NO ROOM TO LAND:

The Case For The Return Of Waharoa Airport

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Ma te whakaatu, ka mohio
Ma te mohio, ka marama
Ma te marama, ka matau
Ma te matau, ka ora![1]

From the Treaty, comes recognition
From recognition comes awareness
From awareness comes knowledge
From knowledge comes justice!

E mihi nui ana ahau ki a koutou te tangata whenua o Raungaiti Marae o Waharoa. Ko nga korero mo Waharoa i kimihia, i rangahautia e au, na koutou nga karanga maha. Na reira ka ahei ki te whakatau mai i taku kaupapa tuhinga i runga i te aroha me te whakaaro nui.

Ko te tumanako kia puta te ora me te tika ki a koutou katoa i roto i Waharoa. Tena koutou, tena koutou, kia ora huihui tatou katoa.

Naku noa
Sue Wardill

[1]From Pa Henare Tate in Barlow, Cleve Tikanga Whakaaro (Auckland: Oxford University Press, 1996), xi.

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INTRODUCTION

Rapua mai te mea ngaro: Seek that which is lost.

For over one hundred and sixty years, Maori have struggled to secure Crown and public recognition of rights based on their understanding of the Treaty, but seldom has there been unanimity between Maori and Pakeha. Maori have experienced the effects of legislation that cut across their Treaty rights, in particular legislation that affected their ancestral land. Whether this was done in ignorance, or knowingly, it has left in its wake a distrust of the Crown and its officials.

This paper looks specifically at land in the Matamata North Block at Waharoa leased originally by the Crown in 1942 for use as an emergency airfield during World War II. Following the end of the war and after seven years of stalling, the Public Works Department took the land in 1951 for use as a civilian airport under the Public Works Act 1928. The discussion will seek to ascertain whether the policies, practices and acts of the War Department, the Civil Aviation Department and the Public Works Department, operating on behalf of the Crown, and the Public Works Act 1928 were inconsistent with the principles of the Treaty of Waitangi.

Although the initial event happened nearly sixty years ago, those connected to the airport land at Waharoa still feel bitterness over the loss of part of their ancestral land. The ‘taking’ affected a ‘small’ area of land and a ‘handful’ of people but resentment lingers amongst the Maori community over the way the Crown exploited a time of national need to gain access to the land and, when the need was over, applied legislation to validate ‘taking’ the land to secure permanent possession.

There are two issues surrounding Waharoa Airport. The first is, did the Crown act reasonably, honourably and in good faith in its dealings during

and after the war? The second applies in any situation where land is taken by proclamation for public works: under what, if any, circumstances can the Crown's right to govern in the public interest override the obligation to protect Maori rights guaranteed under the Treaty?

It is proposed that, prima facie, the Crown did not act reasonably and in a spirit of mutual co-operation and trust when it retained land leased from Maori owners for a wartime emergency airfield at Waharoa. Also it is submitted that the act of the Crown, in subsequently acquiring the land under the Public Works Acts 1928, breached the principles of the Treaty of Waitangi. There is an innate conflict between the principle of kawanatanga in Article 1 and the guarantee of tino rangatiratanga in Article 2. This conflict is between the right of the Crown to govern and make laws in the public interest and the promise made that Maori would remain in possession of their lands until they 'willingly' disposed of them at an agreed price.

In this context the Treaty of Waitangi and its guarantees are important. The idea behind the Treaty was that a place could be made for two different cultures in which the rights, values and needs of both could be respected. In such a situation compromises are required but not to the advantage of the one at the expense of the other.

The paper is divided into three sections. The first part considers the legal aspects of the case. It examines the background of the Treaty of Waitangi, discusses the principles of the Treaty and reviews the development and role of public works and public works legislation under which the land at Waharoa was taken. Part two surveys firstly, the dichotomy in Pakeha and Maori land concepts and then the historical framework and the events surrounding the taking of the Airport land. The final section investigates in detail the practices and procedures of the Public Works Act 1928 and the various Government Departments involved in the taking of the land. The contention is that the Act is in conflict with the principles of the Treaty of

Waitangi and that the performance of the Crown, through its agencies, also breached the Treaty principles, in particular through insufficient consultation and by violating its fiduciary duty to the Maori owners of the land.

PART 1 – LEGAL ASPECTS OF THE CASE

THE TREATY OF WAITANGI

Brief Background of the Treaty

British rule in New Zealand was achieved peacefully[2] in 1840, by the signing of the Treaty of Waitangi. Over five hundred chiefs[3] and William Hobson, a delegate of the British Crown, signed the Treaty, made between the colonising power Britain and representatives of the indigenous Maori inhabitants.

The terms of the Treaty reflected some concern on the part of the British authorities in London to prevent lawlessness and to ensure that Maori would not be plundered and exploited[4] by Pakeha[5] who were becoming an important, though not yet dominating, factor.[6] It was also designed in part to control land speculators[7] and alleviate the practices of the New Zealand

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[2]Following the peaceful signing of the Treaty, armed conflict broke out in 1843 when settlers enforced their mistaken claims to Maori land at Wairau. The threat to Maori land and the British intention to impose their customs and their laws on Maori led to clashes in the north and Wellington and eventually to full scale war in Taranaki, Waikato, and Tauranga with the resultant confiscation of large tracts of Maori land. For a more detailed account see G. Rusden (ed) *Aureretanga: Groans of the Maoris* and James Bellich *The New Zealand Wars*.

[3]A total of 541chiefs signed the Treaty - 502 (including both Te Rauparaha's signatures) appended to the Maori text and 39 to the English text: Ross, R M "Te Tiriti o Waitangi: Texts and Translations" (1972) 6 NZJH 129, 136 n 41.

[4]Preamble to the Treaty of Waitangi; for further detail see Rusden, supra n 2, 1-4.

[5]Europeans or non-Maori of whatever origin, including those of mixed Maori-European blood who did not consider themselves Maori.

[6]In 1838 there were about 2000 British subjects in New Zealand. Extensive cessions of land had been obtained from Maori and several hundred people had recently sailed for the country to occupy and cultivate those lands: Despatch from the Marquis of Normanby to Captain Hobson R. N. 14 Aug. 1839 No. 16, BPP 1835-42, IUP Vol. 3, 85, 85. By 1843 there were 11,489 Pakeha in New Zealand (8,326 in the North Island). In the next decade this figure doubled and by 1860 it was about 81,000: Kawharu, I H *Maori Land Tenure* 7.

[7]In anticipation of the pre-emption clause in the Treaty, Sir George Gipps, Governor of New South Wales, stopped a Sydney auction of 2000 acres of land in the Bay of Islands organised by Sydney settlers and businessmen: Orange, Claudia *The Treaty of Waitangi* 33.

Land Company[8] whose aim was to buy land cheaply from Maori and then sell it at a much higher price to the settlers.[9]

Lord Normanby, the British Colonial Secretary, gave William Hobson instructions[10] stating that the principle object of his mission was to moderate and, if possible, avert the disasters likely to befall the 'natives' at the hands of the colonists.[11] He was to deal fairly with Maori, guarantee their rights to land and see that all European land titles derived from a Crown grant:

> The acquisition of land by the Crown for the future settlement of British subjects must be confined to such districts as the natives can alienate,[12] without distress or serious inconvenience to themselves.[13]

With the help and support of James Busby,[14] Hobson invited chiefs of the Northern Confederation and selected others to a meeting at Waitangi to negotiate the formal transfer of sovereignty to Britain. This important

[8]The New Zealand Land Company was a public company floated in England in 1839 formed by the amalgamation of the New Zealand Association and the New Zealand Company of 1825. Its object was to carry out organised emigration from England and settlement in New Zealand. After the repudiation by Lord Normanby of Lord Glenelg's promise of a charter, the Company decided to set up a system of government independent of the British Crown to force the Crown to intervene and ratify their venture. Following the arrival of the Company ship *Tory* on 17 August 1839, William Wakefield bought land (about 20 million acres) in the South Island, Kapiti, Wellington, Wanganui and Taranaki. The Company could no longer deal directly with Maori for the sale or lease of land after the Treaty was signed. The passing of the Land Claims Ordinance in 1841 decreed sales of land before 1840 invalid until scrutinised and approved by a Lands Commissioner. However Normanby's successor Lord Russell not only gave the Company a charter on 12 Feb 1841 but also rewarded it with a huge grant of land that it could select from within the areas of its unproved claims: Bloomfield, Paul *Edward Gibbon Wakefield* 156–231; Lee, Jack *The Old Land Claims in New Zealand* 27-28.

[9]It is suggested that the pre-emption clause in Article 2 legally allowed the Crown to carry on the practices of the New Zealand Land Company. Instead of the profit generated by such transactions going into private hands it went into public funds and public works but arguably this benefited Pakeha more than it did Maori: BPP, supra n 6 at 85 & 87.

[10]Ibid, 85-90.

[11]Ibid, 85.

[12]One of the problems was that 'the natives' did not believe that they could alienate land. See section on "Maori Concepts of Land Ownership": infra at 60.

[13]BPP, supra n 6 at 87.

[14]The Colonial Office appointed Busby as the British Resident in New Zealand in 1832 and he arrived in New Zealand on 5 May 1833: Orange, supra n 7 at 12 &13.

aspect was 'down-played'[15] by stressing concern for Maori welfare through recognition and confirmation of certain rights.[16] In other words, the emphasis was on the benefits flowing from the agreement rather than the restrictions that would inherently follow.

Busby[17] drafted the terms of the Treaty, based on Hobson's notes, in English and gave it to Henry Williams of the Church Missionary Society who, along with his son Edward, translated it into Maori.[18] True to his profession, Williams used 'missionary Maori' in his translation. The words and expressions he used came from the Maori version of the Anglican Bible and prayer book[19] and had certain connotations for Christian Maori.

Kawanatanga v Te Tino Rangatiratanga

The major problem with the two texts is that they do not convey precisely the same meaning. There are several English versions of the Treaty,[20] all of which differ from each other and none of which equate with the Maori version[21] signed by most of the Chiefs. Nor is there an English translation

[15]While Hobson may have conveyed an idea of what was meant by the sovereignty of the Queen, he did not appear to explain in detail what its possible effects might be: Buick, T L *The Treaty of Waitangi* 351.

[16]The Treaty of Waitangi carefully reserved to Maori all their existing rights of property. It neither enlarged nor restricted the existing rights of property, it simply left them as they were: Martin, W *The Taranaki Question* 9.

[17]What was given to Williams to translate was a composite version of the draft notes of Hobson, Freeman (Hobson's secretary) and Busby: Ross, supra n 3 at 135.

[18]Orange, supra n 7 at 39. The English draft from which Williams made his translation has not been found: Ross, ibid, 133 and n 27.

[19]Orange, ibid, 40-41.

[20]Five different English texts were enclosed in Hobson's official despatches. The 'official' English version, printed in the First Schedule to the Treaty of Waitangi Act and reproduced in Appendix 1, is the one signed at Waikato Heads by 33 chiefs and at the Manukau Harbour by 6 chiefs in March and April of 1840: Waitangi Tribunal *Motunui-Waitara Report* 55; David V Williams "Te Tiriti o Waitangi- Unique Relationship Between Crown and Tangata Whenua?" 76 in Kawharu, *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*.

[21]A comparison of the 5 English versions and the Maori text shows that the Maori text was not a translation of any one of the English versions and none of the English versions were translations of the Maori text: Ross, supra n 3 at 134. There is some suggestion that Williams and his son recast the English draft as they were translating it in to Maori: Orange, supra n 7 at 40.

of the Maori version.[22] The concepts in the English version did not have an exact equivalent in Maori with the result that the words used are approximations, for example sovereignty and kawanatanga, possession and rangatiratanga.[23]

It is generally accepted that if a treaty is in two languages or is equivocal, preference should be given to both the understanding of the passive party[24] and the circumstances surrounding the drawing up of the treaty:[25]

> It follows that it is part of the context in which legislation which impinges upon its [Treaty of Waitangi] principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material.[26]

Based on the role that the Maori text played in gaining the signatures of the chiefs it is argued that the Maori text should be treated as the prime reference in any question of interpretation.[27] Lord McNair states that where more than one language is used in a treaty, it is desirable to state which text is authentic or that all are equally authentic.[28] An interesting point is that when Hobson sent the Maori and English texts to London on 15

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[22]It was only in 1869 that T E Young, a Native Department translator, officially attempted to translate accurately an English text into Maori and make a literal translation of the Maori text into English. [1869] AJLC 69-71. See Appendix 1 for Kawharu's literal translation of the Maori text, relied on by the Court of Appeal in the 1987 *SOE* case.

[23]For the difficulties surrounding the Maori and English words of the Treaty see Bruce Biggs "Humpty Dumpty and the Treaty of Waitangi" 300 in Kawharu, supra n 20.

[24]The *contra proferentum* rule of construction holds that, in the case of truly ambiguous words, the interpretation of a document is more strongly construed against the party who drafted it, or whose document it is: *Dryden Construction v NZ Insurance Company* [1959] NZLR 1336, 1339; *British Traders Insurance Co v James* [1968] NZLR 1157.

[25]*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 682 and 692: Richardson and Somers JJ referred to Normanby's instructions; Bisson J at 714-5 cited Maori speeches made at the signing of the Treaty; see also *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 283-4 per Diplock LJ and *Sidhu v British Airways plc* [1997] AC 430, 443 per Hope LJ.

[26]*Huakina v Waikato Valley Authority* [1987] 2 NZLR 188, 210.

[27]Ruth Ross "The Treaty on the Ground" in Department of University Extension Victoria University *The Treaty of Waitangi: Its Origins and Significance* 16; Waitangi Tribunal, *Motunui-Waitara Report* 57.

[28]Lord McNair *The Law of Treaties* 31.

October 1840 both were headed 'Treaty'[29] but when it was printed for publication the Maori text was headed 'Treaty' and the English text was headed '(Translation)'.[30]

The more common view, however, is to examine both versions in an attempt to reconcile them.[31] The Treaty of Waitangi Act[32] requires the Tribunal to do this when considering claims for the breach of the Treaty. Its former chairperson said, "it is not a case of deciding for one text or the other but rather of blending and harmonising the two". [33]

It is paradoxical that the *Report of House of Commons Committee on Aborigines in British Settlements* stated that, as a general rule, it is "inexpedient that treaties should be frequently entered into between the local Governments and the tribes in their vicinity."[34] It warned that the disparity between the parties was a ground for dispute rather than a security for peace. It noted, in particular, that complaints would possibly arise in both the ambiguity of the language used to draw up the agreements and the "sagacity which the European will exercise in framing, in interpreting and in evading them".[35]

The Treaty in its English form is a straightforward agreement in which Maori ceded or transferred sovereignty and gave the Crown sole rights of pre-emption. In return, the Crown guaranteed Maori 'full exclusive and undisturbed possession of their lands, estates, forests and fisheries and other possessions', promised Crown protection and granted Maori the rights of British subjects. Sir William Martin, former Chief Judge of New

[29]Orange, supra n 7 at 85.
[30]BPP, supra n 6 at 220-21.
[31]McNair, supra n 28 at 433. There is authority that in the absence of any provision to the contrary, neither text is superior to the other: ibid, 432; *Buchanan v Babco* [1978] AC 141 in which it was deemed appropriate to look at versions other than English one and compare them.
[32]Treaty of Waitangi Act 1975, s 5(2); supra n 25: *Fothergill*, 283-4 per Diplock LJ and *Sidhu,* 443 per Hope LJ.
[33]Durie, E T "Understanding the Treaty" NZLS Seminar, 1989; see also *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576, 590 per McKay J.
[34]BPP [1837 (425) Vol VII] June 26, 1837, 80.

Zealand from 1842 - 1857, expressed the English meaning of 'kawanatanga' as:

> [T]he rights which the natives recognised as belonging thenceforward to the Crown were such rights as were necessary for the Government of the Country, and for the establishment of the new system. We called them "Sovereignty"; the Natives called them "*kawanatanga*", "Governorship" …To the new and unknown office they conceded such powers, to them unknown, as might be necessary for its due exercise.[36]

The Maori text of the Treaty required that Maori cede 'kawanatanga' over their land to the Crown. The Crown promised to guarantee in perpetuity 'te tino rangatiratanga' of the chiefs, hapu and people (tangata katoa in Maori, 'individuals' in English) over their lands, dwelling places and all other possessions.[37] Maori have strong feelings for the land and the fear that the mana[38] of the land might pass from them if they signed the Treaty was eased by the Treaty's guarantee of rangatiratanga in Article 2.[39] It is very probable that if the guarantee had not been written in to the Treaty, Maori would not have signed the Treaty.[40]

The distinction between 'kawanatanga' and 'tino rangatiratanga' is central to any interpretation of the Treaty. 'Kawana' is the transliteration of governor into Maori[41] and 'kawanatanga'[42] is the power possessed

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[35]Ibid.
[36]Martin, supra n 16 at 9.
[37]The Maori text reads "...ki nga Rangatira ki nga hapu- ki nga tangata katoa o Nu Tirani te tino rangatiratanga o ratou wenua o ratou kainga me o ratou taonga katoa.": Appendix 1, *Te Tiriti O Waitangi*, Ko te tuarua.
[38]Authority, control, influence, power, having influence or power or vested with effective authority: Williams H W *Dictionary of the Maori Language* 172.
[39]Orange, supra n 7 at 58. The leaders of the Kingitanga movement believed that the guarantee of rangatiratanga confirmed that a relationship of equality would continue allowing Maori people a degree of autonomy and they wanted to work with the settler government in a kind of shared administration.
[40]In the oral discussions at the preliminary meeting on 5 February 1840 there was much debate surrounding the issue of sovereign power and territorial possession: Orange, ibid, 48ff; Buick, supra n 15 at 126ff.
[41]Williams, supra n 38: Appendix- words adopted from non polynesian sources.
[42]Kawharu, supra n 6 at 5.

(governor-ship) by a governor.[43] 'Kawana' is used in the Christian bible as the title of Pontius Pilate, the governor of Judea under the power of Rome.[44]

Listening to, reading and debating[45] the Maori translation of the New Testament,[46] Maori would have recognised that the Jewish people enjoyed a measure of freedom in home affairs and self-administration and that Pilate, the governor, was comparable to an overseer[47] while the Sanhedrin,[48] or Jewish Council, was the real governing body. Administration and execution of civil and criminal law was in the hands of the Sanhedrin: Jewish courts decided according to Jewish law.[49] The one exception was that death sentences required the confirmation of the governor who nevertheless decided if he pleased according to the standards of Jewish law.[50]

Chiefs with a Christian background[51] associated kawanatanga with abstract rather than concrete authority.[52] This is shown vividly in the trial[53] of Jesus

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[43]The suffix 'tanga' defines the qualities of the original word: Professor Bruce Biggs, cited in *Te Whakamarama Hui Tanguru 1991* Maori Law Bulletin 6.

[44]A, no ka oti ia te here, ka arahina atu, tukua ana ki a Pirato, ki te kawana (And when they had bound him, they led him away, and delivered him to Pontius Pilate, the governor): *Ko Te Paipera Tapu* (The Holy Bible), Matiu (Matthew) 27: 2.

[45]Ross, supra n 3 at 137 and fn 48.

[46]Missionaries composed a grammar of Maori, [Kendall, Thomas and Lee, Samuel *A Grammar and Vocabulary of the Language of New Zealand* (Church Missionary Society, 1820)], translated the whole of the New Testament, supplying 1,800 copies to everyone who could read, translated (in 1815) and printed the liturgy and services of the Church of England all before 1837: BPP, supra n 34 at 53.

[47]The Roman authorities could still intervene in the legislation and administration of law.

[48]The Sanhedrin was the supreme political, religious and judicial body in Palestine during the Roman period and determined the law for all Israel. Membership consisted of the High Priest, chief priests, scribes and elders, that is, the Sadducean and Pharisaic parties: *Encyclopaedia Judaica* Vol. 14, 835.

[49]Pilate to the Jewish leaders - Mauria atu ia, whakawakia ki to koutou na ture, (Take ye him, and judge him according to your laws); The leaders reply – He ture to matou, a ki to matou ture he mea tika kia mate ia (We have a law, and by our law he ought to die) but E kore e tika kia whakamatea tetahi tangata e matou (It is not lawful for us to put any man to death): Hoani (John) 18: 31; 19: 7; 18: 31.

[50]Schürer, Emil *A History of the Jewish People in the Time of Jesus* 192-94.

[51]The Anglican Church Missionary Society (CMS) established its first station in the Bay of Islands in 1814 and the Weslyan Missionary Society (WMS) at Whangaroa in 1822. Both expanded southwards during the 1830's while the Catholic mission began in the Hokianga in 1838. Under missionary influence many Maori learnt to read and write in the Maori language well before the signing of the Treaty in 1840: Orange, supra n 7 at 6–9;

the Nazarene. Sanhedrin, not Roman, officers[54] arrested Jesus and took him before the council of the Sanhedrin.[55] After trying him the members pronounced the death sentence[56] and took him before the governor for confirmation of the sentence.[57] Pilate, although he had the power to release Jesus,[58] deferred to Jewish law and confirmed the death sentence.[59]

'Te tino rangatiratanga', on the other hand, implied much more to Maori than did the English term 'possession'. 'Rangatiratanga', a Maori word, described the customary authority of the chiefs over their people. Sir William Martin put it thus: "To themselves they retained what they understood full well, the "*tino rangatiratanga"* (full chieftainship) in respect of all their lands." Maori leaders, from their cultural perspective, believed that the guarantee of 'rangatiratanga' tended more towards concepts of 'self-determination' and 'autonomy'.[60]

Although the word is a comparatively recent one,[61] the concept from a Maori cultural and political context is not new. The authority of a 'rangatira' and the power they exercised was not created or limited by

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Morrell W P *The Anglican Church in New Zealand: A History* chapter 1. By 1835 missionaries had come to Matamata and in 1838 Tarapipipi built a Christian Pa at Tapiri close to the Matamata Pa. He learnt to read and write Maori. He was a professing Christian several years before he was baptised in 1839, taking the name William Thompson (Wiremu Tamehana): Rickard L S *Tamihana the Kingmaker* 33-42.

