as there were places of significance to Māori along the coast. An engineer's report was prepared and the public works department recommended that the work proceed despite the proposed route passing through part of an urupā. The takings were proclaimed in April 1934 and compensation was determined in November 1934 by the Native Land Court.

20. No Māori owners were represented at the hearing and compensation of £200 was paid to the Ikaroa District Māori Land Board for distribution to the owners. In 1935 the Public Works Department recommended that the Council proceeded with taking further land at Mātakitaki-ā-Kupe. This land was taken under the Native Land Act 1931. The Court ordered $10^{1}/_{4}$ acres to be declared a public road and compensation of £21 was set, despite land owners not being represented at the Court hearing.

21. The Palliser Bay saga is deemed significant by the Tribunal because of the initial decision to develop the road, driven by the Government's desire to open up the area for closer settlement without the say of Māori land owners.

Gladstone Road deviation and gravel pit takings

22. Of all the public works takings in Wairarapa ki Tararua, the road deviation through the middle of Hurunui-O-Rangi Pā was possibly the most flagrant assault on Māori cultural values and preferences. The stretch of road separated the marae from the urupā and was justified as it provided a straighter approach to the Ruamāhanga River than previously.

23. In 1948, the Wairarapa South County Council approached the law firm representing most land owners to seek their consent to build the deviation. No responses were received. At a June 1953 meeting the Council gained consent from nine owners and began work (representing 19 out of 200 shareholders). Construction was completed in late 1954, despite protests from landowners. In August 1955 the Council gave formal notice of its intention to take the land for a road which had been in use for almost a year. The taking was formalised in December and compensation of £204 was determined.

24. The taking of Hurunui-O-Rangi land for the gravel pit went in parallel with the road deviation. The owners first sought compensation in 1949 and the Council agreed to pay retrospective royalties on £100 in 1952 if it could keep taking gravel without further payment. The payment of royalties was, however, deferred until compensation for the public works taking of the gravel pit was determined. The Māori Land Court finally set compensation at £465. By 1982, the gravel pit was exhausted. The Council then offered it to a local farmer and the farmer later sold the land to a buyer who would build an abattoir on it. Complaints about the abattoir's waste disposal practices have continued ever since.

25. The Council was not interested in involving tangata whenua in what was planned for their land and, as such, its actions showed a complete disregard for the things that Māori hold most dear – the integrity of marae and the tapu of urupā.

Waiohine Bridge deviation and Mangatarere Stream diversion takings

26. In relation to farming and bodies of water in the Wairarapa District, the lack of Māori representation on local authorities meant that if any land was to bear the brunt of the redirected water, it was likely to be

Māori land. The Waiohine Mangatarere Flood Control Scheme was the only example of flood control works reported on in this inquiry district.

27. A scheme was developed to manage flooding between Carterton and Greytown and involved diverting the Mangatarere Stream, constructing stock banks and an overflow, building a new Waiohine Bridge and realigning the road at various points. In November 1960, the Ministry of Works sought to negotiate the purchase of two areas of Māori land affected by the scheme. The compulsory takings were proclaimed in 1964, well after the works were finished and research is unclear on whether compensation was paid. The area taken was approximately 30 acres.

28. In this instance, the authorities avoided negotiating with Māori land owners and had no consideration for the needs and preferences of Māori.

Ōkautete School taking

29. Ōkautete School served the entire community at Ōkautete, both Māori and Pākehā attended and in 1963 it was disestablished as a Māori School, becoming a public school under the Wellington Education Board.

30. Although the school site had been gifted for a native school, where the site was no longer required, section 436 of the Māori Affairs Act 1953 allowed it to be returned to its former owners.

31. In 2004, the offer back of the land was discussed with descendants of the original owners. The Crown would return the school land at nil value but wanted to be paid for the buildings. The sum of $22,500 has been attributed to the school house building – the cost for the Crown to remove the building from its site. This is consistent with LINZ's policy on the disposal of gifted land, whereby beneficially entitled persons must pay current market value. The report deems this approach *"mean spirited and out of keeping with the principles of the Treaty".*

Tahoraiti Block council takings

32. Within the Tahoraiti Block, the Council acquired many parcels of land for a dump, sewage plant, rifle range and aerodrome. The amount of Māori land taken far exceeded takings of Pākehā owned land in the vicinity. A further issue in this regard for claimants is compensation for those takings.

33. The report then provides more detailed case studies in regards to the Dannevirke Gravel Pit, the Dannevirke Rifle Range, the Dannevirke Sewage Reserve, the Dannevirke Aerodrome and the Dannevirke Rubbish Dump.

34. The Tribunal found that the takings within the Tahoraiti Block show that the local authorities in Dannevirke sought to acquire Māori land through compulsory takings and showed no respect for Māori living on the Block.

Tribunal Analysis

Was the compulsory acquisition of Māori land for public works in Wairarapa ki Tararua consistent with Treaty principles?

35. The Tribunal has previously confirmed that the compulsory acquisition of Māori land runs counter to Treaty principle in all but the rarest cases. The Tribunal has also previously criticised the same aspects of compulsory acquisition powers that have been expressed in this inquiry.

36. In the CNI Tribunal's analysis of the Treaty, public works and Māori rights, the observation is made that *"in the interests of fairness and good government, rights should not be taken from people who lack the political representation to protect those rights"*. This Tribunal agrees.

37. The compulsory acquisition of Māori land, in particular without compensation, ran contrary to the colonisation model for New Zealand. That is, despite the general benefit which Māori may have obtained from infrastructure, the Tribunal states that Māori should not have been expected to give up ownership of land they wished to retain in exchange for public works such as roads and railways. The Tribunal sets out the essentials of the land fund model which was to be implemented in New Zealand and explains how the implementation of the land fund model did not go according to plan. In New Zealand, the land fund model involved persuading Māori to accept that the Crown had an exclusive right of purchase and that Māori should sell unused lands to the Crown at relatively low prices.

38. The Crown rejected the view of successive Tribunals that generally compulsory takings are repugnant to Treaty principle. The Crown said that such compulsory acquisitions are part of the legitimate exercise of the Crown's right of Kawanatanga under the Treaty.

39. The Tribunal, however, finds that none of the public works takings in the inquiry met the test for being required as a last resort in the national interest. Any arguments from the Crown that certain railways and/or roadworks met the test because of difficult terrain were not well developed and the Tribunal therefore does not accept those arguments.

40. Furthermore, the Tribunal found that the Crown and local authorities were cavalier in acquiring Māori land for public works in Wairarapa ki Tararua. The Tribunal also noted that today, neither governments or local authorities resort to compulsory acquisition of Māori land without exploring other options, despite being able to do so. The Tribunal found this to be a totally unsatisfactory situation, which is an ongoing and substantial breach of the principles of the Treaty.

When local authorities exercise statutory powers to acquire land compulsorily for public works, what is the Crown's responsibility?

41. The majority of public works takings in Wairarapa ki Tararua were by central Government, however, local authorities later assumed that role from 1876 onwards. The question is then whether local authorities are subject to the same Treaty duties as the Crown is.

42. The Crown has accepted that it was responsible for designing public works legislation and monitoring local authorities' activities under that legislation. As a result, the Tribunal finds the Crown responsible for the prejudice to Māori arising out of takings by local authorities which are not last resorts in the national interest. The Tribunal further says that whether it was the Crown or a local authority responsible for the takings is merely a technical detail and, in principle, there was no material difference.