[52]In William William's Maori translation printed in 1835, Ephesians 1: 21 is translated "ki runga ake i nga kawanatanga katoa, i te mana, i te kaha, i te rangatiratanga…(Far above all principality, and power, and might, and dominion…); see also Orange, supra n 7 at 41 and Waitangi Tribunal *Muriwhenua Fishing Claim* 187.

[53]There was a mixture of charges against Jesus - religious (blasphemy) and political (treason against the state of Rome), hence Pilate's epithet nailed to the cross– "King of the Jews".

[54]Roman soldiers did, however, carry out the death sentence by crucifixion: Matthew 27: 27-35; Mark 15: 15-25; John 19: 23.

[55]Matthew 26: 47, 57; Mark 14: 43, 53; Luke 22: 47, 52, 54 & 66; John 18: 3, 12-14 & 24.

[56]Matthew 26: 66; Mark 14: 64; Luke 22: 66; John 19: 7.

[57]Matthew 27: 2; Mark 15: 1; Luke 23: 1; John 18: 28.

[58]Matthew 27: 15, 26; Mark 15: 6, 15; Luke 23: 16, 17; John 18: 39, 19: 12.

[59]Matthew 26: 66; Mark 14: 64; Luke 23: 24; John 19: 16.

[60]See appendix 1: In Professor Kawharu's translation of the Maori text given to the Court of Appeal in supra n 24 at 662, Kawharu translates 'te tino rangatiratanga' as "the unqualified exercise of their chieftainship".

[61]The use of the word in the last 160 years is described as a "neologism": (1991) 8 Te Whakamarama: The Maori Law Bulletin 1, 6.

Article 2 of the Treaty. Missionaries played a major role in translating, presenting and explaining the Treaty to Maori at Waitangi and throughout New Zealand[62] and both parties were agreed on what 'rangatiaratanga' meant. The early written use of the term is found in the 1815 translation of the Anglican prayer book where it is used in the Lord's prayer: "kia tae mai tou rangatiratanga (thy kingdom come)".[63]

Though the concept of a monarchy or kingdom was unknown to Maori, the notion of the power and authority these embodied was known and understood. The 1835 Declaration of Independence used the term politically to denote independence,[64] while 'mana' expressed authority.[65] 'Rangatiratanga' was the power to lead the nation, underpinned by the 'mana' or authority to do so; together they culminated in 'kingitanga' or sovereign power. The *Motunui-Waitara Report* states that 'te tino rangatiratanga' means the 'highest chieftainship' or the 'sovereignty' of their lands.[66] They were protected not only in their possession of their lands, but also in the 'mana' to control them in accordance with their customs and cultural preferences.[67]

Kawharu observed that the Maori perception of 'kawanatanga' must be placed alongside their understanding of 'rangatiratanga':

> The Maori people's view...could only have been framed in terms of their own culture; in other words, what the chiefs imagined they were ceding was that part of their mana and rangatiratanga that hitherto had enabled them to make war, exact retribution, consume or enslave their vanquished enemies, and generally exercise power over life and death. It is totally against the run of evidence to

[62]Buick, supra n 15, chapters IV & V; Orange, supra n 7, chapters 3 & 4.
[63]Matthew 6: 10; Luke 11: 2.
[64]See Orange, supra n 7 at 255-56 for the Maori and English texts of the Declaration.
[65]Authority, control, influence, power, having influence or power or vested with effective authority: Williams, supra n 38 at 172.
[66]Supra n 27 at 59.
[67]Ibid, 60.

> imagine that they would willingly divest themselves of all their spiritually sanctioned powers - most of which powers, indeed, they wanted protected. They would have believed they were retaining their rangatiratanga intact apart from the licence to kill or inflict material hurt on others, retaining all of their customary rights as trustees for their tribal groups. A counterpoint to this is the fact that many of those who opposed the Treaty did so precisely because they took the view that they had no need of the Crown's protection of their rangatiratanga, or that that protection would compromise it.[68]

From the Maori text, Maori might naturally have drawn the conclusion that they were being asked to share some of their authority with a British administration. In other words, they thought it was a 'protectorate type'[69] relationship that was represented at Waitangi: one in which power and authority would be shared.[70] This confirmed the existence of a relationship of equality in which the Crown gained a share in the governance of the country (kawanatanga) while Maori retained a degree of control (rangatiratanga) over their land and resources.[71]

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[68]I H Kawharu 'Sovereignty vs Rangatiratanga', 9. Unpublished paper presented to the Waitangi Tribunal during the Kaituna River claim, July 1984; cited in Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* 4.

[69]This term is used guardedly. The hallmark of a protectorate is division of legal sovereignty: the protecting state assumes the 'external' sovereignty, with the power to conduct the foreign relations of the protected state, while the 'internal' sovereignty remains with the pre-existing system of government and law. McHugh argues that to apply the 'pure' principle of a protectorate to the Maori tribes of 1840 would require a "sea of change in Anglo-New Zealand legal thought": McHugh, ibid, 47ff.

[70]Orange, supra n 7 at 41-6. Tarapipipi Te Waharoa (Wiremu Tamihana), a chief of Ngati Haua and son of Te Waharoa, echoes this theme in his rhetoric about the Kingitanga movement: ibid, 142ff. In 1857 he went to the Native Office in Auckland to persuade Governor Grey to establish a Council of Chiefs both as a Maori policy making body and as an advisor to the Governor: Walker, Ranganui *Nga Tau Tohetohe: Years of Anger* 111.

[71]See Williams, David V "Te Tiriti o Waitangi- Unique relationship between Crown and Tangata Whenua?", 78 in Kawharu, supra n 20.

The Legal Status of the Treaty

It has been proposed that the Treaty of Waitangi is not a treaty.[72] It partly meets the definition of a "formal agreement entered into between states in order to define…their mutual duties and obligations".[73] However if a state is defined as "a group of people permanently occupying a fixed territory and having common laws, government and capable of conducting international affairs",[74] then, arguably,[75] the Maori tribes of 1840 lacked a central polity that was the credential for the status of an independent sovereign nation state.[76]

The argument maintains that the Maori people did not have the capacity to enter into the Treaty but, interestingly and with Hobson's approval, the initial invitations to attend the meeting at Waitangi were sent out in Busby's name to the chiefs of the Confederation of the United Tribes, or their representatives, who had signed the Declaration of Independence.[77] The constitutional arrangements in the Declaration show that Rangatira (chiefs) sought international recognition of their independent nation state under the name of the United Tribes of New Zealand.[78] Britain agreed that Maori title to the soil and to sovereignty of New Zealand "is indisputable, and has been solemnly recognised by the British Government".[79]

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[72]See Benedict Kingsbury, "The Treaty of Waitangi: some international law aspects" 121 & n. 2, 149 in Kawharu, ibid.
[73]Fox, James R *Dictionary of International and Comparative Law* (Dobbs Ferry, New York: Oceana Publications, 1997) 319.
[74]Ibid, 297.
[75]Orange, supra n 7 at 23.
[76]Article 1 of the Harvard Draft Convention states that the term 'treaty' does not include an instrument to which a person other than a state is or maybe a party: McNair supra n 28 at 4.
[77]Orange, supra n 7 at 35-36.
[78]Help was given by Busby, the British Resident appointed and sent to New Zealand by William IV to keep the peace between Maori and British subjects. 34 chiefs initially signed on 28 October 1835 and the last signature, that of Te Wherowhero, was added on 22 July 1839 making a total of 52 chiefs, which formed a fair representation of the tribes of New Zealand from the North Cape to the latitude of the Thames river: Buick, supra n 15 at 27-29. See also Orange, supra n 7 at 255-56 for the Maori and English texts of the Declaration.
[79]BPP, supra n 6 at 85.

Invitations were later extended to chiefs who had not signed the Declaration.[80] Article 1 of the Treaty refers to both groups.

Nevertheless, based on the above argument, the Courts historically and consistently rejected Maori grievances invoking the Treaty of Waitangi as a cause of action. In the celebrated, but today somewhat notorious, case of *Wi Parata v Bishop of Wellington*,[81] Prendergast CJ set a precedent in 1877 for cases affecting domestic law based on the Treaty. He concluded that Maori had no recognised system of government in 1840 and therefore Hobson did not treat with a sovereign power. Thus, in legal terms, the Treaty was 'a simple nullity' and incapable of incorporation into domestic law.[82] Viscount Simon stated in *Te Heuheu Tukino v Aotea District Maori Land Board* that:

> It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced by the Courts, except in so far as they have been incorporated in the municipal law.[83]

The Court of Appeal was still affirming this general principle until quite recently. *In Re the Bed of the Wanganui River*, Turner J stated:

> Upon the signing of the Treaty, the title to all the land in New Zealand passed by agreement of the Maoris [sic] to the Crown; but there remained an obligation upon the Crown to recognise and guarantee the full exclusive and undisturbed possession of all customary lands to those entitled by Maori custom. This obligation, however, was akin to a treaty obligation, and was not a right enforceable at the suit of any private

[80]Orange, supra n 7 at 36.
[81]*Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur R (NS) SC 72: Wi Parata, a legislative councillor, sought the return of Maori land gifted to the Church for charitable, educational or religious purposes when those intentions had not been fulfilled.
[82]Ibid, 78.
[83]*Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR (PC) 590, 597.

> persons as a matter of municipal law by virtue of the Treaty of Waitangi itself.[84]

Until the provisions in the compact signed at Waitangi are ratified by Parliament, they are not enforceable in New Zealand domestic law. However, in present day jurisprudence the Treaty is acknowledged as a founding document of New Zealand. In the *Motunui Report*, the Waitangi Tribunal described the Treaty of Waitangi in these broad terms:

> The Treaty was an acknowledgement of Maori existence, of their prior occupation of the land and of an intent that the Maori presence would remain and be respected. It made us one country but acknowledged that we were two people.[85]

Until its partial recognition in the Treaty of Waitangi Act 1975, it had no legal force in municipal law.[86] As to the legal context in which it is, or has been relevant, a variety of sources may be consulted. These include the Treaty of Waitangi Act 1975 and the reports and recommendations of the Waitangi Tribunal constituted under that Act. Chilwell J confirmed the relevance of the Treaty to New Zealand law in *Huakina Development Trust v Waikato Valley Authority*:

> The authorities also show that the Treaty was essential to the foundation of New Zealand and since then there has been considerable direct and indirect recognition by statute of the obligation of the Crown to the Maori people. Among the direct recognitions are the Treaty of Waitangi Act 1975 and the Waitangi Day Act 1976 both of which expressly bind the Crown. There can be no doubt that the Treaty is part of the fabric of New Zealand society.[87]

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[84]*In Re the Bed of the Wanganui River* [1962] NZLR 600, 623.
[85]Supra n 27 at 10.3.
[86]*Re Ninety Mile Beach* [1963] NZLR 461.
[87]Supra n 26 at 210.

Although the Treaty of Waitangi is not a binding document in terms of the Constitution of New Zealand it is part of New Zealand law. There are a number of statutes[88] that refer to the principles of the Treaty, as well as several judgments of the High Court, Court of Appeal and Judicial Committee of the Privy Council in which the principles and their relevance are discussed in detail. Several Acts have provisions that impose a positive duty to have regard to, comply with, or act consistently with, the principles of the Treaty.

The duty of the Court is to give meaning and content to the principles of the Treaty so they meet new and changing circumstances. In *Te Runaunga O Muriwhenua Inc v Attorney-General* the Court described the Treaty as a living instrument that must evolve to meet the realities in New Zealand society.[89]

The Status of Non-Signatories

Does the non-signatory status of the hapu/iwi bar Maori from making a claim to the Waitangi Tribunal or seeking to have their grievance heard by the Crown in direct negotiation? The original owners, on whose land Waharoa airport sits, are of Ngati(rangi) Te Oro descent - a hapu or sub-tribe of Ngati Rangi and Ngati Haua. Tarapipipipi Te Waharoa (Wiremu Tamihana) chief of Ngati Haua, a prime mover of the kingitanga movement that was designed to resist the sale of Maori land and whose Matamata pa was situated close to the present day site of the airport, did not sign the Treaty nor did any representative from Ngati(rangi) Te Oro.

[88]For example: Conservation Act 1987 s 4, State-Owned Enterprises Act 1986 s 9, Education Act 1989 s 181, Environment Act 1986 (long title), Resource Management Act 1991, s 8 and Treaty of Waitangi Act 1975 s 6.
[89]*Te Runaunga O Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, 655 and 656 per Cooke P. See also *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC), 517 per Lord Woolf.

In fact several other noted Maori leaders did not sign the Treaty including Te Wherowhero, the principle chief of Waikato[90] and later elected the first Maori king, Rewi Maniapoto of Waikato,[91] Te Heuheu, paramount chief of Tuwharetoa[92], Piko of Coromandel,[93] Tupaea of Ngaiterangi,[94] Te Kani-a-Takirau, paramount chief of the East Coast[95] and Te Amohau, Te Haupapa and Te Pukuatua of Te Arawa.[96]

Their reasons for not signing the Treaty were varied. Possibly their more isolated geographical position gave them a feeling of greater security and wider independence because they were removed from, and less subjected to, the force of external considerations that troubled the northern Chiefs.[97] However, on balance, their refusal is based more on their desire to keep control over their own people, lands and possessions rather than cede any form of control to an outside authority.

Although Mananui Te Heuheu's[98] younger brother Iwikau, who was in the Auckland area when he was invited to Waitangi, signed the Treaty,[99] Te Heuheu, who possibly understood the true intent of the Treaty, repudiated his signing:

> Is it for you to place the mana of Te Heuheu beneath the feet of a woman? I will not agree to the mana of a strange people being placed over this land. Though every chief in the island consent to it, yet I will not.[100]

[90]W C Symonds: BPP supra n 6 at 223.
[91]Rickard, supra n 51 at 58.
[92]Buick, supra n 15 at 222.
[93]T H Bunbury, BPP, supra n 6 at 222.
[94]Buick, supra n 15, 229; Orange, supra n 7 at 71.
[95]Walker, supra n 70 at 97.
[96]Buick, supra n 15 at 227-28; Orange, supra n 7 at 76.
[97]These 'considerations' have been touched on in the section on the history of the Treaty but for a detailed description see Buick, ibid, 1-38 & Orange, ibid, 6-18.
[98]Orange, ibid, 76.
[99]Buick, supra n 15 at 223.
[100]Ibid, 225.

He asserted that his own rangatiratanga was sufficiently strong to rule his own people and he neither needed nor desired foreign assistance. The Te Arawa chiefs and Tupea of Ngaiterangi followed his lead.[101]

Piko wanted more time to assemble the chiefs of the Thames area and consult with them. Although he did not object to the other chiefs signing he saw no necessity to place himself under the dominion of the Queen, who could govern the 'white man' if she pleased, but he would continue to govern his own tribe.[102]

Likewise Tarapipipi Te Waharoa rejected the authority of Queen Victoria over his land:

> I am the chief of Ngati Haua, which is an independent tribe. My father, Te Waharoa, was chief before me. Neither he, I, nor any of my people signed the treaty,[103] therefore we are not bound by it.[104]

In later years he declared that he had not been impressed with the manner in which the signatures were obtained, particularly by the giving of blankets[105] to those who signed. Walker suggests that the association of the treaty signing with gratuities of blankets and tobacco made the Treaty nothing more than a commercial transaction and that signings were prompted as much by greed as by the promised benefits of British protection.[106] Tarapipipi made the remark that many old men were heard to say "let us go and make our mark in order that we may receive a

[101]Ibid, 222 & 229.
[102]BPP, supra n 6 at 222.
[103]His statement is counteracted by the fact that Pohepohe, a chief of Ngati Haua at Matamata, signed the Treaty at Waikato Heads (April 11&26, 1840): Buick, supra n 15 at 263. Tarapipipi married first Ita and then Paretekanawa (aka Wikitoria), both of them daughters of Pohepohe: Rickard, supra n 51 at 46; Stokes, Evelyn *Wiremu Tamihana Tarapipipi Te Waharoa* 33.
[104]Buick, ibid, 348.
[105]Supra n 6 at 221- 24 & 226.
[106]Walker, supra n 70 at 96.

blanket"[107] and W. C. Symonds, in a letter to the Rev John Whitely, said that news of the presents at Waitangi had preceded him[108] and that "everyone who has any pretension to being a chief will flock to sign his name for the sake of obtaining a blanket"[109] while Te Rauparaha signed the Treaty twice and received two blankets.[110]

Although Te Wherowhero's reasons appear to be different, he had just signed the Declaration of Independence[111] that proclaimed chiefly control of the nation and probably saw no reason to sign another document. However Symonds, given the task of gaining signatures to the Treaty in the Manukau/Waikato areas, suggests that Te Wherowhero's refusal was based more on 'pique': firstly, as a leading chief he had not been invited to Waitangi to meet the new Governor; secondly, he had not been accorded the honour of signing much earlier and therefore his signature would be under many other names rather than at the top of the document; and thirdly, the two separate signings at Manukau were not accompanied by the dignitaries, pomp or ceremony that he felt befitted his chiefly status. [112]

The non-signatory status to the Treaty of the hapu/iwi was discussed in *Berkett v Tauranga District Council*.[113] Fisher J held that, as Acts of Parliament did not derive their authority from the Treaty of Waitangi but from the New Zealand Constitution Act 1852, they were binding on all people within the territory of New Zealand.[114] He went on to say that the act or omission of a person's ancestors with respect to the Treaty did not

[107]Rickard supra n 51 at 58.
[108]This is echoed by Maunsell: supra n 6 at 221.
[109]W C Symonds, ibid, 224.
[110]Te Rauparaha first signed the Treaty for Rev Henry Williams on May 14 1840 and then again for Bunbury on 19 June 1840. The British authorities placed great significance on gaining Te Rauparaha's signature and to be fair Te Rauparaha did explain that he had already signed but Bunbury, unable to confirm this, encouraged him to sign a second time: Buick, supra n 15 at 242, 262, 265 & insert 352-353; Orange, supra n 7 at 72 & 81.
[111]He signed on 22 July 1839: Buick, ibid, 29.
[112]BPP, supra n 6 at 233 & 234.
[113]*Berkett v Tauranga District Council* [1992] 3 NZLR 206.
[114]As defined in the NZ Boundaries Act 1863.

affect a person's liability under a statute of general application.[115] The Treaty of Waitangi Act 1975 is such an Act.

Through legislation the Crown regards the Treaty 'principles' as applying equally to all Maori, whether or not their ancestors signed the Treaty, just as it claims 'sovereignty' over all Maori, whether or not their ancestors signed the Treaty. The Treaty of Waitangi Act enables the Tribunal to investigate, report and make recommendations on claims arising from Crown acts or policies relating to the practical application of the Treaty.[116] Therefore non-signatories to the Treaty of Waitangi can make a claim to the Waitangi Tribunal for it to determine whether certain matters are inconsistent with the principles of the Treaty.

Summary

The Treaty of Waitangi gave the Crown some 'legitimacy'[117] in New Zealand, in that it cleared away a legal impediment to the assertion of British sovereignty,[118] but the English and Maori versions of the Treaty created lasting confusion. Debate continues over the interpretation in the Maori version of the Treaty of "tino rangatiratanga" (chieftainship) and "kawanatanga". Henry Williams used the word "kawanatanga" as the translation for both "sovereign authority" and "civil government".[119] The interpretation and application of the Treaty, and its principles, is one pivotal factor in the case for the return of land at Waharoa Airport.

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[115]Supra n 113 at 214.
[116]Treaty of Waitangi Act 1975, s 6.
[117]Supra n 24 at 680–681; Bellich describes it as 'nominal sovereignty' in comparison with substantive sovereignty: Bellich, supra n 2 at 21.
[118]Hobson issued a Proclamation of Sovereignty on 21 May 1840 asserting British sovereignty by the Treaty over the North Island on the grounds of cession, and on the grounds of discovery over the South Island and Stewart's Island effectively ignoring the existence of the occupying tribe Ngai Tahu: BPP, supra n 6 at 140–41. Unaware of Hobson's proclamations, Bunbury claimed Stewart Island on 5 June by right of Cook's discovery and the South Island on 17 June by right of cession by 'several independent chiefs': BPP, ibid, 234.
[119]See Preamble in Appendix 1.

THE PRINCIPLES OF THE TREATY OF WAITANGI

The Treaty contains very general terms that need detailed working out in practice before they can give answers to specific questions. The Treaty's broad concept is that of a reciprocal bargain in which rights of government were ceded in exchange for guarantees of possession and control. In the words of Sir Robin Cooke, any interpretation "must give primary weight to the broad purpose of the pact".[120] To assist in that interpretation, the Waitangi Tribunal and the Courts[121] have ascertained guiding principles against which to assess state action and give fair results in today's society.[122]

Between them, the Court of Appeal and the Waitangi Tribunal have identified seven principles of the Treaty relevant to the case for the return of the airport land at Waharoa. The following is a summary of those principles.

The Exchange of Kawanatanga for the Protection of Rangatiratanga

The principle, that the cession of kawanatanga was in exchange for the protection by the Crown of Maori rangatiratanga, is fundamental to the bargain at the heart of the Treaty[123] because it is derived directly from Articles 1 and 2 of the Treaty itself. Under Article 1 Maori conceded to the Crown the right to govern (kawanatanga) in exchange for the Crown guaranteeing to Maori, under Article 2, full authority and control over their

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[120]Cooke, Robin "Introduction" (1990) 14 NZULR 1, 3.