Even if the public works taking regime, implemented by the Crown, was in breach of the Treaty, was the public works regime procedurally fair and were takings carried out in accordance with that regime?

43. The Tribunal found that in this inquiry the 'as a last resort in the national interest' test has not been satisfied in any of the instances of compulsory acquisition. However, it is still important to enquire into whether the legislation was actually complied with. In that regard, the Tribunal considers issues of procedural fairness, consultation, consideration of alternative sites and forms of tenure, compensation, and offer back.

Tribunal Findings

44. The Tribunal found that the compulsory acquisition of Māori land for public works in Wairarapa ki Tararua was a breach of Article 2 of the Treaty. In essence, the Tribunal found the following:

    (a) The public works regime was, and is, monocultural and the Crown failed to understand the special significance of land to Māori; and

    (b) The legislation was not procedurally fair in relation to Māori land;

(c) By delegating the compulsory acquisition powers to local authorities, the Crown breached the Treaty;

(d) The Crown also failed to supervise offer back provisions delegated to local authorities.

45. As the Tribunal seeks to bring peace and reconciliation to communities who have suffered grievances, claimants need to see that the Crown is willing to move on in areas of policy that have affected them negatively. As such, the Crown must respond to this need.

Recommendations

46. The Tribunal recommends that:

(a) The Crown changes the current public works regime immediately, in particular, that the Public Works Act 1981 be amended to give effect to the principles of the Treaty of Waitangi. The Tribunal sets out specific amendments to Parts 2 and 3 of the Act. Amendments for sections 134 of Te Ture Whenua Māori Act 1993 and section 342 and Schedule 10 of the Local Government Act 1974;

(b) LINZ retains its existing standards for offer back of gifted land;

(c) The Crown gives tangata whenua the Ōkautete School buildings and school house located on the site; and

(d) The Crown assists claimants to find out about land compulsorily acquired within Wairarapa ki Tararua, which may be declared surplus and offered back to the descendants of the original owners or which has been disposed of without offer back.

CHAPTER 9:

HOW VOLUME III WORKS

1. This short chapter sets out the structure of volume III and explains the focus of the chapter being an exploration of how the power relationship between settlers and tangata whenua in this district changed profoundly once the ownership of most of the land passed from Māori to Pākehā.

2. For Māori, their identity, their sense of who they were, was intimately connected to place, even when they no longer owned the bulk of the land. Losing power and influence in their own rohe therefore threatened their very existence.

3. Volume III traces how, in many areas of life in the Inquiry District, the role of hapū and iwi as tangata whenua has been jeopardised.

4. A brief overview of chapters 10-14 is set out.

CHAPTER 10:

THE THINKING BEHIND VOLUME III

1. This volume is set out differently than other Tribunal reports in order to emphasise the thematic connections between the topic areas discussed in volume III. By doing so, it is hoped to paint a more comprehensive picture of the bind that Wairarapa ki Tamaki Nui-ā-Rua Māori find themselves in i.e. they comprise a small minority who have access to none of the corridors of power.

2. The core concept of this volume is how Māoriness is profoundly related to place, and how when Māori are powerless in the very places they spring from, their Māoriness is threatened. By acquiring ownership of land Pākehā came to control and manage everything.

3. Materially and spiritually, Māori interacted dynamically with the physical world in pre-contact times. This symbiosis was a cornerstone of Māoriness.

A Conservation Ethic

4. An in-depth analysis of the pre-contact period from when Māori first inhabited the Island shows that a large number of unique species to Aotearoa were made extinct.

5. Partly as a result of this, Māori developed conservation practices to ensure the continuous supply of native species.

Māori and the Concept of Territory

6. Māori expressed their identity and identification to land through pepeha, waiata and kōrero that spoke of their connection to the land.

7. All places were known intimately to tangata whenua including kāinga and pā.

The Loosening Connection

8. Changes in the relationship with the physical environment began very soon after the arrival of Pākehā including the rapid decline of traditional resources.

9. The introduction of potatoes and pigs, and their impact on mahinga kai practices cannot be overstated.

10. By the later part of the nineteenth century, traditional food-gathering was no longer the major means by which Māori in the Inquiry District obtained a livelihood.

The Connection Unravels

11. The period from 1820 to 1850 was one of upheaval in so many ways and is described by the Tribunal as *"tumultuous"* for tangata whenua.

12. When it came to decisions about the environment, the mood of the times favoured development rather than protection or conservation.

13. In the succeeding chapters of this volume, the Tribunal examines the various areas in which the fundamental grievance of Māori is that in the very places where they live and where they are tangata whenua, they still lack sufficient power to make their cultural preferences count in decision making.

CHAPTER 11:

WHERE AND HOW MĀORI LIVED

Nourishing Terrains

1. The Tribunal briefly revisits the traditional relationship between the tangata whenua and the local environment in the early nineteenth century and notes how that began to change under the impact of European settlement. Both the landward and seaward terrains are considered. To tangata whenua, these were inextricably connected.

Learning the fragile new environment

2. This carefully generated local knowledge grew out of, and intermingled with, Polynesian concepts that arrived with the first settlers. They were intentional voyagers, bringing with them carefully selected gene pools of people, plants, and animals. They also brought conceptual tools such as whakapapa, tapu, and rāhui (restriction on access for a set time) that would, in time, provide the foundations for a new and comprehensive environmental ethic. In Aotearoa, they found an environment that was bountiful but also fragile and highly vulnerable to the arrival of people and animals. It was also decisively different from their tropical homelands.

3. The settlers' local knowledge base was enlarged by exploring the new land, whakapapa were expanded and adapted to include the new environment and this impacted on Māori use of resources.

Kai Pathways

4. The Tribunal discusses evidence given of particular kai pathways, including:

    (a) Tanguru Tuhua's evidence from the 1889 Waikopiro Block hearings who named four pathways where rats were caught and groves of miro trees which were important for birding;

    (b) Hori Herehere's evidence, also from the Waikopiro Block hearings regarding a kai trail that followed the Mangapuaka River; and

    (c) William Wright's evidence regarding kai trails within the Tararua rohe as well as crossing the Tararua Ranges and following the West Coast rivers to Shannon.

Seaward Terrains

5. As the evidence about kai pathways indicates, for the tangata whenua in the pre-contact era, the nourishing terrains of Wairarapa ki Tararua were offshore as much as onshore.

6. The Tribunal discusses the coastal resources and fisheries traditionally used and managed by iwi and refer to the following evidence given in the Inquiry:

    (a) Takiririrangi Smith who described customary uses of the coastal and the marine habitat on the coast north of Flat Point;

    (b) Tipene Chrisp, who collated kōrero of Rangitāne kaumātua of the late nineteenth and early twentieth centuries that showed how Rangitāne hapū fished at various places along the Wairarapa coast; and

    (c) The importance of the coastal resources was reflected in the pattern of Māori occupation and settlement.

Change

7. As Wairarapa ki Tāmaki Nui-ā-Rua Māori and Pākehā increasingly came together from the 1840s onwards, these established patterns began to change, though fairly slowly at first. In lowland areas, Māori began entering into leasehold arrangements with the Pākehā squatters who drove sheep around the rocky coast from Wellington Harbour.