[121]In its interpretation the Court should give weight to the opinions of the Waitangi Tribunal: *New Zealand Maori Council v Attorney-Genera*l [1992] 2 NZLR 576, 598 per McKay J.

[122]*Tainui Maori Trust Board v Attorney-Genera*l [1989] 2 NZLR 513, 529.

[123]*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 663 per Cooke P, 680 per Richardson J, 702 per Casey J & 713 per Bisson J; Waitangi Tribunal: *Muriwhenua Land Report* 390; *Ngai Tahu Sea Fisheries Report 1992* 269*, Turangi Report* 284.

land for as long as they wished to retain them (tino rangatiratanga). Legal sovereignty was not absolute. It was, and is, conditional upon Maori retaining their rangatiratanga. Therefore the Crown's power to govern is constrained by its obligation under Article 2.

The limitation on sovereignty should not be a constitutional problem, for very few governments enjoy unqualified power. The powers of most modern states are abated either by internal entrenched constitutions or by external international agreements or a combination of both. For instance, the European Economic Community has rules and regulations that constrain the powers of constituent states while associations like the World Trade Organisation, to which New Zealand belongs, places controls on its member governments.

The Duty of Utmost Good Faith

The principle of partnership between the Crown and Maori requires each to act towards the other reasonably and with utmost good faith. The Court of Appeal elucidated this principle in the SOE case[124] and found that the Treaty signified a partnership that requires both the Crown and Maori to act towards each other reasonably and with the utmost good faith.[125]

> I see such a principle as very relevant… Implicit in that relationship is the expectation of good faith by each side in their dealings with each other, and in the way that the Crown exercises the rights of government ceded to it. To say this is to say no more than assert the maintenance of the "honour of the Crown" underlying all its treaty relationships.[126]

[124]*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 693.
[125]Ibid, 673 per Richardson J.
[126]Ibid, 703, per Casey J.

The Privy Council also concurred that the relationship should be founded on reasonableness, mutual co-operation and trust.[127] The Tribunal stated that foundation for the partnership came about because when the Treaty extinguished Maori sovereignty and replaced it with Crown sovereignty, it became a 'covenant' for a continuing relationship between them, based on the pledges that each party made to the other.[128]

The Duty to Actively Protect Maori Treaty Rights

The Crown has an obligation to actively protect Maori Treaty rights. The Treaty not only obliges the Crown to recognise Maori interests specified in the Treaty, but also to actively protect them.[129] In the preamble to the Treaty the Queen expresses her desire to protect the "just Rights and Property" of Maori. Article 2 "confirms and guarantees" possession of their land and other properties and the Queen extends to Maori her royal protection in Article 3, giving them the rights and privileges of British subjects.

Several Tribunal reports have stressed the obligation of the Crown to actively protect Maori Treaty rights. Cooke P endorsed this obligation, stating that:

> …the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's Te Atiawa, Manukau & Te Reo Maori reports which support that proposition and are undoubtedly well–founded. I take it as implicit in the proposition that, as usual, practicable means reasonably practicable. It should be

[127]*New Zealand Maori Council v Attorney-Genera*l [1994] 1 NZLR 513, 517.
[128]*Ngai Tahu Sea Fisheries Report 1992* 273.
[129]Waitangi Tribunal, *Manukau Report* 95; *Mohaka River Report 1992* 77.

> added, and again this appears to be consistent with the Tribunal's thinking, that the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her government through her responsible Ministers and reasonable co–operation.[130]

Casey J concurred that this is a principle to be rightly drawn from a consideration of the Treaty provisions in the light of the surrounding circumstances and inherent in the concept of an on-going partnership founded on the Treaty.[131]

The Right of Self-Regulation

In previous reports,[132] the Tribunal has alluded to the principle that tribes have the right of self-regulation. In the *Taranaki Report*[133] and the *Muriwhenua Land Report*[134] it embraced the concept. The Tribunal saw it as a tool for empowerment and an important aspect of rangatiratanga, being the right of indigenous peoples to manage their own policies, resources and affairs within the rules fundamental to the operation of the State. An important aspect of this right is co-operation and dialogue with the Government.

The Right of Redress

In situations where it is shown that the Crown failed to protect Maori rangatiratanga guaranteed in Article 2 and that Maori have suffered

[130]Supra n 124 at 664.
[131]Ibid, 702-3.
[132]Waitangi Tribunal: *Orakei Claim* 143-44; *Mangonui Sewerage Claim* 40; *Muriwhenua Fishing Claim* 187; *The Ngai Tahu Report 1991* Vol 2, 237-8.
[133]Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatahi* 19.
[134]Waitangi Tribunal *Muriwhenua Land Report* 390-91.

detriment as a result of that failure, there is an obligation on the Crown to remedy the breach.[135] If the Tribunal finds that a claim for breach of the principles is well founded, or acknowledged during direct negotiation with the Crown, then the Crown should grant some form of redress, unless there are grounds to justify a reasonable Treaty partner withholding it.[136] This should happen very rarely and then only in very special circumstances.

The Right of Options

In the *Muriwhenua Fishing Claim*[137] the Waitangi Tribunal also raised the principle of options. It indicated that the terms of the Treaty give Maori a choice, either to retain and foster custom under Article 2, or to assimilate new ways in accordance with their Article 3 rights as British subjects, or to blend the two. Under this principle whatever choice is made should not be unduly forced.

The Duty to Consult

A deep-rooted obligation in the Treaty principle of cession of sovereignty to the Crown was in exchange for the protection of Maori rangatiratanga is the duty of the Crown to consult with Maori. The obligation to protect Maori lands also involves an obligation to properly consult them before dispossessing them of their land. Maori are not to be deprived of their land by unilateral action or without due legal process.

In the 1987 *New Zealand Maori Council*[138] case, it was acknowledged that the obligation to consult stemmed from the Crown's protective guarantees

[135]Supra n 124 at 674 per Richardson J & 693 per Somers J.
[136]Ibid, 664-5 per Cooke P; *The Ngai Tahu Report 1991* Vol 3, 1037-38.
[137]Supra n 134 at 195.
[138]Supra n 124.

of Maori interests in the Treaty.[139] However, it made the point that the "notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment".[140] A better view, in the opinion of Richardson J, is that the degree of consultation will vary according to the situation. He said the responsibility of one Treaty partner to act in good faith and reasonably towards the other puts the onus on the Crown, when acting in its sphere, to make an informed decision.

The degree of consultation depends on the amount of information the Crown needs to have in its possession so that it makes informed decisions to ensure it has proper regard to the impact of, and acts consistently with, the principles of the Treaty.[141] The duty does not exist in all circumstances. Richardson J, after discussing the problems in proffering an absolute duty of consultation, said:

> In many cases where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation. In some extensive consultation and co-operation will be necessary. In others where there are Treaty implications the partner may have sufficient information in its possession for it to act consistently with the Treaty without any specific consultation.[142]

His comment implies that, in some areas more than in others, consultation is highly desirable if not essential.

In light of the Treaty guarantees, when the Crown wishes to acquire Maori land, it is argued that full discussion with the owners, or in Richardson J's words, "extensive consultation and co-operation" on the part of the Crown is necessary.

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[139]Somers J agreed that, while each is entitled to good faith, this does not mean the parties must consult with the other although that would be a way of showing good faith: ibid, 693.
[140]Ibid, 683 per Richardson J.
[141]Ibid, 683 per Richardson J; *The Ngai Tahu Report 1991* Vol 2, 437.

The Fiduciary Duty Of The Crown To Maori

Equity is generally seen as a supplement or correction tool to the common law. It is needed because rules of law will sometimes be unfair when applied to particular people and circumstances. Equitable principles give decision-makers leeway to consider the 'justice' of a case.

The fiduciary relationship is but one of equity's remedial instruments. Notions of justice demanded that those who undertake responsibility for the affairs or property of another should not use that position and profit at the other's expense. The relationship arises when one party is in a position of power, influence or domination over another so that the more vulnerable party must rely on the integrity and good faith of the one exercising control. Arguably one of the most important categories of the fiduciary relationship is that of trust and confidence that arises when a person places trust in another or is entitled to trust another.

This is certainly so in respect of the Crown's powers under kawanatanga. The duty of the Crown to provide protection to Maori interests has been described by the Court of Appeal as being "analogous to a fiduciary duty".[143] Further, that duty has been interpreted as being more than merely a passive duty but one that extends to active protection of Maori in the use of their lands and waters to the fullest extent possible.[144]

Common Law Principles of the Fiduciary Relationship

The Canadian Courts have arguably developed the most sophisticated body of jurisprudence with reference to the fiduciary relationship, especially to the fiduciary relationship between the Crown and indigenous peoples.[145]

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[142]Ibid, 683.
[143]Ibid, 664.
[144]Ibid. For support of the proposition see also *Te Atiawa*, *Manukau* and *Te Reo Maori Report*[s] of the Waitangi Tribunal.
[145]See the landmark cases of *Guerin v The Queen* [1984] 1 CNLR 120 and *R v Sparrow* [1990] 3 CNLR 160.

Wilson J in *Frame v Smith*[146] recognised three general characteristics of a relationship, subsequently adopted by the New Zealand Court of Appeal,[147] in which a fiduciary obligation has been imposed:

- One person (the fiduciary) has undertaken to act in the interests of another person (the principal or beneficiary) and, as part of the arrangement between them, the fiduciary has the scope to use a power or discretion;

- The fiduciary can unilaterally use that power or discretion to affect the interests of the principal in a legal or a practical sense; and

- The principal is vulnerable to, or at the mercy of, the fiduciary holding that power or discretion.

The themes of discretion and vulnerability are closely related although the former is possibly more important. It is the presence of the element of discretion that many authorities[148] deem essential in all fiduciary duties:

> The fiduciary obligation is the law's blunt tool for the control of this discretion. Its operation circumvents the need for inquiring into the good faith of the agent's behaviour by concentrating on the possibility that delegated discretion may be influenced by considerations of personal advantage.[149]

[146]*Frame v Smith* [1987] 2 SCR 99, 136.
[147]*DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10, 22 per Richardson J. It has also been approved by the High Court of Australia: *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
[148]Dickson J cited and approved this proposition in *Guerin v The Queen* [1984] 1 CNLR 120, 137; the element of discretion was also approved in *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, 645 per La Forest J and 598 per Sopinka J and in *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)* [1996] 2 CNLR 25, 40 per McLauchlin J.
[149]Weinrib, E "The Fiduciary Obligation" (1975) 25 UTLJ 1, 4.

Yet there is debate about whether vulnerability on its own is sufficient grounds for imposing a fiduciary obligation. It has been argued that it is not sufficient but is a relevant consideration:

> What must be shown… is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out, but they will be important only to the extent that they evidence a relationship suggesting that entitlement.[150]

On the other hand Gibbs CJ, in *Hospital Products Ltd v United States Surgical Corp*, said that the reason for the fiduciary principle lay in the special vulnerability of those who entrust their interests to the power of another and to the abuse of that power.[151] In *Lac Minerals* Sopinka J, relying on the views of Dawson J in *Hospital Products*,[152] thought that the existence of vulnerability was "indispensable" to the existence of a fiduciary relationship.[153]

In Weinrib's opinion

> The hallmark of a fiduciary relation is that the relative legal positions are such that one party is *at the mercy* of the others discretion.[154]

In this context vulnerability is the consequence of the potential for the exercise of a power or discretion. The Crown was aware of the particular vulnerability of Maori to the settlers and the effects that colonisation would have on them. This is clearly indicated in the preamble to the Treaty and

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[150]Finn, P D "The Fiduciary Principle" in Youdan (ed) *Equity, Fiduciaries and Trusts* 46.
[151]*Hospital Products Ltd v United States Surgical Corp* (1984) 55 ALR 417, 432.
[152]Ibid, 488.
[153]*Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, 599.
[154]Weinrib, supra 148 at 7. Emphasis added.

the Crown acknowledged that power differential in the Waikato Raupatu Claims Settlement Act 1995. By virtue of the authority contained in the Public Works Acts the Crown has the decision and ultimate discretion, with the threat of compulsory taking as the consummate weapon, to alienate private land and with it the rangatiratanga over those lands. The Maori owners of the land at Waharoa were vulnerable to the discretion vested in the Crown and the actions of the various Government Departments as they performed their Crown delegated duties.

Imposition of a Fiduciary Relationship

Whereas traditionally the concept of a fiduciary obligation was limited to relationships such as those between trustee and beneficiary, solicitor and client, agent and principle, it is the nature of the relationship and not the specific category of the persons involved that gives rise to the fiduciary duty.[155] When looking at the relationship between parties it is preferable to ask whether there are fiduciary obligations arising from a specific arrangement rather than whether a particular relationship is fiduciary:

> The imposition of fiduciary obligations is not limited to those relationships in which a presumption of such an obligation arises. Rather, a fiduciary obligation can arise as a matter of fact out of the specific circumstances of a relationship. As such it can arise between parties in a relationship in which fiduciary obligations would not normally be expected.[156]

Professor Finn has postulated a hierarchy of standards for acceptable and desirable social behaviour. In ascending order they are: the 'unconscionability' standard, the 'good faith' standard and the 'fiduciary' standard.[157] The common thread between all three is the obligation of one

[155]*Guerin v The Queen* [1984] 1 CNLR 120, 137 per Dickson J.
[156]Supra n 153 at 646 per La Forest J.
[157]Finn, P D "Fiduciary Law and the Modern Commercial World" in McKendrick (ed) *Commercial Aspects of Trusts and Fiduciary Obligations* 3.

party in the relationship to acknowledge and serve the interests of the other. 'Unconscionability' allows one party to act self-interestedly but prevents excessive or exploitive conduct. 'Good faith' also sanctions self-interested acts but obliges that party to have regard to the legitimate interests of the other. The 'fiduciary' standard commands one party to act selflessly and with undivided loyalty in the interests of the other:

> A person will be a fiduciary in his [sic] relationship with another when and in as far as that other person is entitled to expect that he [sic] will act in another's interests or (as in a partnership) in their joint interests, to the exclusion of his [sic] own several interest.[158]

The fiduciary is required to subordinate their own interests to the promotion of the interests of the other and the law regulates the fiduciary's power in the relationship so that they can not use their position to their own advantage or to the other's detriment.

The central idea is service of another's interests and accordingly the fiduciary is under two obligations:

> (a) not to misuse their position, or knowledge or opportunity resulting from it, to their own or a third party's possible advantage; or
>
> (b) not, in any matter falling within the scope of their service, to have a personal interest or an inconsistent engagement with a third party - unless this is freely and informedly consented to by the beneficiary or is authorised by law.[159]

Breach of the conflict rule was discussed in a Canadian case, *Kruger v The Queen*.[160] The Penticton Indian Band sought compensation for land seized in 1940 and 1943 by the Department of Transport on behalf of the Crown.

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[158]Ibid, 9.
[159]*Chan v Zacharia* (1983) 53 ALR 417, 435 per Deane J.
[160]*Kruger v The Queen* [1985] 3 CNLR 15.

In September 1938 the Indian agent reported that Penticton Council wanted to lease the land for an airport. In July 1940 the Band agreed to lease the land for ten years at ten dollars an acre. In August and November 1940 the Department decided to expropriate the land instead of leasing it. Compensation was only fixed in January 1941 and paid in March and April 1941. In July 1942 the Department advised the Indian agent that it needed more land and expropriated it in 1944. Compensation was paid in March and April 1946. The Departments of Transport and Indian Affairs had significant discussions that lasted for many years. After examining the facts Heald J concluded that the Crown had not acted exclusively for the benefit of the Band and was subject to the conflict of interest and duty rule.

> The Governor in Council is not liable to default in its fiduciary relationship to the Indians on the basis of other priorities and other considerations. If there was evidence in the record to indicate that *careful consideration and due weight* had been given to the pleas and representations by Indian Affairs on behalf of the Indians and, thereafter, an offer of settlement reflecting those representations had been made, I would have viewed the matter differently.[161]

The fact that the Band consented ultimately to the transaction did not save the Crown because the consent was given out of shear desperation after the Crown had already occupied the land and taken away the people's livelihood.

Fiduciary Duty of the Crown to Maori Under the Treaty of Waitangi

In New Zealand the Court has located the fiduciary duty to Maori squarely in the principles of the Treaty of Waitangi. It found that the responsibilities

of the parties, which are 'analogous to fiduciary duties' or 'of a fiduciary nature', have their origin in the Treaty of Waitangi. In the words of Cooke P:

> In New Zealand the Treaty of Waitangi is major support for such a [fiduciary] duty. The New Zealand judgments are part of widespread international recognition that the rights of indigenous peoples are entitled to some effective protection and advancement.[162]

It has not considered the existence of an aboriginal fiduciary obligation arising independently of statutory reference to the principles of the Treaty nor that it has its source in common law. In *Te Runanga O Muriwhenua*[163] the Court of Appeal drew on case law from other common law countries, particularly Canada. It intimated its sympathy with the principles of partnership and the fiduciary analogies drawn from Canadian case law. Although it approved them as highly persuasive, it gave no indication of the status of any aboriginal fiduciary doctrine in its own right.

In the radio frequencies case, Cooke P purported to leave this question open[164] but the practical result of his judgement was to recognise a fiduciary obligation incumbent on the Crown apart from any statutory basis, that is, the Crown's obligations of partnership and good faith derive from the common law.

The basis for the fiduciary duty of the Crown to Maori is the express statutory incorporation of the 'principles' of the Treaty of Waitangi into legislation. The Court of Appeal did not need to resort to an extra-statutory aboriginal fiduciary doctrine. Instead it extracted one from the words of

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[161]Ibid, 98.
[162]*Te Runaunga O Whare Kauri Rekohu Inc v Attorney-General* (Sealords case) [1993] 2 NZLR 301, 306.
[163]*Te Runaunga O Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641.
[164]*New Zealand Maori Council v Attorney-General* (Broadcasting case) [1991] 2 NZLR 129, 135.

section 9 of the State-Owned Enterprises Act 1986[165] that enabled the fiduciary duty to prevail over the other provisions of the statute.[166] In *New Zealand Maori Council v Attorney-General* Cooke P stated "the Treaty signified a partnership between races"[167] and went on to confirm that "the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties."[168] The same principle was recognised by the Court of Appeal in the *Sealords* case. In his summary Cooke P held:

> ... the Treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards each other.[169]

The Court found that the Treaty of Waitangi created a partnership between Pakeha and Maori, requiring each to act towards the other 'reasonably' and 'in good faith'. The relationship between the Crown and the Maori tribes created responsibilities analogous to fiduciary duties but the duty of the Crown as a fiduciary is not merely passive. It includes the active protection of the Maori people in the use of their lands and waters to the fullest extent reasonably practicable[170] and an obligation to remedy past breaches of the Treaty.[171]

Summary

[165]State-Owned Enterprises Act 1986 s 9: Treaty of Waitangi – Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.
[166]Ibid, ss 23 & 27.
[167]Supra n 124 at 664.
[168]Ibid, 664.
[169]Supra n 162 at 304.
[170]Supra n 124 at 664 per Cooke P.
[171]Ibid, 683 per Richardson J and 693 per Somers J.

The Waitangi Tribunal reports[172] and Court of Appeal decisions[173] have identified overarching Treaty principles in an attempt to balance the right of the Crown to exercise kawanatanga or governorship with the guarantee of protection of rangatiratanga to Maori. The Treaty of Waitangi Act 1975 requires the Waitangi Tribunal[174] to inquire into, and report on, claims by Maori for breaches of the observance of the Treaty principles.[175]

Several themes arise that are significant in the way that the authorities handled the taking of Maori land for the airport at Waharoa. One is the lack of proper consultation processes to allow for the concerns of all parties to be recognised and all possible alternatives to be explored. Another is the breach of the fiduciary obligation concerning the misuse of position and the conflict of interest of duty. The former obligation aims to prevent the fiduciary from using their position to advantage interests other than that of the beneficiary while the latter's objective is to preclude the fiduciary from being swayed in their service by considerations of personal or third party interest.

[172]Waitangi Tribunal: *Manukau Report 1985* 90; *Orakei Report 1987* 134-5; *Mangonui Report 1988* 60; *The Ngai Tahu Report 1991* Vol 2, 215-233; *Mohaka River Report 1992* 70; *Te Maunga Railway Lands Report 1994* 4.
[173]See Supra n 124; *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513; Supra n 163; *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 533.
[174]Initially the Tribunal was restricted to considering claims arising after 10 October 1975 but the Treaty of Waitangi Amendment Act 1985 allowed the Tribunal to consider claims dating back to 6 February 1840.
[175]See E T Durie's comments on the work of the Tribunal in McLay, G. (ed) *Treaty Settlements: The Unfinished Business* 7.