8. While Māori were dependent on the resources of the sea, lake, wetland, rivers, and the forest-wetland margin, the squatters were interested in the areas of bracken fern and native grasses that provided immediate fodder for sheep.

9. The Tribunal discusses the change in Māori established patterns with the increase in Pākehā settlers to the area, and how the two economies meshed together for mutual benefit.

10. Bryan Gilling's evidence regarding areas of open scrub and grassland that were modified by Pākehā pastoralists is noted as a prelude to a summary of the focus of the following chapters.

McCaw Lewis
LAWYERS

CHAPTER 12A:

THE EFFECTS OF COLONISATION AND DEVELOPMENT ON LANDWARD TERRAINS

Terrain 1: the Wairarapa Lowlands and Wetlands

1. When Europeans came to the Inquiry District their focus was on changing and developing the land to maximise its agricultural potential. This chapter identifies the environmental effects of colonisation and how these affected tangata whenua, particularly mahinga kai.

2. The environmental effects of colonisation including deforestation and catchment control are discussed.

3. The Tribunal notes positive developments in the relationship between Wairarapa ki Tamaki Nui-ā-Rua Māori and the Department of Conservation regarding reserves administered by the Department around Lake Wairarapa.

4. The effects of these environmental changes on tangata whenua are discussed, particularly the loss of the wetlands.

Terrain 2: Wairarapa ki Tararua Rivers

5. The importance of rivers to Māori and in particular for this inquiry district the Ruamahanga River system in Wairarapa and the Upper Manawatu River system in Tararua are mentioned.

6. Manahi Paewai is mentioned as one who lived beside the Upper Manawatu River at Kaitoki near Dannevirke.

7. The Ruamahanga River is discussed including its reduced catchment area after 1974.

8. The effects of waste disposal into rivers is discussed, including wāhi tapu and treasured bathing and camping places being destroyed by engineering works and pollution. Species loss was exacerbated by the introduction of trout which preyed on indigenous fish.

Terrain 3: Te Tapere-nui-ā-Whātonga/Tamaki Nui-ā-Rua/Seventy Mile Bush

9. The rapid and comprehensive onslaught on the Tamaki Nui-ā-Rua forest as a result of Vogel's immigration, public works and land settlement schemes is discussed.

10. The Te-Tapere-nui-ā-Whātonga forest is one of the densest in the North Island, and was a saw miller's dream. Under Vogel's scheme settlers set about felling the forests in preparation for cultivating.

11. The Tribunal notes that no one seemed to have considered the implications for the environment or tangata whenua of deliberately destroying the vast ecosystem.

12. When discussing the depletion of Te-Tapere-nui-ā-Whātonga and the effect on mahinga kai of tangata whenua, the Tribunal notes that two strands of evidence were presented. One strand relates to how Rangitāne hapū stayed in the forest of Te-Tapere-nui-ā-Whātonga, effectively hiding there until the threat of invasion had past.

13. Evidence was brought to the Tribunal's attention by Steven Oliver regarding the dwindling involvement in seasonal hunting from the 1870s onwards. The Tribunal notes that, for a number of reasons, this evidence may not have described the situation for the whole of the bush. In particular this evidence may not have

addressed the fact that parts of the bush that the Native Land Court did not hear evidence about were those occupied continuously by Rangitāne hapū.

14. In general, the once great Te-Tapere-nui-ā-Whātonga was greatly reduced what is today an unfortunately small remnant of what it once used to be.

Terrain 4: The Remutaka, Tararua, Ruahine, and Aorangi Ranges

15. A similar story can be told about the mountain ranges – the Remutaka, Tararua, Ruahine and Aorangi. The Tribunal notes that they were much modified, including tall trees being removed by logging and land clearance from the lowlands into the upland forest.

16. A large number of predators were released into the forest, sometimes by accident and sometimes by design. These included cats, dogs, rats, pigs, goats, trout, Canada geese, deer, possums, stoats, weasels and ferrets.

17. From the late 1870s onwards, the Crown began to see its responsibilities as extending to the environment. This was in order to construct a sense of nationhood rather than recognising Māori rights.

18. The Tribunal notes that the current legislation fails to give Wairarapa ki Tamaki Nui-ā-Rua appropriate access to places and materials of cultural and spiritual importance within the forest parks.

Terrain 5: Coastal Hills and Ranges

19. Although Māori intentionally participated in the pastoral farming on the coastal hills and ranges, they did not anticipate the magnitude of environmental changes that would ensure including the destruction of habitat and the loss of tāonga species and mahinga kai.

Species Conservation

20. The Tribunal makes particular note of the extinction of the huia, a bird of great distinction to Māori, highly prized for its tail feathers. Huia that survived deforestation and burning of forests, then had to deal with the introduction of new species, particularly mustelids.

21. Rangitāne in their closing submissions endorsed the tapu nature of the huia. Particularly for Rangitāne ki Tamaki Nui-ā-Rua, the huia had more mana than any other bird. *"The huia feathers were tapu, the human head was tapu, and the Rangatira who wore the feathers on their heads as personal adornments were tapu."* Even the special carved boxes (waka huia) were tapu and accorded great care and respect.

22. The huia, admired for its beauty and novelty by naturalists and scientists, created an enormous demand for skins. This led to many huia being shot or captured.

23. In order to attempt to save the huia, chiefs from the Wairarapa and Manawatū districts placed a tapu on the Tararua Range and also sought the support of the government.

24. Bureaucratic delays and inertia prevented any action to protect the huia. The last sighting of the bird was in 1907 after which it was almost certainly extinct.

McCaw Lewis
LAWYERS

CHAPTER 12B:

LOCAL GOVERNMENT: REPRESENTATION AND RESOURCE MANAGEMENT

1. The focus in this chapter is on the extent to which Local Government (whom the government has delegated many important functions) address obligations to Māori within the Inquiry District under the Treaty.

2. The main claimant concerns were very low levels of Māori representations on councils, monocultural practices, the failure of councils to approach environmental matters from a Māori perspective, and the failure of the legislation to require councils to pay attention to the Treaty of Waitangi.

How does Local Government legislation address Treaty obligations to Māori?

3. The Tribunal sets out an in-depth analysis of the Local Government legislation to date, particularly recent changes that underpin the Local Government Act 2002.

4. In general, the Crown has delegated the responsibility to local councils however there is no equivalent level of accountability.

What is the regime for electing councils and to what extent does it enable Māori representation?

5. This section focuses on:

   (a) The low levels of Māori participation in councils in comparison to their percentage of the population;

   (b) Statistics which show improvements in Māori representation in Local Governments but that Pākehā remain consistently over-represented among candidates, and more importantly, among those elected; and

   (c) Māori representation on local authorities within the Inquiry District focusing on analysing the various councils within the Inquiry District's websites. The Tararua District Council is noted as having a close working relationship and a Memorandum of Understanding with Rangitāne o Tamaki Nui-ā-Rua, as a result of Rangitāne o Tamaki Nui-ā-Rua investing considerably in developing their relationship with the council.

How is the RMA regime working for Māori?

6. The shortcomings of the RMA from a Māori and Treaty point of view are well known. The Tribunal examine the local issues:

   (a) Comments made by earlier Tribunals are equally applicable in the Wairarapa ki Tararua district; and

   (b) The lack of resources, both human and material, is a major obstacle to hapū and iwi playing the role they would like to play.

7. What are the problems with the present regime?

   (a) Local authorities are overwhelmingly monocultural despite several local authorities serving a larger proportion of Māori than the national average:

(b) Māori are marginalised within the larger community;

(c) Inconsistent or meaningless consultation, if even at all;

(d) The council and Māori talking past each other, that is, an inability, or unwillingness on the council's behalf to conceive environmental issues in a Māori way;

(e) Iwi without adequate resources and capacity to effectively engage with the councils in consultation;

(f) Dysfunction, that is, experiences with councils being problematic. This is particularly the case for Rangitāne.

8. On the basis of Rangitāne's experiences of working with the councils legislative change is needed.

Has enough been done to address these problems?

9. Other players in the local authority scene are examined to ascertain their role in making the work of local bodies more Treaty-compliant over time, for instance:

(a) **The Ministry for the Environment** has a monitoring role regarding Māori participation with RMA processes particularly local authorities financial provision for Māori participation;

(b) The **Local Government Commission** and **Department of Internal Affairs** have sought to build stronger links between local and regional councils and Māori in regards to local Government legislation. There has been mixed progress by local authorities engaging with iwi over the past two decades. The Tribunal recommend mandatory Treaty audits of local authorities;

(c) **Te Puni Kōkiri** – reports prepared in 2004-05 and 2006-07 suggest that the existing legislation works best where councils and iwi have a substantial resource base and iwi and council leaders have strong face-to-face relationships;

(d) **Local Government New Zealand** – a non-governmental organisation that is the *"champion of best practice in the local Government sector"* – a survey of councils in 2004 showed that a number of councils had engaged with Māori at various levels however the Tribunal note that this survey asked councils to assess themselves; and

(e) **The *"Local Futures"* research project** – a five-year study of strategic policy and planning in local Government – undertook a study whose findings reinforce those carried out by other agencies;

10. Information extracted from examining council websites confirm the pattern of widely varying practices among territorial authorities in regards to Māori-related policies and provisions.

11. Some councils are making substantial progress in developing meaningful and mutually productive relationships with the Māori communities they represent. Overall however, performance is patchy and there are no sanctions at all for poor practise – the legislation is enabling but not coercive.

CHAPTER 12C:

THE DEPARTMENT OF CONSERVATION

1. Fourteen percent of the land area in this Inquiry District is "Conservation Estate" managed by the Department of Conservation ("DOC").

The legislative and organisational context

2. Set up under the Conservation Act 1987, in 1996, as part of a wider vision-setting exercise DOC developed a draft strategy for Māori relationships.

3. Significant tension developed between DOC and Māori in the 1990s – the Crown's 1994 proposal to settle Treaty claims excluding conservation estate, the taking of kererū (a protected species) for cultural purposes, and use of the pesticide 1080 in traditional food-gathering areas.

DOC's work in Wairarapa ki Tamaki Nui-ā-Rua

4. A number of developments over the past decade showed DOC and iwi increasingly working together, to their mutual benefit including, for Rangitāne, the Pūkaha Mount Bruce;

5. Rangitāne have also been involved in two projects: The Ngāwhenua Rāhui reserve at Mohangaiti Lake which is a native nursery at Te Kura Kaupapa Māori o Tamaki Nui-ā-Rua in Dannevirke, used for education and forest restoration, and a scheme to gather native plants from conservation lands for rongoā, with tangata whenua and DOC agreeing on how to harvest the plants.

Claimant concerns

6. Although acknowledging the developments claimants continue to have concerns:

   (a) The devolution of decision-making power to iwi is rare;

   (b) Positive outcomes depend on the goodwill and competence of staff on the ground, but local concerns are not necessarily understood or supported by senior staff in Wellington;

   (c) Iwi and hapū have neither the resources nor depth or the skills to participate on a sustainable, professional basis;

   (d) There are significant obstacles for iwi to develop cultural-commercial enterprises on conservation land;

   (e) Only when DOC finds ways to devolve and share its statutory decision-making powers with Māori would there be a genuine partnership; and

   (f) Arrangements with department staff and managers may be vulnerable should those staff leave the department in the future. Hence, claimants desire for existing understandings to be formalised.

7. The Tribunal comments that iwi who face significant resource constraints – human and financial – would find it difficult, perhaps impossible to realise plans such as Rangitāne's for Pūkaha Mount Bruce.

8. Jim Rimene is quoted in regards to Te Tāperenui o Whātonga and its importance to Rangitāne. His vision for Pūkaha includes a three-way partnership between Rangitāne, DOC and the National Wildlife Centre.

9. Mike Grace notes that the Memorandum of Understanding constrains Rangitāne's involvement at Pūkaha Mount Bruce, especially in terms of their wish to develop an ecological-cultural tourism business there.

10. The Tribunal considers that observations in regards to whale-watching off the Kaikōura Coast are relevant to the situation in which Rangitāne and DOC find themselves today in regards to the forest remnant of Tāperenui o Whātonga (Seventy Mile Bush) at Pūkaha Mount Bruce. The Tribunal support Rangitāne's aspirations to develop an ecological-cultural tourism enterprise at Pūkaha Mount Bruce and also their desire to formalise the Pūkaha Mount Bruce brand and to develop a joint management plan with DOC.

Conclusion

11. The law requires DOC to interpret and administer its Act so as to give effect to the principles of the Treaty. Although progress is acknowledged, significant problems remain from the point of view of tangata whenua.

Recommendations

12. The Tribunal recommends a joint working group, comprising representatives from iwi and DOC to review the Department's activities and current relationships within the region, and to identify opportunities for joint decision-making and funding for Māori programmes, especially in the training area: *"With respect to Pūkaha Mount Bruce, we think that joint management and ownership would be the ultimate expression of partnership between the Crown and Rangitāne. We would regard the return of part ownership of the reserve as fitting cultural redress for Rangitāne"*.

CHAPTER 12D:

MĀORI HERITAGE MANAGEMENT

1. The purpose of this chapter is to emphasise the importance of securing better protection for Māori heritage sites in Wairarapa ki Tararua. The Wairarapa ki Tararua district is full of places and objects that have special significance for Māori. These places are enduring physical manifestations of nearly every aspect of traditional Māori life.

2. The south Wairarapa coastline is archaeologically important.

3. Māori oral tradition articulates centuries of intimate connection between tāngata and whenua. Heritage sites provide tangible evidence of a people's deep knowledge of local resources and climate – knowledge that allowed them, in numerous simple but effective ways, to extract all they could from the environment without damaging it. The still discernible traces of where and how tūpuna lived are a vivid link with the lives they led so long ago.

4. The Tribunal notes that the district's heritage sites are at considerable risk of degradation and in some cases destruction from property development. They acknowledge that much damage has already been done to the area.

Why better protection is needed for Māori heritage sites

5. The Tribunal sets out the three key reasons that underpin their call for a better protection regime for Māori heritage sites:

   (a) The importance of Māori heritage sites to tangata whenua;

   (b) The importance of Māori heritage sites to everybody as the heritage of New Zealand's indigenous people is an important part of the story of our land; and

   (c) The recognition of Treaty rights and balancing them with other rights (i.e. the property rights of those who own the land). The Tribunal states that:

      (i) The Crown's Treaty duty should be explicitly delegated to local authorities. The Tribunal sees a significant role for the Crown in supporting local authorities and tangata whenua to operate a workable protection regime for heritage sites located on local authority land; and

      (ii) The situation is complex where Māori heritage sites are on private land, which is largely the case in Wairarapa ki Tararua, and that concerns regarding heritage sites should be accepted as a legitimate basis for interfering with private property rights.