PUBLIC WORKS

The English Principles

The development of the principles concerning land usage for public works ensured that the sovereign's right to take land was balanced by protections for the 'owners' of the land. Through the centuries, as landowners became more powerful, the sovereign's prerogative power to take private land was restricted. As early as 1215, the Magna Carta prohibited the deprivation of freehold interest by royal prerogative:

> No free man [sic] shall be... disseised of his [sic] freehold or liberties or free customs but... by the law of the land.[176]

In 1606 Edward Coke, in *The Saltpeter Case*, stated that the sovereign power to take private property for the common good was balanced by necessity, such as in times of emergency or great danger.[177] Blackstone, commenting in 1765, described the high regard in which private property was held and the extraordinary care, such as legislative authority and 'full indemnification and equivalent', that had to be taken if private land was taken by compulsion.[178]

The land-owning class was in a unique position to benefit from the promotion and development of their own private interests in 'public works'.[179] At the beginning of the Industrial Revolution, when private land

[176]Magna Carta c 29.
[177]12 Coke's Reports 12.
[178]Blackstone, William *Commentaries on the Laws of England* Vol 1, 39.
[179]Simmons, Jack *The Railway in England and Wales, 1830-1914: Volume 1 - The System and Its Working* 35 & 245. Landowners subscribed 41% of all share capital in canals built between 1755 & 1780 and nearly 22% of all those built between 1780 & 1815: Ward J R *The Finance of Canal Building in Eighteenth Century England* 74. Landowners also financed roads and river improvements to assist navigation and also developed docks and harbours to transport coal, minerals and other materials from their land to overseas markets; for example the Curwen's development of Workington, the Stenhouse's of

taking was at its height, they were about 1.2% of the population. Quite apart from being the richest class, they were also the ruling class: four-fifths of the House of Commons, most of the House of Lords and nearly all the King's ministers were either great landowners or the relatives of landowners.[180]

The State's right to take land for public purposes was therefore balanced by protections to suit the interests and needs of the powerful landed class of the time. These protections included the principle that when land was taken the owner was entitled to full and equivalent compensation. Legally the owner's interest ended, however the pre-emptive right of first offer to buy back the land if it was no longer required recognised that the former owners still had an 'equitable' interest in the land. The owners however had to buy the land back because they had been paid compensation when it was taken. Each taking required special Acts.[181]

Extensive consultation occurred as every Act came under scrutiny in the landowners' own forum of Parliament. When 'takings', particularly for railways and canals, became more numerous, Parliament saw the need to develop a consistent system of procedure. In 1845 it passed the Land Clauses Consolidation Act that contained several protective measures for the landowner such as, the right to notice, the right to object and the right to have an independent hearing. Parliament, although it made the laws, acted primarily as a referee between competing interests of landowners rather than as a developer or owner of public works.

By the time the Treaty of Waitangi was signed in 1840 England was in the latter years of the industrial revolution. The English colonists were already imbued with the traditions and principles of public works developed in

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Maryport, the Lowther's of Whitehaven, and the Tennant's and Llewellyn's in Wales: Mingay, G E *Land and Society in England 1750–1980* 18.

[180]Perkin *The Age of the Railway* 34-35.

[181]For instance the Stockton and Darlington Act 1823 and the Liverpool and Manchester Railway Act 1826 authorised the setting up of companies, the raising of money from shareholders and the taking of land, by compulsion if necessary, to build railways.

England: in particular the balancing principle of right to compensation for land taken and the requirement for legislative authority before land was taken for public purposes. Joint initiatives by landowners and industrialists in the development of railways, canals and roads led to the urbanisation[182] of the country. This urbanisation, with its attendant social problems and counter measures, such as Borough responsibility for public amenities and services, was also well established.

The Position in New Zealand

However, New Zealand was a society with new conditions. One of the draw-cards that attracted the British colonists to New Zealand was its promotion as a place of escape from a class structure in which a powerful and rich minority controlled the majority of land and commercial enterprises. Private enterprise was unable to promote and develop public works in the same way as it had in England and it was soon clear that the English system needed modification to suit new circumstances. One of the earliest changes was the assumption of regional, local and central government responsibility for public works.

Formation of the Public Works Department

Julius Vogel[183] realised that the greatest problem facing the 'colony' was communication. There were a few permanent roads built to allow for the

[182]For example the towns of Crewe, Swindon, Wolverton and Redhill were all railway creations and the railway companies provided employment, dominated the manufacturing and service industries, built housing and even took over the management of the town. Kellet, John R. *The Impact of Railways on Victorian Cities* 3. In Crewe the railway company also provided the doctor, priest, teacher and policemen. Perkin, supra n 180 at 126-28.

[183]Sir Julius Vogel (1835-99) was elected to Parliament in 1863. Under the Fox administration Vogel became Colonial Treasurer, Commissioner of Customs and Postmaster General. He was Prime Minister from 1873-1876 and Deputy Prime Minister under Stout from 1884–1887: McLauchlan, Gordon *New Zealand Encyclopedia* (4th ed) 604.

movement of British troops during the Land Wars of the 1860's and, while they also linked one or two major settlements and trading routes, for the most part the colony consisted of a handful of isolated settlements widely separated by wild, unexplored bush-land. The colony was struggling financially[184] and the majority of public works construction up to that time was the responsibility of the individual provinces.[185]

The level of construction was directly related to the prosperity of the individual provinces without due regard to the interests of New Zealand as a whole.[186] In the South Island for instance, the discovery of gold allowed the Otago Provincial Council to promote advanced public works throughout the Otago region but in the North Island the Colonial Governors spent most of their finances on the establishment of Auckland as the capital of the colony and providing the trappings of government such as the governor's residence, customhouse, post office, courthouse and jail.[187]

Looking at the disparity between the different areas, Vogel saw the clear need for roads, railways and other construction to bring the various settlements together and to provide an equality of resources throughout the country. Believing this would bring about both mutual protection and prosperity he established the Public Works Department in June 1870, borrowed ten million pounds from overseas[188] and paralleled this with an immigration policy[189] to provide the necessary manpower to construct his vision of a united and prosperous country.[190]

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[184]"The Government had little enough in its treasury and none to spend on public works", John Barr City of Auckland cited in Furkert F W *Early New Zealand Engineers* 27.
[185]Furkert, ibid, 38.
[186]Ibid, 75. Furkett (1876–1949) joined the Public Works Department as an engineer in 1894, and was head of the Department from 1920 until his retirement in 1932: ibid, 18.
[187]Noonan, Rosyln J. *By Design: A brief history of the Public Works Department 1870-1970* 1 & 3.
[188]Ministry of Works *Works News: Journal of the Ministry of Works Combined Social Clubs of New Zealand* 11.
[189]Immigration and Public Works Act 1870.
[190]NZPD Vol 9, 1870: 180 & 185.

Although Vogel stated that the primary reason for his public works scheme was colonisation, settlement and the linking of settlements together to assist in the development of trading opportunities, a cynical suggestion is that its peacekeeping potential as a solution to Maori - Pakeha relations was equally as important.[191] Many Maori were engaged in the scheme and Maori with tools in their hands were less likely to take up weapons.[192] It was also a symbol of Pakeha power. The opening up of the interior, especially in the North Island, allowed freer access by troops and law enforcement officers and deprived hostile Maori of sanctuaries that had previously been inaccessible to Pakeha.[193] At the same time it encouraged Pakeha settlement to tip the numerical scale against Maori.[194]

Public Works Legislation

> *Let us look at the laws that are passed in Parliament...they do not listen to us, they do not heed our people's words...and there is always the desire to take from us more land and more things which made us strong...the substance of the land is truly gone but Parliament still makes laws that ignore us...*
> Paraire Tomoana(1913)[195]

Modern law relating to acquisition of land for public works evolved in the early nineteenth century in England, with the construction of canals, roads and railways. The parent statute was the Lands Clauses Consolidation Act 1845,[196] which was "An Act for consolidating in One Act certain Provisions usually inserted in Acts authorising the taking of Lands for Undertakings of a public Nature". The Act did not provide any definition of a public work, but merely established the procedures to be used when a

[191]Ibid, 185.
[192]Ibid, 181.
[193]Ibid, 181 & 283; see also "Construction of Roads by Armed Constabulary" AJHR 1871, D-1C No. 1.
[194]Supra n 190 at 182 & 185; "First Annual Report of the Immigration and Public Works Department", AJHR 1871, D4.
[195](1991) 9 Maori Law Bulletin, 4.

"special Act" was passed to authorise "the Works or Undertaking of whatever Nature which shall by the special Act be authorised to be executed". The 1845 Act covered provision for notice of intention, negotiation, and arbitration of disputes, payment of compensation along with other related matters. The New Zealand version of this Act, the Land Clauses Consolidation Act 1863, was almost identical in concept to its English counterpart.

> In New Zealand the right to take land has always been regarded as deriving from statutes giving that power. It is accepted in New Zealand that the owner of private land is entitled to protection from arbitrary decisions by the executive in respect of his [sic] land.[197]

Public Works Act 1928

There was no debate when the Public Works Bill passed through both the House of Representatives and the Legislative Council in 1928. The Minister of Public Works described it as "entirely a consolidating measure"[198] and the leader of the Council used a similar phrase- "a pure consolidation".[199] The legislation was sufficiently acceptable that the politicians saw no need to discuss its provisions, suggesting that the basic assumptions within it were well established. There were further amendments, described by Barker as a "patchwork of some 40 different amending statutes in as many years".[200]

The Act empowered the Minister of Works, or a local body, to take land for "any public work". This Act gave the Minister very sweeping powers that over-emphasised the public interest to an extent where the private,

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[196]8 VICT Cap 18.
[197]Barker, R I "Private Right vs Public Interest - compulsory acquisition and compensation under Public Works Act 1928" (1969) 45 NZLJ 251, 252.
[198]Supra n 190, 1928: 651.
[199]Ibid, 730.
[200]Supra n 197 at 251.

'individual' interest was jeopardised. In his article "Private Right vs Public Interest - compulsory acquisition and compensation under Public Works Act 1928", Barker outlined the considerable powers the Crown had to take land for public works:

> The power to acquire land must always be given by statutory authority. The Public Works Act [1928] itself sets out a fairly exhaustive definition of Crown public works and then provides that the Governor-General may declare any work or undertaking to be a 'public work". Section 30 of the Finance Act (No 2) 1945 permits the taking of land by the Crown for such vague purposes as "subdivision, development, improvement, regrouping or better utilisation; provision or preservation of amenities; public safety in respect of any public work".[201]

The assumption of the Crown's right to acquire the freehold title of private citizens to land required for a range of public purposes was well entrenched in New Zealand law and practice during and following the Second World War.

A "public work" is defined in section 2(a) Public Works Act 1928 as that which:

> His Majesty, or the Governor-General, or the Government, or any Minister of the Crown, or any local authority is authorised to undertake under this or any other Act or Provincial Ordination, or for the construction or undertaking of which money is appropriated by Parliament...

There followed a wide-ranging list of public works: "Any survey, railway, tramway, road, street, road, gravel-pit, quarry, bridge, drain, harbour, dock, canal, river-work, water-work and mining work" (section 2(b)) as well as

[201]Ibid, 252.

"electric telegraph, fortification, rifle range, artillery range, lighthouse" (section 2(e). The list included hospital, school, university, college, and associated teachers' residences or any building or structure required for any public purpose or use, such as Ministerial residences, (section 2(c, d & f) and any lands necessary for the use, convenience, or enjoyment of the same. Sections 10 - 14 contained procedures for the taking of land required for any of these public works. The definition of 'public work' was extended as the need arose. As an example the Public Works Amendment Act 1935 (ss 2-4) included aerodromes owned by the Crown or local authorities

Sections 22 and 23 set out the procedures for taking land by proclamation. The public notification of an intention to take land is found in section 22(1). Plans of the land affected, a survey of the land, "together with the names of the owners and occupiers of such lands, so far as they can be ascertained", had to be made available for public inspection and a notice of intention to take published twice in the *New Zealand Gazette*. A copy of the notice and a description of the work was served on the "said owners and occupiers and any other person having an interest in the land so far as they can be ascertained". Any 'well-grounded objections' were to be lodged in writing within forty days of the first publication and, if it was a government work, could be heard before "the Minister [of Works] or some person appointed by him [sic]".

A discriminatory provision in section 22(3) excluded many Maori landowners from this process:

> The provisions of this section requiring the names of the owners and occupiers of the land to be shown on the plan thereof, and requiring copies of the notice and description referred to in this section to be served upon the said owners and occupiers and upon all other persons having an interest in the land, shall have no application to any Native

> [Maori] who is an owner or occupier of the land or has an interest therein unless his title to the land is registered under the Land Transfer Act, 1915. Entry on the Provisional Register shall not be deemed to be registration within the meaning of this subsection.

There was provision under section 22(4) for a notice of intention to go in *Kahiti*, the Maori language gazette, "but no proceedings for the taking of land shall be invalidated by the failure to conform to the requirements of this subsection". Under section 47 of the Finance Act 1931, publication of a notice in the *Gazette* was deemed to be equivalent to publication in *Kahiti*.

If there were no objections, or they had been heard and considered, but it was still "expedient that the proposed works should be executed, and that no private injury will be done thereby for which due compensation is not provided in this Act"[202] a proclamation was prepared. It was accompanied by a survey plan, certified by the Surveyor-General and approved by the Governor-General, and published in the *Gazette*. The land now vested absolutely in the Crown.

An alternative to taking the land by proclamation was to negotiate its purchase. There was provision in section 32 of the Act for the Crown to enter into an agreement or contract to take or purchase or lease land for public works. However, in practice, the Public Works Department, later the Ministry of Works, normally took Maori lands by proclamation, especially blocks in multiple ownership, when such lands were required for public works.[203]

[202]Public Works Act 1928 s 23.
[203]See Marr, Cathy *Public Works Takings of Maori Land 1840-1981*, Chapter 9; Ward, Alan *An Unsettled History* 141, 158.

Summary

Public works legislative provisions, imported into New Zealand after 1840, were based on principles developed in England over many centuries. These principles reflected the balance of power between the English sovereign and the powerful English landed class. They were modified and adapted to meet the different circumstances that the settlers found in this country with one notable exception: they failed to take into proper account the cultural values that Maori had with respect to their land.

PART 2 – BACKGROUND TO THE CASE

PAKEHA AND MAORI CONCEPTS OF LAND OWNERSHIP

Whatu ngarongaro he tangata, toitu he whenua: Man perishes, but the land remains.

Following the signing of the Treaty in 1840, the Crown assumed sovereignty (though Maori dispute that the Maori text gave sovereignty) and Maori became subject to the general legal system inherited from the English common law.[204] While the system, on the whole, gave little attention to the customs and laws of Maori, some customs relating to land did receive recognition. Under Article 2, Maori land title was recognised and undisturbed possession of the land was guaranteed though the Crown had exclusive rights to purchase land that Maori wanted to sell.[205] This, according to McHugh, "presupposed the continued viability of customary law at least in its definition of traditional (real and personal) property rights."[206]

While the Maori version the Treaty envisaged a "partnership" between Maori and the British, the colonists, via the English version of 'sovereignty', felt they had a right, if not a duty, to replace the Maori system with their own 'superior' system:

> Of what use is it, practically, for a man to say I possess a right to my property, when there is no law to define the obligations which are created by such a right, or government with power to administer the law, supposing it to have existed? New Zealand was, in an

[204] *The Queen v Symonds* (1847) NZPCC 387, 388 per Chapman J.
[205] The pre-emption clause in Article 2 of the Treaty of Waitangi. See Appendix 1.
[206] McHugh, P. G. *The Aboriginal Rights of the New Zealand Maori at Common Law* 169.

> emphatic sense, a country without a law and without a prince.[207] [208]
>
> …Maori people were held to have no law, and therefore no authority, because the early settlers could not discern in Maori society the things they identified as 'legal' – the courts, the police, the written reports. So Maori society, while not 'law-less', was possessed only of lore and custom, which needed to be suppressed and destroyed in order that the monist idea of 'one [English] law for all' could be imposed.[209]

The colonisation of New Zealand by Britain had an enormous impact on Maori who, as a result, experienced great and long lasting changes to their lives:

> The coming of the Pakeha overlaid and dominated the world view of the Maori with Christianity and the secular concept of land as a commodity to be bought and sold in the marketplace. Money and the material goods it could buy destroyed social cohesion as a deep rift developed between land sellers and non-sellers.[210]

The society that the (mainly) British settlers came from between 1840 and 1880 was marked by enormous distinctions between the rich and poor, the powerful and the powerless, the cultured and the unsophisticated. Politically the prominent landowners were the governing class both nationally and locally[211] and socially there were differences between the landed aristocracy and the newly created professional, industrial and merchant classes, although the political and social restraints between these

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[207]Busby, James *Remarks Upon a Pamphlet Entitled "The Taranaki Question* (Auckland: Philip Kunst, 1860) 5.
[208]Craik noted that: "Although there are no written laws in New Zealand, all these matters [societal management] are, no doubt regulated by certain universally understood rules…": Craik, G L *The New Zealanders* (London: Charles Knight, 1830) 203.
[209]Jackson, M "Justice and political power: Reasserting Maori legal processes" in Hazelhurst, K (ed) *Legal Pluralism and the Colonial Legacy* 249.
[210]Walker, Ranganui *Nga Tau Tohetohe: Years of Anger* 57.
[211]Mingay, G E *Land and Society in England 1750–1980* 20.

groups were lessening.[212] In the countryside there was a huge financial gap between the wealthy landowners and the petty farmer, tradesman, artisan and labourer.[213]

A brief historical survey of land 'ownership' in England will help explain how this situation developed and the particular concepts of land, long established in English common law, imported to New Zealand by the settlers.

Pakeha Concepts of Land Ownership

The customary laws that the Germanic invaders of England brought with them included four classes of landed property: *folk-land* - land belonging to the nation and not to a person or particular community. It was the land left over after distribution to the freemen of the invading tribe; *common-land* – land held by communities rather than a single owner and allocated by authority of the community and *heir-land* - land that could pass by descent but could not be alienated. Later *book-land*[214] was introduced and was probably *folk-land* granted under the express terms of a written instrument and came closest to what could be termed 'full ownership'.[215]

Over several generations a ruling class with a larger subclass of people dependent on them replaced the community of equals. Since land was the ultimate source of wealth, the most influential man in each community or

[212]Landed families inter-married to secure their possession of land but also allied themselves with the mercantile and industrial classes to improve their fortunes. In the same way the latter classes united through marriage in order to create new capital resources partly used to buy estates of land and improve their social standing: ibid, 7; Joshua Williams, in 1862, stated that 'everyman who accumulates a fortune immediately lays it out in the purchase of land with a view to found a family and to perpetuate his name': Juridical Society's Papers ii, 599 cited in Holdsworth, W S *Historical Introduction to the Land Law* 304; see also Ward J T & Wilson R G *Land and Industry* 9–13.

[213]Mathias, P "The social structure in the eighteenth century: a calculation by Joseph Massie" (1957-58) X *Economic History Review* 42-3.

[214]According to Pollock, *book-land* was probably the forerunner of *copyhold* which was land held at the will of the lord according to the custom of the manor and recorded in the lord's court roll: Pollock, F *The Land Laws* 42.

district absorbed the authority of the land along with that of the community, until he or his heirs became a lord or king.[216] Cultivation of land was now undertaken by people who occupied it by agreement or permission of the superior lord and paid for its use in money, in kind, in labour or in all three. This land was called *loan-land* and marked the beginnings of the feudal and manorial system – a co-operative association for the mutual defence of its members.[217]

William I, following his conquest of England in 1066, completed this transformation. He needed a strong centrally independent administration to rule a country that, although recently united under Edward the Confessor, was still very parochial. As a first step in the process, he declared himself absolute owner of all the land of England.[218] Then, in return for homage, military duties and other services, he granted the right to enjoy portions of the land to his followers and those Anglo-Saxon leaders who had not opposed him.[219] The recipient of a grant from the king, or tenant-in-chief, apportioned rights in the land to lesser lords in return for services and they in turn did the same until, at the end of the chain of grants, there was a tenant occupying and cultivating the land in return for various services to their 'superior'.[220]

Strictly speaking, in English law, there was no concept of ownership. The general theory of tenure is that all land is held of a superior and is incapable of absolute ownership. In other words the person who is called the 'owner' does not 'own' the land but holds it as a tenant of the Crown. The doctrine of tenure regulates the duties and rights of tenants against a superior (ultimately the king or Crown) and the doctrine of estates regulates the rights of the tenant to the land holding itself.

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[215]John, Eric *Land Tenure in Early England* 2-3.
[216]There were many kings and under-kings of the various tribes: Pollock, supra n 214 at 24 &41.
[217]Ibid, 52.
[218]The Scottish kings followed William's practice: White, Robin M & Willock, Ian D *The Scottish Legal System* 12.
[219]Pollock, supra n 214 at 34.

Because the Crown owned all the land everyone else only had an interest, or an estate, in or over land:

> The land itself is one thing, and the estate in land is another thing, for an estate in the land is a time in the land, or land for a time…[221]

The largest and greatest interest that a person can have in land is an estate is 'fee simple'. As long as there is an heir, either ascending, descending or collateral, it cannot pass to the Crown.

Many of the settlers from Britain were denied, for various reasons,[222] freehold titles (land with no fixed term attached) in their native land. The 'New Domesday Survey' of 1873 indicated that, although one million people out of a population of over 23 million[223] owned some land, fewer than 7000 persons possessed nearly 4/5ths of England and Wales. In 1883 it was estimated that 24% of the land was held in estates over 10,000 acres and 29.4% in estates between 1000 and 10,000 acres. If country gentlemen, possessing less than 1000 acres are added, then landlords owned almost 90% of the country. The proportion owned by farmers was about 10 – 12%, so landlords who did not themselves farm the land commercially owned the remaining 88 – 90%.[224]

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[220]The legal term for this process is subinfeudation.
[221]*Walsingham's Case* 75 ER 805, 816.
[222]As an example the Law of Primogenitor (usually) gave the eldest male, either a son or other family male, 'title' to the land. In this way land was preserved in a family down the generations. This law was considered preferable to the opposite Law of Partiability, which would "in a few generations break down the aristocracy of the country, and, by endless subdivision of the soil, must ultimately be unfavourable to agriculture, and injurious to the best interests of the State.": *First Report of the Commissioners on the Law of Real Property 1829* 6-7, cited in Holdsworth, supra n 210 at 305. As an aside it was the issuing of Crown Grants that brought Maori land into the Pakeha land system with its individualising of title plus the use of the Law of Partiability by the Land Court that assisted in the break down of traditional concepts of Maori land ownership.
[223]The 1871 census states that the population of England and Wales was 22.712 million: *Whitaker's Almanack* (1999) 112.
[224]Mingay, supra n 211 at 65 & 120.

In New Zealand the colonists' greed for land was, according to Oliver, the most devastating feature of cultural contact.[225] In their need to acquire control of the land and obtain security of tenure through freehold title (private ownership) the settlers ignored, overlooked or lacked appreciation of the deeper communal nature of Maori land and the special sentiment Maori had for the land and its importance to the tribe and family.

The law and practices of England that the settlers brought with them emphasised the commercial aspect of land as property. This concept, coupled with the desire for freehold titles denied the settlers from Britain, led to a tendency to interpret Maori custom in similar terms and to regard Maori customary title as a form of communal or group joint tenancy. Communal ownership meant that people had overlapping rights to and interests in land. Private ownership meant denial of access to the land unless designated as the land's 'rightful owner'. Private ownership meant that each sector of society had to separate out their interests in, and rights to use, pieces of land.

Maori Concepts of Land Ownership

An understanding of the contemporary attitude of Maori towards land must begin with a consideration of their emotional feeling to it, as opposed to a purely economic attachment. To Maori the land was an enduring reminder of the ancestors, their deeds and those of the tribe. The land had a dual role, sustaining both flesh and spirit:

> But means of maintenance and the fulfilment of social obligations do not cover all the factors involved; appreciation of the landscape, association of the names of natural features with the memories of bygone years, with home and family, the linkage with tribal fights, sacred places, the burial of

[225]Oliver, D L *The Pacific Islands* 157.

> ancestors - in fact all the interests generated by the play of aesthetic emotions and social sympathies, as well as the weight of traditional teaching combined to create the sentiment for the land.[226]

This sentiment for the land has as its source Maori spiritual belief. The world, in Maori cosmogony, is divided into three states of existence: *Te Kore* (the void), *Te Po* (the dark and the domain of the gods) and *Te Aomarama* (the light and the dwelling place of humans).[227] The primeval pair was Ranginui and Papatuanuku and their offspring (the gods) lived in the darkness between them and soon decided that the only way out of their world of darkness and ignorance was to part their parents.

It was Tane, god of the forest,[228] who separated them[229] and, as a consequence, brought not only light into the world but also knowledge of good and evil.[230] While Rangi became the sky father, their children remained with Papa, the earth mother. Papa is loved because of the bounty that springs from her and sustains her children.

Humans, conceived out of the creative force of Tane,[231] are *tangata whenua* and belong to the land.[232] They see themselves not dominating nature but rather as one with it.[233] Their role in this relationship is both practical and spiritual: caring for nature, respecting the gods of each resource by giving them their due ritual and using only what is needed of each resource for sustenance and survival.[234]

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[226]Firth, Raymond *Economics of New Zealand Maori* 372.
[227]Walker, R *Ka Whawhai Tonu Matou: Struggle Without End* 11-12.
[228]Tane's children (the trees), planted in the earth, still reach for the sky above them.
[229]Te Rangikaheke of Te Arawa (c1849) states that this was the first sin: Walker, supra n 227 at 15.
[230]Ibid, 12.
[231]Kawharu, I H *Maori Land Tenure* 53
[232]Walker, supra n 227 at 14.
[233]This is in contrast to the (Pakeha) Judeo-Christian concept of 'subduing the earth': Genesis 1: 26.
[234]Walker, supra n 227 at 14 & 23.

Traditional Maori society had a developed code of social behaviour expressed through ideas of leadership, decision-making and land tenure exercised according to customary law.[235] Although some customs differed between the various Maori tribes, recognised customary laws regarding the 'right' to land were common to all.[236] Kawharu points out that while there is speculation about the accuracy of details in ethnography of pre-contact Maori society, there is sufficient validity for it to be used as the basis of a general discussion of Maori land tenure.[237]

Customary land title was held and owned communally by iwi, hapu and whanau; the tribal, kin and extended family groups descended from the great ancestor who was the conqueror or first planter in the district.[238] The boundaries of tribal lands were determined by specific food gathering and cultivation requirements and clearly defined by reference to rivers, streams, lakes, hills, valleys, forest and fishing grounds and the younger generation was always taught two things: whakapapa or genealogy and the names and boundaries of ancestral land.[239]

Settlements, influenced by various factors, were to some extent unstable and tensions, from within and without the group, led to a great deal of movement. The cause of these movements was usually political and sometimes economic. When a group reached a maximum size for the immediate land space, smaller bands would move away from the main settlement. This was usually within the tribal domain but sometimes they would have to move further afield. While they may have given up their rights in the land of the parent tribe, they still acknowledged them as supreme and would aid the defence of the tribal estate from any outside intrusion. Eventually these offshoots themselves became politically

[235]Kawharu, supra n 232 at 34-48; 54-55. These were recognised by many European writers of the early 1800's: see Stokes, Evelyn *Maori Customary Tenure of Land* chapter 3.
[236]Smith, N *Maori Land Law* 87; Stokes, ibid, 39-41, 75.
[237]Kawharu, supra n 231 at 37.
[238]Kawharu, supra n 231 at 39; Smith, supra n 236 at 85.
[239]Kawharu, ibid, 60.

independent and at this point the boundary lines between them became sites of sub-tribal dispute. Survivors of these wars either fled to friendly settlements or were taken in by the conquering group and on occasion given land rights in exchange for military allegiance.[240]

As a consequence of this movement no territory remained vacant or unclaimed, which meant that for Maori there was no concept of 'waste land':

> Despite the comparatively small population in pre-European times, there was no appreciable area of land anywhere in the country which was without its owners. Districts devoid of permanent inhabitants were yet visited periodically if not for cultivation at least to obtain some food supplies. Swamps were drawn upon for eels, raupo pollen, and flax, lakes and streams for fish, forests for berries, timber and game while other portions of land were valued as sources of red ochre, stone for implements, etc...Naturally interest in fertile or productive lands was greater than in those of lesser economic utility, but the latter were never quite neglected or without a claimant.[241]

In contrast to Pakeha land tenure, Maori did not have private or individual ownership or rights to usage of land. Land was a tribal resource to be used for 'communal' benefit and, as such, the large area owned by the iwi (tribe) was subdivided into areas occupied by the hapu (sub-tribe), the principal unit of Maori society.[242] Smaller particular portions of hapu land were 'given' to the whanau (nuclear family group) to occupy, use and cultivate: or as Firth puts it:

> Within the territory of the tribe each *hapu* held its lands in exclusive possession and within this again were various species of

[240]Ibid, 46-48.
[241]Firth, supra n 226 at 383.
[242]Durie, E T "Custom Law" (1994) 24 VUWLR 325, 329.

> ownership, closely defined and pertaining to the various groups of relatives, to families and to individuals. The whole forms an intricate system of rights and privileges, obedient to the supreme dictates of the tribal welfare, and is not capable of description by any simple comprehensive term.[243]

Maori land law, according to Kawharu, allowed families and individuals to occupy and use specific areas of tribal lands and resources. Such rights included the right to a particular clump of flax, to an eel-weir, a rat catching or bird snaring area, or to a kumara patch.[244] Outsiders were often given, in return for koha or donations of produce, certain rights to occupy, use and cultivate land 'belonging' to the tangata whenua or occupiers of the land.[245] Real property rights were always subordinate to the general interests of the community and only the consent of the whole tribe could take those rights away:[246] "In Maori land there was an individual right of occupation, but only a communal right of alienation."[247]

The Influence of the Maori Land Court

After the signing of the Treaty of Waitangi, customary Maori land tenure was subsumed within British law[248] and the Native Land Court was set up to determine the 'ownership' of Maori land and convert the land into titles derived from the Crown.[249] Statute prescribed the Court's jurisdiction but the Court determined its own procedural operation and principles to ascertain 'ownership' according to Maori custom.[250] To fulfil this task the Pakeha judges of the Land Court, many of whom were not educated in law

[243]Firth, supra n 226 at 382.
[244]Kawharu, supra n 231 at 61.
[245]Ibid 51 &59: Kawharu explains that food exchanged hands as a form of rent, tribute and payment for services and was not compensation but an indication that title remained with the owners. Often it was refused in case acceptance was construed as payment for title.
[246]Ibid, 61; Martin, W *The Taranaki Question* 5; Smith, N. *The Maori People and Us* Chapter III.
[247]Acheson, F O U *Ancient Maori System of Land Tenure* quoted in Firth supra n 224 at 375.
[248]Supra n 204 at 388-89 per Chapman J.
[249]Native Lands Act 1862 and 1865.
[250]Native Land Act 1865, ss 23 & 30.

and did not understand or speak Maori, had to come to terms with the concepts, traditions and language of a foreign culture and fit it into the British common law of land tenure.[251] These, and the judges' decisions, are recorded in the Minute books and other records of the Native Land Court. Using their personal experience and understanding of traditional Maori society the judges[252] recognised claims to ownership of land under four principle 'take' or rights.[253]

Take taunaha (discovery)

The first person to sight previously unoccupied areas could, by reference to landmarks, take certain portions of newly discovered lands.

Take raupatu (conquest)

Conquered land only remained part of tribal territory if the conquerors prevented the former occupiers from carrying out the acts of usage and occupation that showed 'ownership'. This included total annihilation, enslavement or displacement of the original inhabitants to prevent any resurgence by them and pre-empt any counter-claim or residual rights they might still claim.

Take tupuna (ancestry)

The foremost right was acquired through ancestry. In order to succeed to land, it was necessary to prove, by means of whakapapa or genealogy that they were entitled to share in tribal lands. No one could succeed unless they could claim unbroken blood ties to the tribal ancestor. Those who discovered the land had some claim to it, but those whose forebears had lived on the land and made use of it for many generations had the principle right to the land.

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[251]*New Zealand Gazette* 1867, 158 per Fenton C J, Native Land Court.

[252]Smith, later a judge of the Land Court, warned that, in the codification by the Land Court judges, customary land tenure may have been modified by Pakeha influence in Maori life and society: Smith, supra n 252 at iv. For example the succession rules introduced by Fenton were not strictly customary; genealogy alone did not confer rights to land, rather a potential right was fortified by living on the land and taking part in hapu activities but, as Maori became more mobile, Fenton's rules were accepted.

Take tuku (gift)

The Court took in to consideration rights conferred by gift but the gift had to be clearly and openly made and recognised by both the parties and their descendants.[254] Mutu argues that such gifts were solely for a specific purpose and came back to the giftor when the giftee ceased to occupy and use the land or its resources.[255]

A 'take' had to be supported by actual use, possession or occupation on a continual basis. Tribes would ensure that all portions of the tribal territory were visited, and used, with sufficient frequency to maintain their claim to the land: "I ka tonu taku ahi, i runga i toku whenua – my fire has always been kept alight upon my (people's) land".[256] The Court regarded this principle of 'ahi kaa', or keeping one's fires burning, crucial to any claim to land, otherwise the right became 'ahi mataotao' (cold).[257]

Conquerors not only had to plunder the area, but also had to show that they had settled the land and used its resources. Tribes beaten in battle could still maintain a claim if they had not been permanently forced off the land. If they remained, even in unsettled conditions or returned soon after being driven off, their rights were still recognised.[258]

Because the living were seen as caretakers, holding the land on behalf of the ancestors for those still to come, there was no concept of selling land[259] and no concept that an individual could use land without owing obligations to the ancestral group. It would not be too far off the mark to say that

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[253]Kawharu, supra n 231 at 55-63; Smith, supra n 236 at 30-74.
[254]For instance, Ngati Rangi of Tauranga gave land at Omokoroa for seafood gathering to Te Waharoa of Ngati Haua as a reward for fighting on their behalf. This right is still exercised.
[255]Mutu "Cultural Misunderstandings or Deliberate Mistranslation? Deeds in Maori of Pre-Treaty Land Transactions in Muriwhenua and Their English Translations" (1992) 35 Te Reo 57, 60-69.
[256]Kawharu, supra n 231 at 41.
[257]For a fuller description see McHugh, P G *Maori Land Laws of New Zealand* 2ff.
[258]Kawharu, supra n 231 at 56.

Maori society, then as now, sees itself as 'land-using' people, in contrast to the 'land-owning Pakeha'. This tenet is well summed up by the Irish singer-songwriter Dolores Keene:

> It's the land that is our wisdom,
> It's the land that shines on through,
> It's the land that feeds our children,
> You cannot own the land,
> The land owns you.[260]

Summary

The root of real property law in England and New Zealand, (the colonists adopted the English common law that was in force in 1840), is feudalism, although the feudal system has long been extinct as a social, political and land ownership system:

> The feudal system, long extinct in England itself as a social and political system, is yet the source of all doctrines of the English law of real property. It is a fundamental principle of that law that all lands are held of some superior lord …and to say that the doctrine of tenure is not to prevail in this colony is as much to say that the English law of real property is not in force here. This we may safely treat as an absurdity.[261]

The doctrine of tenure assumes that the Crown is the ultimate owner of all the land. In other words, the parent or radical title lies with the Crown.[262] An individual property owner is seized of a freehold estate in fee simple that is derived from the Crown.[263] Even Maori freehold title is, in legal

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[259]Buck, Peter (Te Rangihiroa) *The Coming of the Maori* (Wellington: Whitcombe and Tombs, 1952), 383; Stokes, supra n 235 at 40-41.
[260]Dolores Keane (Irish singer - songwriter) "Solid Ground" from *Solid Ground* (Dara Records: (CD065, 1994).
[261]*Veale v Brown* (1867-71) 1 NZCA 152, 157.
[262]Hinde, G W McMorland, D W Campbell, N R Grinlinton, D P *Butterworths Land Law in New Zealand* 16.
[263]Ibid, 19.

terms, derived from the paramount title of the Crown[264] and this has important repercussions re the power of the Crown under the Public Works Acts.

From the outset there was tension between the countervailing Pakeha and Maori attitudes towards land and land usage. Individual ownership of property is the keystone in the structure of western society. Land is an economic commodity and has an economic value and it must be productive, otherwise it is 'waste' land. In contrast, Maori society traditionally regarded land ownership as being vested in the group and members of the group had usage rights given to them. Its value is both intrinsic, illustrating the strong cultural and spiritual interests of the group and extrinsic, providing the means to sustain the group.

For Maori the land at Waharoa provided a spiritual link tying them to their people and their ancestors. It gave them a grounding or turangawaewae, but it was also for some their principle means of livelihood. Government bureaucrats did not comprehend this concept and it shows in their dismissive attitude to the protests of the 'owners' of the airport land. The fact that they did not consider any other course of action apart from outright taking and were unwilling to return the land despite calls to do so from within government circles indicates that they had no empathy for the owners' feelings for their ancestral land.

[264]Ibid, 25.

A BRIEF HISTORY OF THE MATAMATA BLOCK

The intensity of the intrinsic feeling that the people of Waharoa felt for the land is strongly reflected in a letter from Tawara Morewa, dated 17 June 1942 and addressed to the Prime Minister and Minister of Native Affairs. It is the first item of correspondence in the Maori Affairs file concerning the aerodrome. In the letter Morewa expresses his feelings and those of the other Maori owners about the taking of the land for the aerodrome. Its content discloses the fact that it is ancestral land to which they have a very deep sentimental and physical attachment and they desire ardently to keep the land in their possession:

> He whakaatu tenei na matou raga Iwi Maori no ratou nga paanga whenua I roto ite Poraka O Matamata Raki No 1 me No 2…koaua whenua keite mahia I roto I enei ra hei taunga 'Air Plane'. Noreira kaore matou e whakaae kio matou paanga whenua kia riro hei taunga 'Air Plane'. He whenua hoki enei no matou koeke iho ehara ite mea utu kite moni engari no tua whakarere i mahue tia iho e ratou mo matou mo ta ratou whanau. Hei urupa hei kainga tuturu moake tonu atu…ko matou urupa Tupapaku meo matou kainga. Kaore matou e hiahia kia hokona kite moni. Kia riwhi tiatu ranei ki tetehi atu whenua. Mokete ranei. Punga moni ranei. Ite mea he whanau kotahi matou kaore matou e hia hia kia wehe-wehe matou i runga io matou paanga whenua. [265]
>
> (Translation: Native Affairs Department)[266]
> We the Maori who have interests in Matamata North No 1 and No 2 blocks…hereby inform you that the said land is being converted into an aerodrome. We object to our interests in these blocks being used for this purpose. These lands were left

[265]MA 1, 19/1/610: extract of a letter from Tawara Morewa, dated 17 June 1942.
[266]The translated letter was forwarded to the head of the Public Works Department on 8 July 1942 by the Native Affairs Department.

> to us by our elders. They were not bought for money. These lands were left to us for our homes for all times and also for a cemetery… Our dead are buried there. We do not wish to sell for money, nor do we desire that these blocks be exchanged for any other lands nor mortgaged nor to serve as security. We are the members of one family and we object to being separated from each other and from this land.

The Original Crown Grant

The original hearing was held at a Native Land Court sitting in Hamilton on 31 March 1866.[267] Representatives from Ngati Rangi (also written Ngatirangi), Ngati Haua, Ngati Tawhaki and Ngati Ruarangi spoke at the hearing.

TeRaihi, a chief of Ngati Rangi and Ngati Haua, stated that the owners in former times were Ngati Rangi and Ngati Tawhaki but his Ngati Haua ancestors went to war with these tribes. When Werewere and Mataroa of Ngati Haua were killed in one of the battles, Te Oro and Haua II came to avenge their deaths. Te Oro made peace with Taha, the chief of Ngati Rangi who lived at Tokerau (Matamata North),[268] by asking for Taha's daughter Paretapu[269] and took her back with him to Parahao.[270] Taha gave the mana of the land and the people of Ngati Rangi and Ngati Tawhaki to their son and his grandson, Te Ahuroa.[271] Some of Ngati Haua lived with, and intermarried into, Ngati Rangi and Ngati Tawhaki. Some of Ngati Tawhaki left and went to Maungatautari but following the introduction of

[267]1 Waikato MB 21-24 & 72.
[268]Nepe Patehau: 33 Waikato MB 30.
[269]Taha insisted that Te Oro leave and come back for Paretapu so that it could not be said that she was taken in battle as a slave: ibid, 29, 37 & 48. The descendants from the union of Paretapu (Ngatirangi) and Te Oro (Ngati Haua) are Ngatirangi Te Oro: Wirihana Te Tutere: ibid, 37. Hori Neri also states that the hapu is Ngatirangi Te Oro and Ngati Te Oro is a new name "got up" at the Court of 1905: 34 Waikato MB 44. See Appendix 5 for the whakapapa of the area.
[270]Nepe Patehau: supra n 268 at 30.
[271]Ibid, 22, 37 & 48.

Christianity, Te Tiwha[272] and Tarapipipi Te Waharoa (Wiremu Tamihana) invited the rest of Ngati Tawhaki to return and live on the land,[273] and according to Te Raihi "we are now one".[274] Kereama Tauwhare stated that claimants in the application represented all the tribes, although Te Keepa, who declared that Ngati Haua derived title from intermarriage, did not think Ngati Tawhaki had a claim. Te Raihi gave a description of the boundaries of the land with the agreement of the other claimants present and presented ten names to the Court. Munro J admitted these ten "according to Native custom" and, following the Crown survey in 1867, issued a Certificate of Crown Grant for the Matamata Block (5468 acres) in favour of the following ten people:

***Crown Grantees*:**	***Iwi:***	***Other Affiliations*:**
1. Te Raihi (Toroatai)[275]	Chief- Ngati Haua Chief- Ngati Rangi	Ngati(rangi) Te Oro, Ngati Ruarangi,[276] Ngati Pare
2. Te Keepa Ringatu	Chief- Ngati Rangi	
3. Te Pakaroa (TeHeka)[277]	Ngati Haua	Ngati Rangi
4. Hakiriwhi Te Purewa	Ngati Haua	Ngati Pare[278] Ngati Koura[279]
5. Hori Neri	Ngati Rangi	Ngati(rangi) Te Oro, Ngati Tawhaki[280]
6. Hoani Te Huia	Ngati Rangi (mother)	Ngati Pare (father) Ngati(rangi) Te Oro
7. Kereama Tauwhare	Ngati Rangi	Ngati Haua Ngati(rangi) Te Oro[281]
8. Mita Hauwai	Ngati Rangi	
9. Teni Ponui	Ngati Ruarangi	Ngati Haua, Ngati Werewere[282]
10.Tamati Te Putu	Ngati Rangi	Ngati(rangi) Te Oro

[272]In his evidence at the Te Aroha investigation, Henare Ngataha of Ngati Haua stated that Te Tiwha (of Ngati(rangi) Te Oro) succeeded Te Waharoa as chief of Ngati Haua and Tarapipipi succeeded Te Tiwha: 2 Waikato MB 230.
[273]Soon after 1840 they were invited to live at Tarapipipi's Christian community at Tapiri on Paeoturawaru (Matamata) not far from the Matamata Pa and close to the present Raungaiti Marae; some followed Tarapipipi to his next settlement at Peria: supra n 268 at 38 & 39.
[274]Supra n 267 at 21.
[275]13 Waikato MB 108.
[276]3 Waikato MB 192.
[277]Supra n 267 at 17. He was a tamati to Te Waharoa, a chief of Ngati Haua
[278]Supra n 276 at 61. His mother was Rangiherehere, daughter of Te Waharoa by his first wife and his elder sister was Rangiherehere II wife of Tamati Te Putu: 30 WMB 12, 17 224.
[279]Supra n 275 at 65.
[280]12 Waikato MB 140.
[281]Supra n 276 at 161.
[282]Ibid, 197.

From the record this was not a detailed investigation[283] involving a range of parties, nor did the Court have an inquisitorial role, so only evidence presented in Court was admitted. This led to many possible owners being excluded from the title because they were not present at the moment when the Court considered the claim.