Shortcomings of the current regime for managing and protecting Māori heritage sites

6. The legislative regime for managing and protecting Māori heritage sites fails to work in the interests of Māori and that it does not, and cannot, guarantee to Māori the protection of their taonga envisaged in the Treaty.

7. The Tribunal then goes on to describe the regime and how it works in the context of addressing each of the nine primary claimant criticisms.

Overview of the legislative scheme

8. The current statutory regime to protect Māori heritage is centred on the HPA and the RMA. The former governs the Historic Places Trust, a Crown entity responsible for the protection and conservation of heritage sites. The scheme is difficult to follow and a single, simple, clear source of law to regulate this area is sorely needed.

How effective are the protective mechanisms in the HPA?

9. The HPA provides for three protection mechanisms:

   (a) Heritage orders;

   (b) Heritage covenants; and

   (c) Protection for archaeological sites.

10. The claimants say that these are ineffective in protecting Maori heritage sites.

Heritage orders

11. The interaction of the two Acts in regard to Heritage Orders and Heritage Protection Authorities is nowhere obvious.

12. There is confusion regarding what a Heritage Protection Authority ("HPA") is, or can be.

13. The particular provisions considered are complex and raise questions.

14. The Tribunal then offers its interpretation of the provisions and how they appear to work, although acknowledging their lack of confidence that how the scheme appears to work is how it actually works in practice. The main issues identified are:

   (a) It is unclear whether the territorial authority is a decision-maker or recommender; and

   (b) The Tribunal questions why the process prescribes a recommendation by the territorial authority to the HPA when the HPA is the one sought the heritage order in the first place.

Heritage covenants

15. The difference between heritage covenants and heritage orders is explained. The Tribunal acknowledges Davidson's evidence that the regime's provision for covenants and orders had not worked for the claimants in this Inquiry.

16. Certainly, given the significance of the sites in south Wairarapa, it is indeed surprising that, except in one instance, they have not been the subject of either an order or a covenant. The exception is a heritage covenant at Mangatoetoe.

17. The Tribunal notes the substantial fines for offences under the HPA, however states that it does not appear that such fines have been imposed in defence of these special places.

Do these protective mechanisms work?

18. With regards to Heritage Orders and Covenants, the main issues identified by the Tribunal are as follows:

   (a) The Historic Places Trust cannot itself decide to implement either a heritage order or a heritage covenant;

(b) The Parliamentary Commissioner for the Environment observed in 1996 that heritage orders were rarely used, and were not understood by councils or tangata whenua. The Tribunal find this unsurprising given their own difficulty in following the legislation; and

(c) Cost is almost certainly a factor in the relatively low number of covenants put in place.

Archaeological Sites

19. Not enough of the archaeological sites in the Wairarapa District are being protected by the Historic Places Trust possibly due to lack of funding.

20. Positive and active steps need to be taken in order for the Trust to police the provisions for protecting archaeological sites, and there is the need for a register of archaeological sites in Wairarapa ki Tararua.

21. Although the Act provides for substantial fines, a Court would need compelling evidence before it could impose such fines, and this is unlikely until skilled staff are on the job policing an up-to-date register.

Is the Māori Heritage Council adequately resourced to carry out its functions?

22. In this part the Tribunal simply notes the establishment of the Māori Heritage Council, who sits on the Council and the role of the Council, which is:

(a) To consider and make proposals for the registration of sites of Māori interest;

(b) To develop programmes that allow heritage sites of Māori interests to be identified and conserved by Māori; and

(c) To advise the Trust on a wide range of issues relating to Māori heritage.

How the Māori Heritage Council works

23. In this part the Tribunal notes the deficiencies of the Māori Heritage Council, drawing on particular evidence and reports. The Tribunal notes that it has heard no evidence that the Māori Heritage Council works well.

Are Māori heritage sites under-registered by the Historic Places Trust?

24. The Historic Places Trust is required under statute to establish and maintain a register of four kinds of heritage sites: historic places, historic areas, wāhi tapu, and wāhi tapu areas.

25. Nationwide, relatively few Māori heritage sites are registered by the trust.

26. Part of the problem appears to be that the Trust largely relies on the New Zealand Archaeological Association's database for information, instead of establishing its own comprehensive register.

27. Attempts by the Historic Places Trust and the New Zealand Archaeological Association to systematically compile a comprehensive list of Wairarapa ki Tararua's archaeological sites have been largely unsuccessful, although there has been some progress.

28. The Tribunal also acknowledges the Parliamentary Commissioner for the Environment's 1996 report which states that, where archaeological sites were included in the historic places register, it was typically done with no assessment of their value from a Māori perspective.

Factors contributing to under-representation

29. The following factors have contributed to the under-representation of Māori sites on the register:

    (a) The Historic Places Trust's lack of resources, which prevents it from proactively investigating and registering sites;

    (b) Acknowledging Davidson's evidence, that Māori heritage protection lags behind European heritage protection due to a lack of expertise of those on the Trust;

    (c) Opposition from local Pākehā landowners; and

    (d) The barriers facing Māori groups including lack of resources to undertake the necessary preliminary research and general disillusionment with the heritage protection regime.

To what extent do local authorities include registered sites in District Plans?

30. One of the most important consequences of the under-registration of Māori heritage sites is that such sites are less likely to be included in District Plans and therefore do not attract the maximum statutory protection available under the RMA.

31. Specific matters noted by the Tribunal in relation to local authorities include:

    (a) Māori heritage is a low priority for local Councils and that there is a lack of knowledge and understanding by Councils of Māori heritage issues;

    (b) Statistics suggest that local authorities in Wairarapa ki Tararua do include registered sites on District Plans, despite there being no legal obligation on them to do so. However that some wāhi tapu are in the District Council's 'silent file' so that they are omitted from the District Plan and the Tribunal notes the potential dangers of this process, given the District Council's limited resources;

    (c) Māori reluctance to list wāhi tapu in public planning documents due to the preference of keeping the location of significant sites confidential. The Tribunal notes that some local authorities in Wairarapa ki Tararua have found ways of reconciling the need to protect sites with the need for confidentiality, including the GIS computer mapping project adopted by Rangitāne;

    (d) The inclusion of registered sites in District Plans is discretionary, which means that there is a risk that sites will not be included. The Tribunal states that the legislation must be changed so that Councils are compelled to list registered sites in plans; and

    (e) The fundamental problem is the low levels of registration of Māori sites.

Do local authorities use RMA provisions for transfer of powers and joint-management agreements?

32. The Tribunal importantly notes that the RMA provisions have been little used due to confusion about:

    (a) The requirements for an application;

    (b) The question of who will pay for the process;

    (c) The Act's specification of 'Iwi Authority'; and

    (d) A widespread reluctance among local authorities to transfer authority to tangata whenua.

33. It also noted that the potential of the RMA provisions is unlikely to be realised. The Tribunal notes that it is difficult to see what will make power-holders willing to release some of it. It states that hapū could play a

larger role at the planning and policy development stages and in considering consent applications however that funding would need to be made available to Iwi for this to work.