For instance Peina Tarawhitu, on November 11, 1867 when the Certificate of Title were issued, claimed that his name should be on the grant. He was told that, as an interlocutory order had been made, the Certificate would stand in favour of the ten named, but if he felt wronged he could write to the Governor who may grant a rehearing.[284] Likewise in 1884 Tuwhenua Te Tiwha and Panapa Te Pea stated that the 'proper' grantees had not been included as many were away with the HauHau movement at the time of the hearing in 1867. They were also concerned that the right by gift to Te Waharoa did not entitle Te Pakaroa,[285] Hakiriwhi and Ponui to be on the Crown Grant.

The Ten Owner Rule

The strong push towards individualisation of title was reflected in the "ten owner rule" found in s 23 of the Native Land Act 1865 whereby a Certificate of Title could be issued to no more that ten 'owners' unless the block was over 5,000 acres. The rule was incompatible with communal Maori title and led to many tribes being divested of their lands with effectively no voice in the process and no compensation for their loss.

The section was modified in the 1867 Act[286] so that the names of all the owners were to be endorsed on the back of the Certificate instead of just

[283]The initial investigation was done in one day, takes up two and half pages in the minute book and there were no objections to the information presented.
[284]Supra n 267 at 74.
[285]Harete Tamihana disagreed that Te Pakaroa claimed land through Te Waharoa; it was through his mother who was Ngatirangi: supra n 275 at 114.
[286]Native Land Act 1867 s 17.

ten. This was to stop the ten on the front selling the land on their own behalf without consulting the members of their hapu and without dividing the sale proceeds among all the 'owners'. However the ten 'owners' named on the front of the certificate could control leasing and rents without reference to the rest of the 'owners'. Fenton, the Chief Judge of the Land Court refused to implement the policy possibly because he felt that communal title should be eliminated. Munro J followed Fenton's example and did not endorse the Certificate of Title for the Matamata block and this bode trouble for the rest of the hapu of Ngati(rangi) Te Oro just a few years later.

The 1891 Commission on Native Land Laws was highly critical of the Native Land Court for failing to use the provision correctly and award certificates in the name of the tribe:

> Without doubt, all lands in New Zealand were held tribally. The Certificates of title should have been issued to the tribes and hapus [sic] by name…Instead of issuing certificates in favour of the tribe, the Native Land Court adopted the habit of issuing certificates to individuals by name, causing the Native owners to choose ten, or a lesser number from among themselves… [287]

While tribal understanding, based on Maori customary law, was probably that those listed on the Crown grant were kaitiaki/trustees, legally these ten were absolute owners, as no trust relationship was expressed or implied in the documents. The trust relationship was not recognised or enforced until the passage of the Native Equitable Owners Act 1886.

In the meantime this rule ultimately led to the erosion of customary controls by the group over the land because any member of the group could apply to have their interest determined by the Court under s 21 of the Native Land Act 1865 and then sell their interest. Tribal owners not named

on the certificate were simply dispossessed of their land by this process with no recompense except when the 'owners' shared the sale proceeds. For instance, when Hori Heri sold the land for which he was a 'trustee' to J. C. Firth, the question was asked "where will their [the people he was trustee for] area be?" and the reply was "they must look after themselves". He did, however, share the sale proceeds of £300 with his relatives.[288]

The Execution of Judgements against Real Estate Act 1867 also exposed debtors to Supreme Court action to settle debts that could result in the seizure and sale of land. As land passed through the Native Land Court and title was individualised, the individual owners could have their portion of the tribal land alienated to pay personal debts. Although these persons were brought into the title in a representative capacity only, abuses occurred and sales were sometimes effected by those having the legal, but not the beneficial, ownership, aided and abetted no doubt by those who were aware of the true situation. This was another effect of regarding the few who were nominated as absolute owners rather than as tribal trustees.[289]

J. C. Firth and the Ten Owner Rule

In 1859 Josiah Clifton Firth, an Auckland businessman, helped found the Direct Purchase Association, a group of Aucklanders that advocated the passing of legislation to waive the pre-emption clause in Article Two of the Treaty of Waitangi and allow the direct purchase of Maori land by settlers.[290]

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[287]AJHR 1891, Sess II, G1, vii.
[288]Supra n 268 at 29 & 31.
[289]The trust relationship was not recognised or enforced until the passage of the Native Equitable owners Act 1886.
[290]Waterson, D B "The Matamata Estate" (1969) 3 (1) NZJH 32, 33.

He visited the Waikato with the intention of obtaining leases of land[291] and, taking advantage of his good relations with Tarapipipi Te Waharoa (Wiremu Tamihana), he acquired 56,000 acres (22,662 hectares) in the Matamata County in the period from 1866 to 1883 for an outlay of £12,000.[292] Waterson writes that Firth, who farmed and lived in the area close to the future site of the Matamata township, was "obsessed with private visions of "nation making" " and had a confused philosophy of "imperialism, British Israelism, Christianity, social Darwinism and bourgeois improvement".[293]

His strategy was to tie up the lands in long-term leases before the Native Land Court had determined titles and exploit the owners' growing debts to gradually secure, in piecemeal fashion, the freehold title to the land. Stone, referring to the land at Matamata, laments:

> The sad old story of Maori land buying is revealed in the records: a succession of deeds of conveyance... generally signed in the notorious Maori Land Court town of Cambridge, the consideration for the transfer being receipts for advance credits spent by Maori owners before execution of transfer.[294]

For instance, on 23 November 1867 Firth registered claims for money owed to him in survey costs by the 'owners' of various blocks in the Matamata area: £136-14 for Matamata, £454 for Puketuta and Puketuta No

[291]Sorrenson, M P K "The Maori King Movement 1858-1885" in R Chapman and K Sinclair (eds) *Studies of a Small Democracy* (Auckland: University of Auckland, 1963) 33, 39; the subsequent passing of the Native Lands Act 1862 made direct purchase possible.
[292]Vennell, C W et al *Centennial History of Matamata Plains* 54; According to Joan Stanley he leased 56,000 acres in 1865: Stanley, J *Matamata - Growth of a Town 1885-1985* 5.
[293]Waterson, supra n 290 at 32.
[294]Stone, R C J *Makers of Fortune: A Colonial Business Community and Its Fall* 141-143. Stokes suggests that negotiations for leasing the land in the Matamata area were well underway before 1866, the date at which most titles in the area were determined by the Court: Stokes, Evelyn Wiremu *Tamihana Tarapipipi Te Waharoa* 291.

1, £134-18 for Hinuera, and £61-9-6 for Hinuera No 3.[295] No doubt there were other blocks involved. Many of the grantees for Matamata were also grantees on these surrounding blocks.[296] On 3 November 1868, he acquired leases for the Matamata block for which he paid rental of £100 per year.[297] Then on 17 October 1884 he made application under s 12 Native Land Division Act 1882[298] for the subdivision of 5460 acres of the Matamata Block claiming, by deeds from 1868 to 1882, that interests equal to 21/40 shares, a little over half the block, had been conveyed to him. The shares claimed were:

Crown Grantees	***Shares awarded to Firth***	***Date Conveyed to Firth***
Te Raihi Toroatai	5/40	3 Nov 1868; 15 Aug 1882
Te Pakaroa Te Heka	1/40	1 Aug 1877
Hori Neri	5/40	29 May 1876; 8 June 1880; 26 Nov 1880
Te Keepa Ringatu	4/40	?
Hakiriwhi Te Purewa	3/40	18 Sept 1877
Mita Hauwai (Kataraina Ropiha- 1 of his 4 successors)	1/40	?

On 29 October 1884 Firth was awarded 19/40 (2597 acres) of the block and granted a defined portion south of a line running east to west to include the southern most point of the block.[299] Later, in 1886, he divided 800 acres of the northern end of his land into farms for 16 of his

[295]Supra n 267 at 117; Firth supplied his surveyor and charged the cost to the Maori "owners". It is one of the anomalies of the legislation that although Maori "owned" and knew the boundaries of their land they were forced to pay for their land to be surveyed before the Land Court issued a Crown Grant.
[296]Te Raihi was on the Crown Grant of all 4 blocks, Hori Neri and Kereama Tauwhare were on 3 and Te Pakeroa and Tamati TePutu were on 2 of these blocks and other grantees, or successors, were on blocks in the Matamata vicinity for example Hungahunga, Kiwitahi, Taramoarahi, Te Pae O Turawaru, Te Puninga, Turangamoana, Whakatakataka, Waiharakeke and Wharetangata.
[297]Supra n 275 at 109.
[298]S 12 Native Land Division Act 1882 reads: Individuals who have acquired before the passing of this Act an undivided share in, or lease of, any land granted to Natives may apply for subdivision.
[299]Supra n 275 at 135.

employees[300] (the present township of Waharoa) and established a cheese factory in the township on a site near the present railway line.

A Crown Grant[301] for the residue of 2871 acres was issued in favour of:

Ruhia Te Putu	}	
Mihiata Te Putu	}	successors to Tamaiti Te Putu
Katia Te Putu	}	
Kereama Tauwhare		
Hoani Te Huia		
Mita Tiki	}	
Mihi	}	successors to Mita Hauwai
Puaia	}	
Kerei Te Aho		successor to Teni Ponui

The Coming of the Railway

In 1885 the Thames Valley and Rotorua Railway Company, in which Firth was a promoter and shareholder, constructed a railway line from Morrinsville across the plains to Matamata and on to Tirau.[302] A tiny flagstation was built 4 kilometres away from Firth's homestead on the Matamata Estate.[303] The railway line, and the land taken for it,[304] lies just north of Waharoa on the other side of State Highway 27, opposite Raungaiti Marae and the airport land. From information noted it appears that the railway may already have been in existence, though the proclamation that officially took the land is dated 12 June 1888.[305] The parcel of land affected was 25 acres, 1 rood, 21 perches situated in Block No. 432N in the survey district of Wairere (P.W.D. 15765).[306] It was taken under s130 of the Public Works Act 1882, which reads:

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[300]Davison, G (ed) *Waharoa School 1887-1987: Celebrating 100 Years* 18.
[301]Supra n 275 at 133-135.
[302]It was begun in Morrinsville in 1884 and reached Litchfield in 1886: Duxfield, S et al *Historic Matamata* 20; Waterson also states that the line traversed Firth's estate by 1886: supra n 290 at 34.
[303]Stanley, supra n 292 at 6.
[304]Known locally as the Plantation.
[305]*New Zealand Gazette* Vol 34 1888: 675.
[306]Ibid.

> [the] Governor may, by Proclamation, take any land required for a railway. The Proclamation is conclusive evidence that the land is vested in Her Majesty and no Proclamation may be legally challenged on any ground whatsoever.

There appears to have been no consultation with, or provision of relevant information to, the 'owners' and the timing of the acquisition (possibly after the fact and thus a *fait accompli*) was keenly felt by the 'owners'. As they had no input into discussions or proposals, the Crown failed to consider any alternative suggestions apart from outright taking.

On 22 June 1888 the under-secretary for Public Works requested the Chief Judge of the Native Land Court, under s14 of the Public Works Amendment Act 1887,[307] to arrange a sitting to ascertain the amount of compensation to be paid to the owners. The Court finally sat on 3 December 1889 at Cambridge. Although the owners received notices handed to them personally to attend the Court they did not appear. James McKay, a land agent, said Kereama Tauwhare (and possibly the others) refused to appear "as he appeared to think that the land should not have been taken without consulting them".[308]

In the absence of the owners the Native Land Court heard from several witnesses on the amount of compensation that should be paid and there was quite a disparity in the price per acre. The Government valuer, Mr Cheeseman, informed the Court that:

> I do not think the land would fetch £2 an acre but as the Railway takes 25 acres of the best part I estimate its value at £3, and as all lands taken compulsorily should be dealt with in a liberal spirit I add £25 to that

[307]S 14 amends s 26(1)(b): Native Land Court to ascertain to whom compensation should be paid and how much should be paid for Native land and for Native-owned land under Crown Grant, Certificate of Title or Memorial of ownership.
[308]9 Otorohanga MB 18.

> making in all £100 which I think a very fine offer...[309]

John Hunt of Walton, also a valuer, said he was familiar with the piece of land. It was overrun with sweet briar, partly covered with tree stumps and contained a ballast pit so he considered that Mr Cheeseman's offer was a good one.[310] On the other hand James McKay considered £4 a better offer as Firth had sold nearby land of similar quality to settlers at £5 an acre[311] on the last occasion that land was sold in the area. The Court however settled for £3 an acre making a total of £102[312] to be paid to:

Owner	***Payment***	
Rihia TePutu	£6.16	}
Mihiata TePutu	£6.16	}successors to Tamati Te Putu
Katea TePutu	£6.16	}
Kereama Tauwhare	£20.8	
Kahurangi Ka	£10.4	}successors to Hoani Te Huia
Hoani TeHuia (11 yrs)	£10.4	}
Nikora TeKupenga	£10.4	}successors to Mita Hauwai
Mita Tiki	£10.4	}
(dec- no successor)		
Kerei TeAho	£20.8	successor to Tenei Ponui

Trustee Or Not to Be?

In 1905 the Court was asked to determine whether the ten people listed on the original certificate of title were the sole 'owners', or whether they were trustees.[313] After hearing much evidence in which the claimants were cross-examined by both the Court, through the Judge and Assessor, and by counter claimants, the Court agreed with the parties that the grantees were trustees.

[309]Ibid, 17.
[310]Ibid, 18.
[311]Ibid.
[312]Compensation Order of the Native Land Court, 3 December 1889.
[313]Supra n 268 at 20-23, 24-42, 43-58, 61-63, 64-67, 215-216.

The Court now had to decide who were the 'owners' in 1867 so it could list the present 'owners'. Teni Tuhakaraina set up a case for Ngatirangi and Ngati Tawhaki by ancestry and occupation; TeRawhiti for the descendants of Paretapu and Te Oro (Ngati(rangi) Te Oro) through ancestry, occupation and conquest and Tua Hotene for Ngati Haua through conquest and occupation.

The Court did not admit Hotene's claim of conquest on the following grounds: Taha had made peace with Te Oro, therefore Ngatirangi were not conquered and furthermore since the 'European War'[314] only two or three of the people he claimed for had occupied the land. The Court noted that Ngati Haua had not raised a claim by conquest over Ngatirangi and Ngati Tawhaki at either of the two previous hearings in 1867 or 1884. The Court also observed that the surrounding lands in the Matamata area had been awarded to Ngatirangi and Ngati Tawhaki. The Court did however concede a right of Ngati Haua by gift to TeWaharoa.[315]

Te Rawhiti's claim by ancestry and occupation was accepted although his claim through conquest was rejected because it was not only inconsistent with his claim by ancestry from Taha over whom conquest was alleged, but his witness admitted it was not conquest.[316] Ngati Tawhaki's case was different. Although they had been absent for a generation or two, their right rested on permanent occupation since they were invited to return seventy years ago.[317]

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[314]The Land Wars of 1860-65.

[315]Harete Tamihana declared that the portion owned by Hakiriwhi and Hoani Te Huia was given by Whangaihau, Pehioi and [H]ohua (all Ngati Rangi) to Te Waharoa: supra n 275 at 114. The land at Matamata was a gift from Taha to his grandson Te Ahuroa, and with it the mana of the people of Ngati Rangi living there. Te Ahuroa gave a portion of the land to Pehioi and Hohua who in turn gifted it to Te Waharoa: Hare Penetito, supra n 266 at 38 & 49. Nepe Patehau claims the gift to Te Waharoa came about because he gave land at Horotiu (Cambridge) to Ngati Rangi and Ngati Tawhaki. In payment, Pehioi gave Matamata to Te Waharoa to live on, Whangaihau gave Taramoerahi and Tiki gave Te Whangai. When Tarapipipi (Wiremu Tamihana) wanted to return the lands they would not take them so the lands now belong to the descendants of Te Waharoa: supra n 268 at 27.

[316]Wirihana Te Tutere: ibid, 34-38.

[317]They were not represented in the block because they were considered guests on the land. When Ngati Tawhaki built a house at Waharoa to lay claim to the land, Ngati Te Oro and Ngati Haua (Te Tiwha, Epiha, Te Tutere and Te Pakaroa) had the house burnt

The Court considered that the chief occupants of the land had been Ngatirangi and Ngati Tawhaki. Those who could show descent from Paretapu and Whakapoi,[318] the children of Taha, had the best claim and those not descended had a lesser claim. Teni and TeRawhiti gave the Court evidence of the present representatives of the persons who were alive in 1867 and the Court listed fifty-four people, holding fifty-one and a half shares, as the owners. [319]

The decision was appealed in 1907 but the Court saw no reason to quash its original decision because it found the two hapu, Ngati(rangi) Te Oro and Ngati Tawhaki, were of the same stock and were 'as one people'. It also found that Ngati Tawhaki were not driven away despite evidence to the contrary and although they had been absent for some time, the Court found this did not merit forfeiture of their rights. The Court did not add any more names to the block but it did bring the Ngati Tawhaki share allocation up to that of Ngati(rangi) Te Oro - fifty-four owners with seventy-three and three quarter shares.[320]

Friction erupted between the two groups as a result of that decision and in 1908 the block was partitioned between Ngati Rangi and Ngati Tawhaki on one side and Ngati(rangi) Te Oro on the other. Matamata North No 1 was ordered in favour of Hamiora TeKeene and twenty-one others and Matamata North No 2 went to Hare Kereama and thirty-one others.[321]

The rest of the history of the Block is one of fragmentation through succession and partitions to various whanau groups and alienation of land from the group. Forced alienation to the Crown of interests in their land is not new to the people of Waharoa and Raungaiti Marae. Apart from the

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down because it was built under the mana of Ngati Tawhaki and not under Whakapoi: ibid, 38.

[318]See appendix 5 for genealogy showing the linkages between the various iwi and hapu.

[319]Supra n 268 at 215. See appendix 6.

[320]34 Waikato MB 51-52. See appendix 6.

[321]Ibid, 125.

airport land, the tribal interests in the area, Ngati(rangi) Te Oro, Ngati Rangi, Ngati Haua and Ngati Tawhaki, have had other areas in the Matamata Block taken for public works. The block is also criss-crossed by roading, including Waitoa – Wairakei Main Highway (State Highway 27), Wardville, Te Aroha – Waharoa No 313 and Jaggers roads. Land was also taken in early 1960 under the Public Works Act 1928 for re-alignment of the railway line and the creation of the Kaimai deviation to link the Waikato with the port of Tauranga.[322]

Summary

This brief historical summary of the Matamata block reveals a story of a long connection to the land by the hapu of Ngati(rangi) Te Oro. A conservative estimate of twenty-five years for each generation from the original Crown grantees would place Taha, the chief of Ngati Rangi who gave the mana of Matamata to his grandson, on the land in the early 1700's. It also reveals the story of a slowly diminishing resource, with subsequent loss of rangatiratanga through alienation, to both the Crown and private interests. The taking of land for the airport should be considered in the context of the history of the Matamata block and the progressive loss of rangatiratanga that was for the most part forced on the hapu.

[322]The Kaimai tunnel project was approved in 1964; construction began in 1965 and it was opened on 12/9/78.

AERODROME CONSTRUCTION

Pre-War

The Public Works Department was responsible for the construction of most development projects in New Zealand such as irrigation and hydro schemes, river control, roading, bridging, railways, soil conservation, public buildings and low-cost housing. Aerodrome construction was the one new activity undertaken by the Public Works Department during the depression.[323]

Esmond 'Gibby' Gibson, a civil engineer with the Department, had been supervising relief workers engaged in building the Royal New Zealand Air Force (RNZAF) base at Wigram. He recognised that developments in airplane design and improvements in the technique of instrument flying meant that a cohesive aviation industry was necessary for the internal and external economic viability of the country in order to retain, expand and compete in overseas markets.[324] He backed up his opinion by learning to fly and qualified as a commercial pilot in the early 1930's.[325]

He also organised a deputation by the New Zealand Aero Clubs to the Ministry of Defence and at that meeting put forward a scheme for building an aerodrome near every town of any size.[326] The Government liked the idea and in September 1933 approved the establishment of a chain of landing grounds throughout the country.[327] The scheme had as its objectives to provide for the development and safety of civil aviation, though a secondary consideration was the provision of employment to

[323]Ministry of Works *Ministry of Works 1871 – 1971* 1-15.
[324]Noonan, Rosslyn J. *By Design: A brief history of the Public Works Department Ministry of Works 1870 – 1970* 149.
[325]In 1936 Gibson became the commanding officer of the first fully operational territorial squadron. He served with RNZAF and US forces in New Zealand, Malaysia, Australia and the South Pacific and was awarded an OBE and the Legion of Merit (US): Traue, J. E. (ed) *Who's Who in New Zealand* (11th ed) 121.
[326]Noonan, supra n 324 at 149.
[327]Supra n 323 at 15.

create a permanent national asset at a considerable saving of capital expenditure on the part of the Government and local bodies.[328] The Public Works Department was given the task of planning and constructing the airfields.