Does the resource consent process protect Māori heritage values?

34. It as critical that the resource consent process closely monitors any proposed disturbance to archaeological sites. Particular matters commented on by the Tribunal in relation to the resource consent process include:

    (a) Local authorities have too little knowledge and understanding to give proper consideration to the potential adverse effects of proposed consents on Māori heritage values and make fully informed decisions about consent applications;

    (b) Local authority approaches regarding consultation with tangata whenua vary. Ideally Iwi should be involved in consent applications at an early stage and fully involved in participating in Council processes; and

    (c) Iwi have no money to participate in the process.

How well do government agencies work together and with Māori?

35. There is no consistency in the way in which local authorities approach Māori heritage issues when making plans and policies or in the way in which they manage their relationships with Iwi.

36. Across the district there have been some attempts to co-ordinate the policies and procedures of different local authorities, including the Wairarapa coastal strategy, however that it is up to each local authority to decide whether to adopt these recommendations – iwi have no further role in the implementation.

37. There are many agencies for tangata whenua to deal with and maintaining relationships with all of the agencies is enormously expensive for under-resourced hapū.

38. The categorisation of heritage sites is inconsistent and the different methods of categorisation make it difficult to compare sites across districts or to determine the exact nature of the sites themselves.

What is the state of public awareness about Māori Heritage Issues?

39. There is a general lack of awareness about Māori heritage issues among the public and, in order to raise public awareness, Te Puni Kōkiri could be commissioned to write an instruction manual for councils on the nature and importance of Māori heritage sites, and how to engage with Māori authorities to identify and list them.

Are portable taonga adequately protected?

40. In this part, the Tribunal considers what is wrong with the portable taonga regime. The criticisms of claimants and witnesses that are noted include:

    (a) Many finds go unreported and the penalties imposed under the current statutory regime do not work;

    (b) Iwi are not involved in the management of artefacts;

    (c) The process for vesting ownership in iwi is unworkable - the Tribunal noting that this is likely to do with the cost of making an application; and

(d) There is no regime for the protection or management of pre-1975 finds, therefore many taonga remain in private collections (under the "finders-keepers" rule) and the only way for hapū to reacquire items in which they have interests is to buy them on the open market.

41. In its conclusion for this part, the Tribunal notes:

(a) South Wairarapa groups have been particularly exposed to the inadequacies of both the "finders-keepers" rule and the bureaucratic process for vesting ownership in iwi;

(b) The Crown should set about remedying some of the mistakes of the past; and

(c) For the Crown to assume the ownership of taonga of iwi is clearly not in accordance with Treaty principles, and iwi should not have to buy taonga back.

Overall conclusion

42. The main problems with the current heritage management system are:

(a) Poor funding;

(b) Poor site registration, including that too few sites are registered and that no register of archaeological sites has yet been set up;

(c) Key protection mechanisms are clumsy, overly bureaucratic and confusing;

(d) Although the inadequacies affect the management of all heritage, Māori heritage generally fares the worst; and

(e) Tangata whenua are far too little involved in making decisions about their sites and taonga.

43. Changes need to be made to address these serious problems, and it is the task of heritage management experts, both Māori and Pākehā, to work out exactly what is required for a more effective and culturally responsive regime.

A Postcript: Positive Developments

44. The Tribunal finishes this chapter by noting some of the hopeful signs regarding heritage management in Wairarapa ki Tararua, including the GIS computer mapping project being undertaken by Rangitāne.

CHAPTER 13A:

THE EFFECTS OF POPULATION GROWTH AND EXPLOITATION ON THE SEAWARD TERRAINS

1. The Tribunal shifts its attention to the coastal marine environments and the sea itself. Until well into the twentieth century, these were bountiful environments for Māori and were seamlessly entwined with the land and the seasonal patterns that regulated their lives.

2. The degradation of landward terrains by rodent infestation may have been discernible as early as the 1830s. Certainly, introduced species affected vulnerable fauna early in the contact period, and by the end of the nineteenth century, the Wairarapa ki Tararua landscape was also very extensively modified by pastoral farming and associated service towns. A visitor to New Zealand's shores at the start of that century would barely have recognised most parts of the country 100 years later.

3. By comparison, the seaward terrains changed relatively little.

Land Sales and Coastal Resources

4. As with the selling of other Māori land, when coastal land was sold, extensive areas of the coast were reserved by Māori.

5. Māori conceived their mana as extending to fishing rocks, submerged rock pinnacles and fishing holes offshore. Pākehā conceptions of land and sea as distinct environmental zones affected the ability of Māori to articulate and obtain what they wanted and needed as owners of coastal resources.

Coast Begins to Change

6. Until the second half of the twentieth century, Māori continued to use coastal resources, owing to the lack of coastal roads and naturally sheltered points for mooring.

7. Since the 1950s, use of seaward terrains steadily increased. This led to complaints over growing commercial and recreational pressure on previously abundant fish stocks, including paua and koura.

8. Along with the growth of holiday home ownership and camping, there has been an expansion of commercial enterprises and new land uses which added to the pressure on coastal environment and resources.

9. In regards to DOC policy, the Tribunal notes that it is *"surely a far cry from the rangatiratanga that tangata whenua properly expected to retain, at least over the areas reserved from purchase"*.

The Ngāti Hinewaka Experience

10. The Ngāti Hinewaka struggle to have the Crown recognise their customary fishing rights in the waters off their rohe provides an interesting case study.

11. Ngāti Hinewaka petitioned Parliament in the 1940s to set aside a reserve pursuant to the Māori Social and Economic Advancement Act.

12. The Tribunal, agreeing with its earlier stance, notes that the Crown's solution was to treat the law and rights conferred on Māori by this Act with contempt by refusing to consider applications on their merits.

13. In attempting to have a taiāpure established under the Māori Fisheries Act 1989, Ngāti Hinewaka had not, it seems, consulted Rangitāne who had parallel interests in the same Wairarapa ki Tararua coasts.

14. Alerted by the public notices, James Rimene of Rangitāne o Wairarapa wrote a brief but formal objection on 27 May 1992. The taiāpure proposal was important for Rangitāne, he said, and overlapped with other issues to do with the Crown's recognition of them as tangata whenua in Wairarapa. Ultimately, a hui in August 1994 restored the relationship, and Rangitāne o Wairarapa withdrew its objection and indicated it would attend the formal hearing. (In the event, Rangitāne leaders present at the hearings were not allowed to contribute for procedural reasons: Rangitāne had not filed a written 'submission' and had withdrawn its 'objection'.

15. In 1995, the taiāpure sought by Ngāti Hinewaka was finally achieved at Palliser Bay, however was relatively small in comparison to what they originally sought.

16. The Tribunal recommends an amendment to the legislation, particularly around the uncertainty of the word "littoral" in the context of "littoral coastal waters" as set out in section 54A of the Māori Fisheries Act 1989.

Conclusion

17. The Tribunal concludes that the development of the coast is now affecting the natural environment and also endangering the tangata whenua's relationship with their mahinga kai and wāhi tapu, and that they are poorly placed to bring about changes to mitigate these effects.

CHAPTER 13B:

MANAGING THE CUSTOMARY FISHERY

1. Tangata whenua in this Inquiry District protested the negative effects of commercial fishing on their customary fisheries as early as 1949.