The scheme involved locating and inspecting suitable sites along the main air routes by specially qualified engineers working in tandem with the Controller of Civil Aviation. Once an area was selected and an engineering survey undertaken, the ground was levelled by the Public Works Department using unemployed labour supplied by the Unemployment Board.[329] By 1936 the scale of the project had assumed such proportion that the Department created the Aerodrome Services Branch to co-ordinate these activities and the Government appointed Gibson to the position of engineer in charge to oversee the work[330] in conjunction with Civil Aviation[331] and the Air Services Branch of the Ministry of Defence.[332]

The Second World War

The arrival of war in 1939 caused acceleration in aerodrome construction.[333] The first few weeks of the war convinced Britain that the key to winning the war was air supremacy. However Britain did not have the facilities to train enough aircrew to expand the Royal Air Force so training schools were set up in other Commonwealth countries.[334] For its

[328]*New Zealand Official Yearbook* (NZOYB) (1936): 280.
[329]Ibid.
[330]Ewing, Ross & Macpherson, Ross *The History of New Zealand Aviation* 112.
[331]The controller of Civil Aviation was an officer of the Defence Department: supra n 324 at 187.
[332]Supra n 323 at 16.
[333]At the commencement of the scheme there were 25 licenced areodromes: *NZOYB* (1934): 196; at 31 March 1939 there were 40 developed airfields and 2 RNZAF stations: *NZOYB* (1939): 265; at March 1943 there were 37 RNZAF stations: *NZOYB* (1946): 181; by March 31 1943 there were 79 aerodromes and 17 emergency fields in use: *NZOYB* (1944): 181. From 1939 - 1945 (the duration of the war) £50K was spent on defence construction; airforce work, particularly aerodrome construction, amounted to £16K: Baker, J. V. T. *Official History of New Zealand in the Second World War 1939 - 45: War Economy* 229-230, 235.
[334]Wright, Matthew *Kiwi Air Power* 37.

part the Royal New Zealand Air Force (RNZAF) had to train 144 elementary pilots, 80 advanced pilots, 42 observers and 72 wireless operators and air gunners every four weeks.[335] To honour this commitment the Government needed to build more aerodromes and to upgrade existing ones for military use. It also had to extend and alter existing runways to hard surfaces to cope with the growing size and weight of military aircraft.[336]

Adding to these commitments was the immediate threat to New Zealand's security. In September 1939 an enemy submarine intruded into New Zealand waters but an aircraft search failed to locate it. As a result of this alarm the RNZAF provided air cover at major ports to incoming and outgoing shipping.[337] On 13 June 1940 the German raider Orion mined the entrance to the Hauraki Gulf, but by dawn it had retired out of range of available aircraft. Shortly afterwards the SS Niagara, sailing from Auckland to Vancouver, struck a mine and sank between Bream Head and Moko Hinau. In August the Orion returned and sank the Turakina west of Cape Egmont.[338] In November it came back, this time joined by two other vessels, and sank the Holmwood and the Rangitane, but once again it retreated out of range of service aircraft.[339] These incidents showed up a weakness by the RNZAF to patrol a large coastline from its limited bases.

Also, in the weeks following the destruction of the American base at Pearl Harbour on 7 December 1941, New Zealand faced the threat of invasion from the Japanese. The ease and swiftness of the Japanese thrust led to a strong feeling that it would quickly overrun the South Pacific.[340] New

[335]Bentley, Geoffrey Conley, Maurice *Portrait of an Air Force: The Royal New Zealand Air Force, 1937-1987* 30.
[336]Ross, J M S *Official History of New Zealand in the Second World War 1939-45: Royal New Zealand Air Force* 112.
[337]McIntyre, W David *New Zealand Prepares for War: Defence Policy 1919-39* 245.
[338]Ross, supra n 336 at 69.
[339]Ibid, 70
[340]In the opening months of the war Japan occupied French Indo-China and in January 1942 entered Manila, striking Rabul two days later. By June the Japanese were established on a line from the Andaman Islands in the Indian Ocean through the Netherlands East

Zealand's vulnerability to attack was heightened after reports of a Japanese submarine lying off the Wairarapa coast. On 8 March 1942 the submarine launched a plane that made a reconnaissance flight over Wellington and the next day it was seen over Tauranga. The submarine then sailed into the Hauraki Gulf and its plane flew over Auckland before departing from New Zealand waters.[341]

The threat to New Zealand's security therefore was very real and caused a revision of New Zealand's defence requirements, particularly when New Zealand became a forward base for American forces.[342] There was even a question of whether overseas troops should return to face the possible threat to New Zealand.[343] Thus, from its primary role as a training organisation, the RNZAF had to face three major commitments in the crucial year of 1942:

1. To maintain the promised output of trainees for air service oversees,
2. To prepare operational squadrons for the war in the Pacific and
3. To develop an operational airforce capable of fighting the enemy at home.

The expansion needed to meet the Japanese threat,[344] to accommodate the large numbers of United States air units and to develop operational squadrons of the RNZAF[345] necessitated a drastic increase in the building

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Indies to the Solomon Islands. Japanese warplanes attacked Darwin to the alarm of the Australians and apprehension of New Zealanders: Bentley & Conley, supra n 335 at 72.

[341]Ewing & Macpherson, supra n 336 at 141.

[342]Operational aircraft from the United States began to arrive in 1942: *NZOYB* (1951-52): 214.

[343]McIntyre, supra n 337 at250.

[344]Sixteen thousand new recruits were enlisted during 1942 to meet the demands of these programmes. Bentley & Conley, supra n 335 at 82.

[345] *NZOYB* (1943): 144.

programme during 1942.[346] It was during this period of expansion that the aerodrome at Waharoa was built.[347]

Post-War

By early 1944 Japanese air opposition was no longer a major threat in the Pacific and by the end of that year was almost non-existent. Following the war and the closure of most of the stations established to meet the needs of the war, the emerging Government-owned New Zealand National Airways Corporation (NAC)[348] absorbed many of the air services operated by the RNZAF.[349] From the late 1940's the Public Works Department was busy planning, building or improving airports in the major centres of Auckland, Wellington and Christchurch and in the towns of Tauranga, New Plymouth, Rotorua, Whangarei, Gisborne, Napier, Wanganui and Queenstown.[350]

Gibson's prediction about the importance of air transport was borne out. One of his pre-war duties as aerodrome engineer for the Areodrome Services Branch was to locate and inspect suitable sites on the main air routes for use as emergency landing sites for light aircraft.[351] During the war years the programme initiated in 1933 was an ideal vehicle by which to increase the mobility and defensive power of the Royal New Zealand Air Force and the war therefore conveniently accelerated Gibson's government-backed scheme to have an airfield or airport close to every

[346]There were two stations in September 1939, fourteen by March 1941 and thirty-seven by March 1943: *NZOYB* (1946): 181.
[347]Waharoa is listed as one of the 39 RNZAF stations in New Zealand: ibid.
[348]The NZNAC Act 1945 established NAC (operational 1 April 1947) with complete control of air transport as a national service: *NZOYB* (1947-49): 304.
[349]After the war the RNZAF ran a quasi-civil air transport organisation. 90% of passengers carried by 40 Squadron and the Sutherland Flight were civilians; 42 Squadron operated an internal mail service between Wellington and Auckland, stopping at New Plymouth and Rukuhia (Hamilton) as required; they also operated a freight service between Paraparaumu and Woodbourne under contract to NZ Railways and 41 Squadron maintained a regular courier run to Japan: Bentley & Conley supra n 335 at 120.
[350]Supra n 323 at 16.
[351]Marr, Cathy *Public Works Taking of Maori Land 1840-1981* 167-8.

sizeable town.[352] Many of these identified sites,[353] either developed or on standby for use during the war years, were later converted to civilian use following the war.

[352]From 1947 – 1957, the formative years in the development of a national civilian air service, Gibson was the Director of Civil Aviation. He then took up the position as aeronautical consultant with Leigh, Fisher & Associates of San Francisco. From 1965 - 1972 he was President of the Wellington District Aero Club: supra n 325 at 121.

[353]Raglan airfield, also taken for an emergency aerodrome on 2 October 1941 with compensation awarded by the Maori Land Court, became one of the best known cases during the land protests of the 1970's. Gibson was instrumental in confirming the claims of the Maori owners that the original agreement was subject to the return of the land after the war.

WAHAROA AIRPORT[354]

One such site was land in the Matamata North block, 'taken' in 1942 by the Air Department, with the assistance of the Public Works Department, for the establishment of an emergency aerodrome at Waharoa[355] and converted to a civilian airport after the war. There had been discussions prior to the war about establishing an airport to serve the Morrinsville – Te Aroha district of Piako County but, on the outbreak of war, the matter was left until "the time was opportune".[356]

Immediately prior to World War II Maori occupied the land using it for residential purposes, for cultivation of food, for dairy farming and the grazing of stock.[357] It was noted that parts of the land were of poor quality due to cropping and not being sown down, and some of the land tenanted to Pakeha farmers, albeit on unconfirmed leases,[358] was a source of income for the owners.

'Taking' the Land For War Time Emergency Use

The first entry on to the land at Waharoa was on 23 June 1942.[359] There was no communication with the owners prior to that first entry. They were alerted to the situation when they saw a surveyor on the land. When asked what was going on and to stop the work he informed them that the

[354]Unless otherwise specified, references are to the Maori Affairs file *MA 1 19/1/610 Vol 1: Waharoa Aerodrome*, held by the National Archives of New Zealand.
[355]Waharoa is listed as one of the 39 RNZAF stations in New Zealand: *NZOYB* (1946), 181. It was used as a satellite airfield of RNZAF Station Tauranga: Memo, J Buckeridge, Acting Controller of Civil Aviation to the Prime Minister's Department, 2/12/46.
[356]Vennell, C W & More, David *Land of the Three Rivers* 111.
[357]See appendix 6 (notes) for more detail.
[358] Report of Beechey J, Re Matamata North – Waharoa Aerodrome, 10/8/42.
[359]M V Bell, Deputy Registrar Maori Land Court, Auckland: "Report Re Waharoa Aerodrome and Maori Lands Required Therefore" (undated) following meeting 28/1/48.

Government wanted to use the land as an emergency airport but was reserving its decision pending his report.[360]

Several blocks of land were involved. One block of 84a 0r 17p (Lot 2DP 29064), known as Wright's farm, was purchased outright. The rest of the land (145a 2r 28p) was Maori-owned land in the Matamata North Block (S.O.34532). The individual blocks, the owners[361] who were eventually compensated and the area of land affected by the aerodrome were:

Block	***Owners***	***Area of land taken***			***Area of block***		
		a	**r**	**p**	**a**	**r**	**p**
1A	Kura Patehau (Mrs Rangitawhia Keepa or Kemp), Okeroa (Ruby) Roritutu	25	1	13.8	91	2	36
1B1	Tawara Te Morewa, Pungatara Maka	1	3	11.1	77	1	14
1B2	Timi Panapa, Te Pea (Tohinga) Kaukau	0	1	10	68	3	0
1B3	Timi Panapa, Te Pea (Tohinga) Kaukau	45	2	7.2	91	2	26
2G1	Turia Penetito, Hare Wharamate	36	3	14.4	42	1	0
2G2	Timihua Penetito	7	1	3.7	14	0	13
2H1	Tame Taka Wirihana Family (10 persons)	0	0	7.3	18	3	4
2H2	37 persons	9	1	23	37	2	9 [362]

When a letter of objection from Tawara Morewa, on behalf of the owners, was addressed to the Government,[363] an informal meeting of the Native Land Court was arranged on 7 August 1942 at Raungaiti Marae, Waharoa. In attendance were: the owners, Mr Longlands, solicitor for the owners, Mr Carter, Public Works Department land purchase officer, Mr Gordon, Government valuer, Mr Findlay, Public Works officer based in Hamilton,

[360]Letter from Tawara Morewa (17/6/42) on behalf of the Committee of Raungaiti Marae, to the Prime Minister (PM) and Minister of Native Affairs (MNA).
[361]The names of the individual owners are listed in Appendix 6.
[362]2a 0r 4.9p of the total area was set apart and gazetted as Native Reservation (Rangauiti Marae) on 30/8/39 (NZ Gazette 105/2445 of 7/9/39).
[363]Letter from Tawara Morewa (17/6/42) on behalf of the Committee of Raungaiti Marae, to the PM and MNA.

Mr Cotter, officer of the Maori Land Court, and E. M. Beechey, judge of the Maori Land Court, who wrote an informal report of the meeting.[364]

From the Judge's report it seems that the Government was undecided about the long-term plans for the land. Mr Gordon had only certain information given him by the Air Force and was unable to give any commitment from the Government about whether the aerodrome would be temporary or permanent in nature. However, in the event of the first possibility, the proposal was that the Government would fix the value of the land and pay *interest* on that value for the time the land was occupied by the aerodrome. At the end of the time the ground cover would be restored and re-sown and from this the presumption was that it would be handed back to the owners after the war was over.

Mr Gordon did point out that *if a third runway was needed then the aerodrome might become permanent* in which case the freehold of the land would be taken and the value fixed would form the basis of a claim for compensation. Even at this early stage in the proceedings, in the event of permanent occupation and despite other alternatives open to the Government, 'taking' was the only method under consideration.[365]

The Airport Land After the War

Following the end of the war the Government had still not come to a decision about the temporary or permanent status of the aerodrome. In the meantime, the owners had received no payments in either rent or compensation for the loss of their land to the aerodrome.[366] In 1943, probably after an enquiry from the owners, the Public Works Department

[364]Report of Beechey J, Re Matamata North – Waharoa Aerodrome, 10/8/42.
[365]This is discussed more fully in the section on compulsory taking of land under the Public Works Act.
[366]Memo, Native Department (ND) to Public Works Department (PWD), 17/9/43.

approached the Land Court and asked it to deal with the matter,[367] but the Court declined, advising that it did not have the authority to make such an award.[368]

The matter lay in limbo until the owners, concerned about the future of their land, held a meeting in May 1944 at Waharoa and asked Mr Findlay for the return of their land when the war was over and payment of all rent for the time of use.[369] It seems that none of the Government departments involved thought it was their responsibility for paying compensation for the time of use.[370] The difficulty also stemmed from the fact that rent was only to be paid if the land was not required permanently and that decision had not yet been made.[371]

Late in 1944 a decision was finally reached. On 1 September 1944, Mr Cotter approached the Native Department advising that the owners had been badly treated by Europeans who had the final say with regard to their lands, while the owners had to fend for themselves. He also pointed out that for some owners the land taken was their principle means of livelihood.[372] By 21 September the Air Department advised the Public Works Department that the airfield "will not be required for the RNZAF or for civil purposes after the war"[373] and on 11 October the Minister of Public Works advised the Native Minister that:

> It has now been decided that the Waharoa Airfield will not be required for Air Force or for civil purposes after the war…[374]

[367]Memo, PWD to Native (Maori) Land Court (LC), 10/9/43.
[368]Memo, LC to PWD, 17/9/43.
[369]Letter, M R Findlay to LC, Auckland, 24/5/44.
[370]Eventually the Air Department paid rent to the owners through the Waikato-Maniapoto Land Board.
[371]Memo, LC to ND, 16/9/44.
[372]Memo, MNA to ND, 1/9/44; see appendix 6, (notes) for owners use of the land.
[373]Memo, PWD to ND, 21/9/44; letter, MNA to Hon. J Cotter, LC, 2/10/44.
[374]Memo, Minister of Public Works (MPW) to MNA, 11/10/44; reiterated in a letter from the ND to LC, 11/12/44.

In the meantime on 26 September, E. T. Tirikatene, a member of the Executive Council, wrote to the Native Minister advising that urgent representations had been made in connection with the Waharoa aerodrome lands.[375] He wanted to know how much land was involved, the price per acre, the amount disbursed to the owners, the amount disbursed on account of welfare of the owners and the amount held in trust with the rate and amount of interest allowed.

The Minister of Native Affairs replied on 18 October reiterating the decision of 21 September, that "…Waharoa airfield will not be required for Air Force or for civil purposes after the war…". He added that:

> [N]o part of the Native land, therefore, has been taken and the question of a *rental* from the time the land was occupied for aerodrome purposes is now being investigated…[376]

Mr Cotter was sent to discuss, and gain, the agreement of the Maori owners to the proposal that rent be 5% per annum of valuations made by the Hamilton District Valuer in 1942. The Native Department would then arrange apportionment and distribution of the rental.[377] In December 1944, the Maori Land Court advised the Ministry of Native Affairs that, in accordance with the arrangement, the owners had agreed to the proposal.[378]

In the Next Breath

The Civil Aviation Branch, however, faced continual lobbying from local authorities, chambers of commerce and aero clubs in the area that wanted the airfield retained and finally, on 7 March 1946, the Branch, influenced

[375]Memo, Hon. E T Tirikatene to MNA, 26/9/44.
[376]Memo, MNA to Hon. E T Tirikatene, 18/10/44. Emphasis added.
[377]Rent amounting to £614/16/6 for 2 years 7 months at the rate of £236 per annum, was distributed to the owners by the Waikato-Maniapoto Land Board: Memo, LC to ND, 1/3/45; the individual block payments were 1B1- £5.10.0, 1B2 - £0.10.0, 1B3 - £135.0.0, 2G1- £61.5.0, 2G2 - £14.0.0, 2H1- £1.5.0, 2H2 - £18.10.0: Memo, PWD to ND, 26/7/46.

by that pressure, did a complete turnaround and argued against returning the land:

> From the viewpoint of this Department, the fact that an eminently suitable airfield has been developed at Waharoa at public expense, it seems most undesirable that the land or portion of it comprising the runways should be returned to its owners… I therefore strongly urge that the present lease tenancy or agreement for the use of the land should be continued for a further period with an understanding that the present unsatisfactory position will be determined before the end of the current year.[379]

The National Airways Corporation (NAC), responsible for initiating and operating commercial services throughout the country, was not interested in Waharoa as a commercial airfield and according to Buckeridge, acting controller of Civil Aviation, its future lay solely as a local airfield serving aero clubs, airtaxi and private flying.[380] However, NAC finally agreed that it might be useful as an alternative to Rotorua and could have some value to serve feeder and sub-feeder services.[381]

Despite the less than enthusiastic commitment from NAC, the committee, established by Civil Aviation to look into future civilian airport needs, decided on 23 January 1948 that the aerodrome with shortened runways would be retained as a civilian airport. The land acquired from Mr Wright was declared surplus to requirements and it was decided to use this as part settlement in compensation to Maori owners. The Committee also requested that negotiations begin with the Maori owners to acquire the

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[378]Memo, LC to ND, 15/12/44.
[379]Letter, Air Department, Civil Aviation Branch (AD-CA) to PWD, 7/3/46.
[380]Memo, J Buckeridge, Acting Controller of Civil Aviation to the Prime Minister's Department, 2/12/46.
[381]Notes on Future of Waharoa Airport, 7/11/46; memo, ibid.

land, despite the adamant wish of the owners that the land be returned.[382] Interestingly, the owners were described as satisfied after the proposals on compensation, which included the land exchange, were explained to them. In reality the issue of the airport taking left much bitterness among local Maori, even to this day.

Delay, Delay, Still More Delay

The airport was already a going concern but the tidying up of the formal taking of the land and the compensation details was a long drawn out process. At the beginning of 1949 the owners appealed to the Department of Maori Affairs demanding to know the Government's intentions. By now they appear to be so disillusioned with the chicanery of the Departments involved that they threatened to repossess the land unless there was a prompt settlement.[383] A letter telling them that a start was to be made on fencing off the reduced boundary and the area not needed would be handed back to the owners placated them.[384]

A year passed before the Waharoa Tribal Committee sought an urgent meeting with Maori Affairs.[385] Further correspondence[386] prompted Mr Royal to approach Mr Herewini, a Maori Welfare Officer in Hamilton. He was directed to make "a special effort" to obtain a written report from the Hamilton Public Works engineer.[387] Within a week the Ministry of Works asked the Land Court for any objections to the taking of Maori land for the airport,[388] but there is no information on whether the same request was

[382]Notes of the meeting held at Waharoa, 28/1/48 and letter, Kaukau Warena to Minister of Maori Affairs (MMA), 16/8/48 in which he stressed that the use of the airfield was for the duration of the war.
[383]Telegram, J H Wharawhara, Secretary, Waharoa Tribal Committee (WTC) to P. Fraser MNA, 2/3/49.
[384]Letter, Maori Affairs Department (MA) to WTC, 15/6/49.
[385]Telegram, WTC to T P Ropiha MA, 26/7/50.
[386]Letter, WTC to Rangi Royal, MA, 22/1/51.
[387]Telephone call, R Royal to W. Herewini, 12/2/51and memo, 23/2/51.
[388]Memo, Minister of Works (MW) to MA, 27/2/51.

forwarded to the owners. It would appear not, judging by the next letter (mentioned below) from the Tribal Committee.

Finally a notice of intention to take the land, dated 28 June 1951, was published in the NZ Gazette 1951[389] nearly nine years after the initial entry on to the land and a total of 115a 3r 2.1p was subsequently taken under the compulsory provisions of the Public Works Act[390] on 23 October 1951.[391] But that was not the end of the affair and once again the Tribal Committee approached Maori Affairs complaining strongly about the fact that the matter had still not been resolved for the owners, that is the surplus land had not been returned as promised at the 1948 meeting:

> We were promised at a meeting at our Pah [sic] in February, 1948 that a settlement one way or another would take place almost immediately and we were to receive some land and some money if the Aerodrome was to be retained. Four years have lapsed and we now see in the daily papers that the 'drome is to be retained and that the land promised to our principle owners may also be taken.
>
> We consider it was at least the Government's duty to show us some consideration in the matter and if some responsible person is sent here within the next fourteen days to meet us and discuss this matter, we will refrain from taking the action that the position warrants.[392]

A meeting was held on 5 October 1952 and some tentative arrangement reached for the allocation of land offered by the Crown in part compensation. In 1953 severances totalling 12a 17r 1p were taken "for the use, convenience or enjoyment of an aerodrome".[393] The severed areas

[389]*NZ Gazette* (1951) 913.
[390]Memo, C J W Parsons, District Engineer Ministry of Works (MOW) to MA, 19/2/51.
[391]Supra n 389 at 1518.
[392]Letter, WTC to MMA, 15/9/52.
[393]*NZ Gazette* (1953) 995.

were handed back as part of the compensation package.[394] Finally on 23 March and 2 June 1954 sittings in the Maori Land Court at Ngaruawahia confirmed the compensation arrangements of either a monetary payment or payment plus an exchange of land in Wright's farm.