2. Until then, the Wairarapa ki Tararua coast had been sufficiently isolated, and fish stocks elsewhere sufficiently abundant, for customary use of the fisheries to be relatively unaffected by incursions from outsiders. But, gradually, over the succeeding decades came a growing awareness that commercial fishers were affecting Māori customary fishing.

3. New Zealand's fishery was run under a licence system for most of the twentieth century. Effectively, anyone who had a licence could sell all the fish they could catch. As fishing efforts increased in the latter half of the century and fish stocks declined as a result, it became obvious that the licence system was not a sustainable way of managing the fishery.

The Development of the Modern Commercial Fishery Regime

4. The policy-makers promoted the introduction of the quota management system. Māori however asserted their right to the commercial fishery on the basis of the Treaty or on the fact that successive Fishery Acts said they would not affect any Māori fishing rights.

5. Negotiations regarding a fisheries settlement took place in the lead up to the Māori Fisheries Act 1989 and continued until 1992 when the 'Sealord deal' was brokered and enacted in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

The Tribunal's Jurisdiction

6. The measures enacted in the Māori Fisheries Act 1989 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 together constitute a full and final settlement of all Māori claims to commercial fishing rights. The Tribunal's jurisdiction to inquire into or make findings on any claim that relates to Māori commercial fishing rights was removed by this legislation.

7. However, there is no jurisdictional bar to the Tribunal considering claims relating to Māori non-commercial fishing rights. On that basis, the Tribunal chose to respond to claimant desires to inquire into claims relating to customary fisheries.

Customary Fisheries: The Current Regime

8. One such measure to provide for Māori customary fishing is the establishment of taiāpure-local fisheries. As well as taiāpure, other options include mātaitai or making provision for rāhui or temporary closures.

9. Under the Fisheries (Kaimoana Customary Fishing) Regulations 1998, kaitiaki can participate in the development of sustainability and management strategies relating to rohe moana. Various difficulties in accessing these types of measures are outlined by the Tribunal based on claimant evidence.

New Customary Fishing Initiatives

10. New initiatives to increase iwi understanding of the Crown's fishery management methods and processes have been recently initiated which the Tribunal comment on. These include regional fisheries forums, relationship facilitators, extension offices, training and support, fisheries management advisors and compliance resources, and mediation.

Conclusion

11. Although the Crown had devised a number of tools for Māori to use to establish and exercise their customary rights to gather fish, seafood and aquatic life, Māori customary fisheries is still very much a work in progress.

12. A particular concern the Tribunal identify is when too many stakeholders have to be accommodated which reduces the level of control tangata whenua want and need in order to manage *their* customary fishery.

13. The Tribunal recommends:

    (a) Making provisions easier to understand; and

    (b) Creating a more explicit priority for Māori customary fishery rights among the plethora of fisheries interests

14. The Tribunal make a specific recommendation that the Crown review the current situation in five years. If it is apparent that provision for Māori customary fisheries has not significantly improved or if the Crown does not undertake a review, the Tribunal grants the claimants leave to seek a further inquiry into claims in this area.

CHAPTER 13C:

FORESHORE AND SEABED CLAIMS

1. In the Foreshore and Seabed Inquiry held in 2004, the Tribunal found that policies breached the provisions and principles of the Treaty and prejudiced Māori.

2. In closing submissions, claimants asked the Tribunal to consider the resulting Foreshore and Seabed Act 2004.

Claims

3. Two claimant groups in particular are examined by the Tribunal - Ngāti Hinewaka me ōna Kārangaranga and Te Hika-ō-Pāpāuma.

4. The Tribunal consider that the evidence heard from both of these groups discloses a *"very significant interest in the foreshore and seabed".*

Recent Developments

5. In light of the ministerial panel put together to review the Foreshore and Seabed Act, the Tribunal summarise the panel's findings.

6. The Tribunal choose not to report on the foreshore and seabed issues in order to give the government an opportunity to make the necessary changes. If there are no material differences as a result, the Tribunal grant leave for claimants to seek further inquiry into the foreshore and seabed situation.

CHAPTER 14:

RANGITĀNE IDENTITY

1. The Tribunal describes this as an unusual claim. They do accept that the emphasis in the claim was firmly on the Crown's conduct and no wrong doing by Ngāti Kahungunu was alleged.

2. The Crown acknowledged that Rangitāne are now as strong as any other iwi. Since the 1980s, the Crown say Rangitāne have established their profile and mana in Wairarapa ki Tararua and have firm relationships with local and central government authorities in the Tamaki Nui-ā-Rua area.

What is the Crown's Treaty Duty Concerning Māori Tribal Identity?

3. The Tribunal finds that the Crown's duty as a Treaty partner extends to protecting Māori Tribunal identity and should not be regarded as controversial.

4. That said, the Tribunal were not attracted to the concept of Tribal identity as a taonga under Article 2 of the Treaty. Tribal identity is inextricably bound up with rangatiratanga, and the Crown's obligations towards tribes arise from that connection. The Tribunal see taonga rather differently. Taonga are possessions; something owned by and important to people, but not in them and of them. Tribal identity is in the people and of them.

5. Thus, the Crown does have a duty to tribes to recognise them and to protect their tangata whenua status, and this arises as an extricable part of the guarantee in the Treaty of te tino rangatiratanga

Was the Crown responsible for the loss of Rangitāne's Tribal Identity?

6. The Tribunal refers to the claimant's intention that we are not dealing with a situation where bad faith is alleged, the central allegation is that the Crown perpetuated a flawed interpretation of manawhenua in the region.

7. The Tribunal was offered three possible accounts of the origin of that flawed interpretation. It may have come from the writings of nineteenth-century anthropologist Stephenson Percy Smith; it may have flowed from erroneous accounts given by other Māori; or it may have arisen from a failure of understanding on the part of the Crown itself. Perhaps a combination of these factors was at play.

8. The Tribunal refers to the interpretations that were put forward by Percy Smith.

Rangitāne's identity: their experience through time

9. Although some descended from both Rangitāne and Kahungunu, certain hapū claimed their take to land exclusively through their Rangitāne whakapapa.

10. The Tribunal refers to Dr Angela Ballara's thesis and that the 'pure' Rangitāne descent group living east of the Tararua Ranges was Ngāti Hāmua.

11. Tipene Chrisp has conducted the most exhaustive research on the history of Rangitāne's tribal identity in Wairarapa ki Tararua. In an article published in 1993, he described how, from the early twentieth century, Rangitāne were virtually 'written out' of the history of the area. Chrisp argued that a 1904 article in the Journal of the Polynesian Society by Stephenson Percy Smith became the definitive, orthodox view of the history of the occupation of the region. Subsequently, this orthodoxy was uncritically accepted and repeated by any number of authors.

12. The Tribunal refers to a small group of dedicated Rangitāne leaders who have succeeded in reasserting the tangata whenua status of the iwi within the district.

13. The Tribunal witnessed the tangible outcomes of this revival in spirited waiata performed by Te Kura Kaupapa students in Dannevirke.

14. There is reference to kaumātua, Jim Rimene, who has been a key figure in the re-emergence of Rangitāne identity in Wairarapa since the 1980s. It also refers to the evidence of Piri Te Tau and Mike Kawana, who gave a number of examples of the re-emergence of Rangitānetanga in the Inquiry District.

Tribunal's comment

Rangitāne's separate tribal identity

15. The Tribunal accepted the evidence of Chrisp and others that Rangitāne exists, and has always existed, as iwi of Wairarapa ki Tararua with its own unique whakapapa and identity. The Tribunal states, like Ngāti Kahungunu, Rangitāne are tangata whenua in Wairarapa ki Tararua.

16. The Tribunal also accepts that Rangitāne's own tribal identity and tangata whenua status were not widely recognised or understood outside well-informed Māori circles for about 100 years from the late nineteenth century until the 1990s.

17. The work of Chrisp and Ballara establishes that, up until the end of the nineteenth century, certain hapū in Wairarapa ki Tararua identified primarily or exclusively with Rangitāne. Typically, chiefs would not use the term 'Rangitāne' to identify themselves but would give their hapū name instead. Ngāti Hāmua was the principal Rangitāne hapū, and that identification was often used. The Tribunal informs us that the name 'Rangitāne' is not seen in Crown records like purchase deeds and censuses.

Complexity

18. The Tribunal recognise that many Māori in Wairarapa ki Tararua regard themselves as 'aho rua' (two lines). This means that they have links both to Ngāti Kahungunu and to Rangitāne.

19. Whakapapa relationships within and between Wairarapa ki Tararua iwi and hapū were and are complex.

20. Similarly, counsel for Ngā Hapū Karanga submitted that 'every hapū named in the Rangitāne evidence as solely Rangitāne could whakapapa to both Kahungunu and Rangitāne'.

21. While there is contention over these matters, the key point is that most hapū in Wairarapa ki Tararua have at least some connection to both Rangitāne and Ngāti Kahungunu, and these connections are not always straightforward or uncontested.

Resistance

22. The Tribunal accepts there clearly was resistance in some government departments to the re-awakening of Rangitāne.

23. Since the 1990s, central and local government agencies have largely responded to the energy and assertiveness of Rangitāne's leadership and taken steps to recognise and build relationships with the iwi. One example of this is the memorandum of understanding between the Tararua District Council and Rangitāne o Tāmaki-nui-ā-Rua

Effects

24. The Tribunal also accepts the Chrisp assessment that it was in the mid-twentieth century that Rangitāne people were really affected by the subordination of their tribe to Ngāti Kahungunu in public records and documents and in the estimation of officials and the general public.

25. Chrisp describes the 1940s and 1950s as a time of disruption, relocation, and abandonment of marae, as much of the Māori population of the area migrated to the larger towns. It was then that the means by which Rangitāne people had passed on the mātauranga (traditional knowledge) of their tribal identity to the next generation fell away and they could resist the Smith–Tunuiorangi orthodoxy of exclusive Ngāti Kahungunu mana whenua no longer. It became not just the official version of mana whenua in Wairarapa ki Tararua but effectively the only version, because Rangitāne no longer had a firm understanding of who they were and why.

26. The Tribunal accepts Chrisp's argument that the suppression of Te Reo and tikanga Māori by governments in the twentieth century and the breakdown of cultural networks brought about by Māori migration to large towns and cities were significant factors in the dissipation of Rangitāne in Wairarapa ki Tararua.

27. There is no suggestion that the Crown targeted Rangitāne hapū or intentionally sought to misrepresent or suppress their Tribal identity.

28. The Tribunal considered that the continued non-recognition of Rangitāne identity in Wairarapa ki Tararua was a symptom of a wider suppression and loss of language and culture and social change on a national, in fact, global scale.

29. Since the re-emergence and reassertion of Rangitāne identity began in the 1980s, Crown agencies have gradually got on board. Perhaps more insight and knowledge would have assisted in the early years, but the Tribunal did not perceive evidence of any real Treaty breach. The Tribunal commented that Rangitāne's identity in Wairarapa ki Tararua today appears to be as strong as Ngāti Kahungunu, and that the future of Rangitāne in Wairarapa ki Tararua looks healthy.

Conclusion

30. Māori people commonly have whakapapa connections with more than one iwi, and this was certainly the case with tangata whenua in Wairarapa ki Tararua. How people choose to express those affiliations is a matter of personal choice. That choice is variously motivated. Sometimes it is made because of an emotional connection, as in a strong love for a particular relative or tipuna (ancestor) or for a particular part of the whānau; sometimes it can be made for political reasons; and sometimes it is a function of upbringing.

31. The Tribunal summarised the evidence where people indicated they have many Tribal connections, some could have established a whakapapa connection to both Rangitāne and Kahungunu and some to one or the other.

32. How and why Māori affiliated is no business of the Crown, at least in the sense it is no part of the Crown's role to seek to influence that choice. Crown counsel accepted this, but the history of emphasis on Ngāti Kahungunu in this district almost certainly had the effect of encouraging Māori people there to emphasise their connection with that part of their whakapapa.

33. The Tribunal stated that it is certainly arguable that the Crown breached the Treaty of Waitangi in failing to require and maintain a sufficiently sound knowledge of the tribal origins of the people of the district. This failure breaches the principle that the Crown has a duty actively to protect the interests of Māori. As the

Tribunal have said, the interests at stake here are important ones for, of course, tribal identity is an intrinsic part of rangatiratanga.

34. That all said, the Tribunal on balance, did not want to go as far as to find that the Crown breached the Treaty in this respect for two reasons:

(a) The loss of knowledge about Rangitānetanga and the emphasis instead placed on Ngāti Kahungunu was definitely a phenomenon in the nineteenth and early twentieth centuries. However, Stephenson Percy Smith's role in promoting his Tunuiarangi-based orthodoxy means that the Crown's part in causing an emphasis being placed on Ngāti Kahungunu is not at all clear; and

(b) It is not apparent that, in the nineteenth century at least, Rangitāne people were especially concerned about asserting their separate identity. The desire to do this arose at a later stage in colonisation, once the effects of cultural loss began to bite.

35. Rangitāne cannot succeed in their claim against the Crown because they are so manifestly succeeding as a people. Although it was found that the Crown had not breached the Treaty in relation to Rangitāne's identity, the Tribunal did have some suggestions that they hoped would find favour:

(a) It is expected that future publications produced by government departments would include reference to both Rangitāne and Kahungunu as tangata whenua of Wairarapa;

(b) In negotiating with Wairarapa ki Tararua iwi over these claims, the Crown may consider writing to the Chief Executives of local and regional authorities to confirm its recognition of Rangitāne as tangata whenua of Wairarapa ki Tararua and, where no relationship already exists, to encourage local government to develop working relationships with the Rangitāne tribal organisation;

(c) The following name changes are supported because they more accurately reflect Māori tradition and good use of language:

(i) Not Tararua but Tāmaki-nui-ā-Rua;

(ii) Not Tākitimu (Māori Land Court district) but Ikaroa; and

(iii) Not Rimutaka but Remutaka.

(d) Amendments to the Pāpāwai and Kaikokirikiri Trusts Act 1943 to include Rangitāne as explicitly eligible for education scholarships. The trusts were established to provide for the education of the descendants of the people who gifted land for native schools at Pāpāwai and Kaikokirikiri. If it can be established that Rangitāne hapū were right-holders in the land that was gifted to the Crown for schools, then there is no reason for excluding Rangitāne children from eligibility to benefit under the Act. This issue should be investigated and, if necessary, the Act be amended as sought.