Nearly eleven and a half years had passed since the initial entry on to the land and eight and a half years from the time the Air Ministry and Public Works Departments informed Maori Affairs, the Land Court and the Hon. E. Tirikatene that the land at Waharoa was not required for military or civilian purposes. During this time the owners, some of whom had used the land solely for their livelihood, were not only denied access to their land but were also, apart from receiving rent, denied compensation with which to pursue that livelihood. When compensation was finally paid out it was nearly twelve years after the initial entry on to the land, but it was based on the Government valuations made in 1942 and no account for inflation over that time was made.

The Airport Today[395]

The Matamata Airfield Reserve, classified in part as a local purpose reserve (aerodrome), is as an operational airfield located approximately six kilometres north of the township of Waharoa on State Highway 27. It lies in the plains between the Kaimai Ranges and the Cambridge hills and is surrounded by rural land uses and a small settlement associated with Raungaiti Marae. It is situated in Blocks IX and XIII, Wairere Survey District, South Auckland Land District. The legal description of the airport land is in Appendix 4.

[394]The Ministry of Works and Development noted in a letter dated 5 November 1987 that two areas of land were still shown as vested in the owners of Matamata North A Block (6a 0r 14.3p) and Matamata North G2 and H Blocks (6a 0r 2.8p) and would be excluded from the Maori title when the necessary corrections were done: Letter, reference 44/6/0, from BG Parker, District Commissioner of Works (Policy Division Hamilton), to John Luxton, MP.

One of the first users of the airfield was the Piako Aero Club. It had a large hangar near the clubhouse on the aerodrome, which it enlarged in 1955 after the first one was destroyed in a storm in 1954. Light plane and sailplane operations increased and, with the formation of the Matamata Soaring Centre, so did the number of gliders using the field. An aerial top-dressing dump was also sited there.

In May 1961 counties and boroughs within a twenty-mile radius of the aerodrome were invited to set up an authority to maintain, develop and regulate the use of the aerodrome but the meeting made little progress. Several organisations pulled out once Hamilton Airport came into full commercial use and the aerodrome reverted to light aircraft and the administration of the airfield was left to the Piako County Council.[396]

On 6 July 1965, following the signing of a deed by the Piako County Council and the Minister of Civil Aviation, the Council took over the management, administration, control and maintenance of the aerodrome. The area (115a 3r 2.1p) was declared Crown land[397] and later set aside as a reserve for aerodrome purposes by the Minister of Lands and vested in the Chairman, Councillors and inhabitants of Piako County.[398]

Further acquisitions of land were made by Piako County Council in Matamata E and F Blocks (12a 0.6p[399] and 3a 1r 7.4p[400]) to extend the runway. Compensation for these transactions was the concern of the County. Control of the airfield passed to the Matamata-Piako District Council following the amalgamation of the Piako and Matamata County Councils with the Matamata, Te Aroha and Morrinsville Borough Councils in 1989.

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[395]Most of the following information is from the Matamata-Piako District Council *Draft Matamata Aerodrome Reserve Management Plan*, 09/02/00.
[396]Supra n 356 at 112.
[397]*NZ Gazette* (1965) 1556.
[398]Ibid, 2003.
[399]Ibid.
[400]Ibid, (1968) 136.

The airfield has two runways that allow for flying independent of wind direction (compass directions 04-22 and 10-28) and two vectors built to accommodate heavy aircraft. These have drainage tiles laid to ensure flying throughout the rainy winter period. The reserve has fifteen private hangars for storage of aircraft and related equipment, as well as separate clubhouse facilities for each of the following clubs: gliding (Matamata Soaring Centre), parachuting (Skydive Waikato) and aircraft (Matamata Aero Club). It also has an on-site caretaker's house,[401] accommodation blocks, camping sites with associated facilities and a playground. Part of the airfield land is farmed and the runways are used in rotation for the growing and harvesting of silage on an annual basis.

The airfield is a significant centre for recreational flying and is a nationally and internationally recognised site for gliding. It is regularly used for aviation activities such as power flying, gliding, micro-lights, parachuting, hang-gliding and model aeroplanes. It is also used for some military and cross-country flying training, agricultural top-dressing and helicopter operations. It hosts a number of special events during the year, including the New Zealand national gliding championship every second year.

The airport today is a public airport from the perception that members of the public can go on to the site, but it is not a commercial airport. It is in a sense a private field, the home of private aviation sports clubs who own their equipment and storage facilities and pay the Matamata-Piako District Council for the right to use the airfield. The activities that take place at the airfield are reasonably expensive sports open to the minority of people who can afford to avail themselves of these types of activities. For the most part the people from whom the land was taken are not in the financial position to participate in the activities that utilise the land that at one time belonged to them.

[401]This is the farmhouse taken from Wright's land: M V Bell, Deputy Registrar Maori Land Court, Auckland: "Report Re Waharoa Aerodrome and Maori Lands Required

Many of the Maori of the area who live in the township of Waharoa and the Pa are in the lower socio-economic strata of New Zealand society. The 1996 census reveals that Maori are 12.8% of the population in the Matamata-Piako District Council. 53.9% of all people over 15 years of age in the district have an annual income of less than $20,000 and 14.8% of the people receive a government benefit of one type or another.[402] From a New Zealand-wide perspective the real median income for Maori in 1996 was $12,900[403] while for Ngati Haua, the main Iwi that lives in that area, the median income was $10,813.[404] Statistics such as these make a complete farce of the observations of Peter Fraser, the Minister of Maori Affairs at the time of the 'taking':

> I am afraid that it is not possible to concede to your wish to have the aerodrome returned to you – in fact with the increase in air travel, it is expected that the Maoris [sic] will benefit from the proximity to the aerodrome.[405]

Therefore" (undated) following meeting 28/1/48.

[402]Statistics New Zealand Te Tari Tatau *Census 96: What the Census Told Us - Matamata-Piako District* (Wellington: Statistics New Zealand Te Tari Tatau). No information was found to link ethnicity of the area to income in the area.

[403]Te Puni Kokiri *Maori Personal Income: Fact Sheet 7* (Wellington: Te Puni Kokiri, Monitoring and Evaluation Branch, June 2000).

[404]Statistics New Zealand Te Tari Tatau *Census 96: Census of Population and Dwellings – Iwi Vol 2* (Wellington: Statistics New Zealand Te Tari Tatau, January 1998), 413.

[405]Letter, MMA to Kaukau Warena, 16/10/48.

PART 3 – BREACHES OF THE PRINCIPLES OF THE TREATY OF WAITANGI

The issues surrounding the taking of the airport land at Waharoa involve important principles of the Treaty. These are the rights of the Crown to make laws and to take land in the public interest (kawanatanga) against the guarantee of protection of Maori ownership of land (rangatiratanga). It raises the question of whether the Crown can ever justify using the powers of governance given to it in Article 1 in a way that is inconsistent with the rights guaranteed to Maori in Article 2.

A breach of the Treaty principles is a breach of the Treaty.[406] The Public Works Act 1928, indeed any 'public works' Act, and conduct of the Crown in taking land under the Act must be measured against the Treaty principles in order to establish a breach of the principles. In order to establish a breach of the principles, and hence the Treaty itself, the following questions need to be asked and applied to the circumstances surrounding the 'taking' of Maori land at Waharoa; in fact to any 'taking' of Maori land under a Public Works Act.

A Breach?

1. Was the 'taking' justified by exceptional circumstances and as a last resort in the national interest?

2. Were there alternatives to (compulsory) 'taking'?

3. Were the alternatives fully considered?

4. Were Maori properly consulted and fully informed, on both the proposed taking and the alternatives available?

5. Did the Crown treat Maori as a partner on equal terms?

6. Was land retained for longer than necessary?

7. Did the Crown fail to protect *wahi tapu*, such as burial sites?

Repercussions of the Breach

1. What losses have been suffered as a result of the 'taking', particularly if the 'taking' was not justified by exceptional circumstances?

2. If an alternative to outright 'taking' had been effected would the owners have been entitled to rents, licence fees, royalties or other returns while retaining ownership of their land?

3. Where the reason for 'taking' the land no longer exists, were the owners denied access to their land for longer than necessary?

Firstly the rationale behind Public Works 'taking' of Maori land, especially compulsory 'taking', will be evaluated against the principles of the Treaty of Waitangi to establish if the Acts themselves are in breach of the Treaty and what, if any, compromises are available to both partners of the Treaty. The second part will examine in detail the conduct of the Crown, and its various agencies dealing with the land at Waharoa and the owners of the land, to determine if they measured up to, or fell short of, the principles of the Treaty of Waitangi. In particular, their performance will be assessed against the following principles: the duty to consult, the duty to protect the interests of the Maori owners and the fiduciary obligation to act with utmost good faith. This is not to say that the rest of the principles of the Treaty, that is the right of self-regulation, the right of redress and the right of options, are not relevant to what happened at Waharoa. They are. They

[406] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 693.

permeate through the distinguished principles and will be appraised where they are applicable.

TREATY OF WAITANGI V PUBLIC WORKS ACT - A HIERARCHY OF INTERESTS

> *You see we have always been banging into the Pakeha law, always there holding us back or taking things from us, never giving us a say...like with the Treaty for instance...one minute they say the Treaty is nothing, the next that it's something but it gives us nothing.*
> *Ere Ruru (1987)*[407]

The Treaty and Taking of Land for Public Works

The English text could well be understood to include the right of the Crown to acquire land 'for all citizens' and could be extended to allow for compulsory acquisition of necessary public rights of way, including aerodromes. In the *Ngai Tahu Sea Fisheries Report 1992* the Waitangi Tribunal placed great weight on the principle that cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga. This is pivotal to the bargain,[408] reflecting the notion of reciprocity. The Crown received the right to govern in exchange for the guarantee that Maori could retain full authority and control over their lands for as long as they wished to hold them. The taking of land for public works therefore has to be balanced against the guarantees in Article 2 of the "full exclusive and undisturbed possession of lands", and the

[407]Te Whakamarama (1990) 2 MLB, 7.
[408] Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report 1992* 269.

Crown reservation of the right to purchase such land that Maori wished to sell.

The Hierarchy Between the Treaty and the Public Works Acts

The primary question of whether the Public Works Act itself is a breach of the Treaty was addressed, although not fully discussed, by the Waitangi Tribunal in the *Ngai Tahu Ancillary Claims Report*. The Tribunal however noted that there is no provision in the Treaty enabling the Crown to dispossess Maori of any of their lands, forests or other property without their consent. In the *Turangi Township Report*, the Tribunal found that the Public Works Act 1928 was fundamentally inconsistent with the basic guarantee given that Maori could keep their land until they wished to sell it at a price agreed with the Crown.

It is not suggested that the Crown can never *use* Maori land, if needed, for public purposes or public benefit. The Privy Council, referring to the Treaty of Waitangi Act and the State-Owned Enterprises Act, made the following reservation on the principles of the Treaty of Waitangi:

> In their Lordships' opinion the "principles" are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty. ...Foremost among those "principles" are the obligations which the Crown undertook of protecting and preserving Maori property...in return for being recognised as the legitimate government of the whole nation by Maori. The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown. This emphasises the solemn nature of the Crown's obligation. It does not however mean that the obligation is absolute and

> unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Maori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual co-operation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time...[409]

The Privy Council judgment is an affirmation that the Crown has all the authority needed to legislate in terms of Public Works Acts and flows from the corollary that the Crown's authority to govern is recognised within the context of the Treaty. The Act allows the taking of land for public works. However, it does not mean that because the Crown has authority to govern under the Treaty, such authority is unqualified. On the contrary it is limited by, and subject to, the provisions of Article 2.

The Waitangi Tribunal has attempted in its discussions to balance the right of the Crown in Article 1 to exercise kawanatanga or governorship with the guarantee in Article 2 to protect Maori rangatiratanga. In the *Orakei Claim* the Tribunal saw the Crown's exercise of its sovereignty in taking land for defence purposes was intended to secure peace and good order for the nation and thus was a benefit for all citizens. Therefore its actions were not inconsistent with the principles of the Treaty. However, the Tribunal did concede that this was an arguable point, as it went on to say:

> For reasons that follow we do not find it necessary to decide this issue. It may be that, should a similar need arise today, having regard to Maori sensibilities to the

[409] *New Zealand Maori Council v Attorney-General* (PC) [1994] 1 NZLR 513, 517.

> involuntary loss of their land, the Crown might seek to lease rather than acquire ownership of the land. Any such lease could be for the estimated time of the works with a right of renewal for the full term of the works relating to defence.[410]

In the *Te Maunga Railways Land Report*, the Tribunal observed that there may be circumstances when the compulsory taking of land for a public purpose (kawanatanga) constitutes a more significant public interest for both Maori and Pakeha than the guarantee to Maori of tino rangatiratanga,[411] but added:

> We do not suggest that Maori land should never be *used* for public purposes, but we emphasise that the compulsory acquisition of Maori land by the Crown cuts right across the guarantee of tino rangatiratanga in Article 2 of the Treaty of Waitangi. [412]

This observation raises a counter argument. It is contended that there is no instance more significant in the public interest, for both Maori and Pakeha, than the guarantee to Maori of tino rangatiratanga. There is little left of the Treaty guarantee if the government of the day can unilaterally set it aside on the basis of expediency.

However, it is reluctantly conceded there may be instances where the Crown's kawanatanga and interest in taking land may sometimes legitimately outweigh rangatiratanga interests in retaining the land. When these circumstances arise it is incumbent on the Crown to show that the interest serves the *very highest* public good *and* is one that Maori landowners also identify as such. This test is similar to that proposed by the Tribunal in the *Turangi Township Report*.[413]

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[410]Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* 166.
[411]Waitangi Tribunal, *Te Maunga Railways Land Report* 71.
[412]Ibid, 81. Emphasis added.
[413]Waitangi Tribunal, *Turangi Township Report* 285.

Summary

It is contended that every time the Crown *takes* Maori land under the Public Works Act it is in breach of the principles of the Treaty because its powers of 'kawanatanga' under the Act override the guarantee of 'tino rangatiratanga' in Article 2. By removing the land from their possession Maori are denied the right of self-regulation and the right of the option to keep the title to their land. The only justification for the Crown to exercise its power to govern in a manner inconsistent with the fundamental rights guaranteed to Maori in Article 2, should be where the taking is in 'exceptional circumstances' and 'as a last resort in the national interest'.

Taking of Land for Public Works and the Principles of the Treaty

In the exercise of power given under any of the Public Works Acts, which in this case is the Public Works Act 1928, the principle of partnership requires that the Crown's conduct, in its dealings with Maori landowners and reciprocally, Maori with the Crown, is honest, reasonable, faithful and generally above reproach. As part the obligation to deal in 'good faith' the Crown is required to ensure that Maori are adequately notified, fully consulted about the proposal and fully informed of alternatives to the proposal whenever the Crown wants to use Maori land.

The consequence of the principle to actively protect Maori Treaty rights is to require exceptional circumstances to justify a 'taking', compulsory or non-compulsory. It puts the onus on the Crown to pursue any practical alternatives to acquisition, such as mutually acceptable leaseholds. Further, it is submitted, this principle requires the Crown, when using Maori land for public purposes, to share with Maori any financial benefit arising from subsequent use. In essence, Article 2 of the Treaty of Waitangi requires protection of Maori land by the Crown, yet the Public Works Act 1928, in taking land out of Maori ownership, did just the opposite.

Maori have a choice under Article 2 whether to keep their land or sell it. The compulsory provisions of the Public Works Act 1928 used in the taking of the land at Waharoa, however, did not allow the owners to make that choice. Rather the Crown informed them that it was buying their land, so even though they vehemently expressed the desire to retain their land they were forced to sell it. Tribal control over their resources, including land, and the right to make decisions to help themselves is the idea behind the principle of self-regulation, yet in order to exercise control and make decisions, there must *be* 'something' to control and make decisions about.

The Public Works Act, used to take Maori land at Waharoa, diminished the amount of control and decision-making available by not only alienating land from the possession of the tangata whenua but also by removing their right to make decisions concerning the compulsory 'taking' of their land. If it is found that the Public Works Act 1928 breached Treaty principles then the Crown must redress the wrong. Redress may include giving back the land, leasing it or seeking some other 'mutually agreeable' solution.

Summary

The confirmation of rangatiratanga qualifies and limits the right of the Crown to govern to the extent that, in order to avoid a breach of the Treaty or Treaty principles, it must exercise its powers always with that guarantee in mind.

COMPULSORY ACQUISITION OF MAORI LAND

The compulsory acquisition of the freehold title is a contentious issue for any landholder but more so for Maori because a stake in Maori land was, and still is, culturally, politically and socially important in Maori society as a source of turangawaewae or 'grounding' tied to ancestral identity.

The personal or absolute monarchy, as exercised by the rulers of England until John was forced to sign the Magna Carta, has evolved into a parliamentary monarchy, that is the 'Crown in Parliament'. Parliament regulates the freeholders relationship with land and the Crown's right of eminent domain; that is that all land in New Zealand is held of the Crown. It is from the assumption of eminent domain following the signing of the Treaty in 1840 that the Crown derives the power to compulsorily acquire land. It is a draconian, but necessary, power in a complex collective society. However the power is to be strictly construed and must be exercised in good faith and even-handedly:

> It would be unrealistic however, to argue that the compulsory acquisition of land is a power which no government should possess. The use to which the land is put is of vital importance to the whole community. Discussion on the subject must assume a basic acceptance of the proposition that land in private ownership may be properly required for public purposes from time to time.[414]

Ranganui Walker, unashamedly blunt, is not so generous, describing the Crown as

> …cast in the same predatory role as the land robbers of the last century. But its major advantage is its ability to cloak its morally

[414]Barker, R I "Private Right vs Public Interest - compulsory acquisition and compensation under Public Works Act 1928" (1969) 45 NZLJ 251, 252.

> dubious claims to Maori land with the respectability of legal validation[415]

The Public Works Act 1928 permitted the Crown to acquire land compulsorily without direct consultation with the Maori landowners. This contravenes the Treaty duty of the Crown to act in good faith and consult with the Treaty partner in respect of matters affecting them.

The whole area of public works land 'taking' requires some care because the legislation also allowed purchase by willing agreement This means that it can not always be assumed that all 'takings' were compulsory. These provisions could also be used, even if the owner was willing, simply to overcome any possible problems with land title.

On the other hand it can not always be assumed either that, where land was taken by agreement, the owner was truly 'willing' as the Crown had considerable powers to pressure an owner to 'agree' to the Crown acquiring the land. These included the threat of resorting to compulsory provisions if negotiation failed. Experienced lawyers, such as Barker,[416] have shown that s 32 agreements[417] were often heavily influenced by the perceived lack of real alternatives. When there was no right of objection for example, anything other than agreement was deemed pointless. It is significant that the Crown has recognised that Maori land gained by 'agreement' was often given under duress.[418]

Land taken from 'unwilling sellers' cuts right across the obligation of the Crown to protect the interests of Maori explicitly stated in the second article of the Treaty:

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[415]Walker, R J *Nga Tau Tohetohe: Years of Anger* 62.
[416]Supra n 414.
[417]Under s 32 of the Public Works Act 1928, the Minister of Works, or a local authority, could enter into an agreement with the landowner to purchase land or any interest in land, leaving the compensation to be determined by further agreement or by the Court.
[418]Ward, Alan *Waitangi Tribunal Rangahaua Whanui Series: National Overview* (Volume 1) 173.

> confirms and guarantees…the full exclusive and undisturbed possession of their lands…which they may collectively or individually possess as long as it is their wish and desire to retain the same in their possession...[419]

In the Maori version the Crown guaranteed (ka wakarite ka wakaae) Maori tino rangatiratanga or full authority over their lands until such time as they 'chose' to dispose of them at an agreed price.

The Crown proposed to take the land at Waharoa for an airport under the compulsory provisions of the Public Works Act and later ask the Land Court to assess compensation, repartition titles and allot severances to the owners.[420] The 'taking' did not involve 'willing' sellers. The Maori owners plainly told the Crown from the time that the airfield ceased to be used as a military field in 1944 right up to the issue of the Crown proclamation in 1951, and even up to the one issued in 1953, that they wanted their land back and did not want to sell it.

Alternatives to Taking Freehold Title

The policy of taking Maori land for the establishment of public works, and in particular the policy of taking such land without first considering the alternatives prejudicially affected the owners of the land at Waharoa. On many issues the officials and politicians who constituted the Crown in action had policy options available to them. The Crown, when it decides it needs land for a public work, exercises the discretion whether to take the land by proclamation or negotiated purchase but there are several other options it can consider, such as lease, easement or licence. Ultimately, of course, it can resolve not to take the land at all but find another site.

[419]Treaty of Waitangi Act 1975, First Schedule.
[420]MA I 19/1/610: Letter from Maori Affairs to the Waharoa Tribal Committee, 1/3/51.

The Judicial Committee of the Privy Council in *New Zealand Maori Council v Attorney-General*[421] spoke of the requirement for "especially vigorous action" for the protection of vulnerable taonga. Consequently, where a taking is necessary (kawanatanga permits the Crown to seek the *use* of the land for the public benefit), a more consultative approach to negotiation is required which acknowledges Maori rangatiratanga, and does not extinguish Maori title.

An alternative to acquisition of freehold title is the negotiation of a leasehold for public works. In 1982 the Government accepted a long-term lease for the Ohaaki geothermal power project at Taupo. Provisions for such arrangements already existed in the Electricity Act 1968 (s 11(2)(j)) in which the Minister of Electricity has the power to:

> Hold, manage, purchase, exchange, take on lease, or hire, acquire, or otherwise obtain any property whatsoever which in the opinion of the Minister is necessary for the exercise of his [sic] functions under this Act: Provided that, in the case of land or any estate or interest in land, acquisition shall be undertaken on behalf of the Minister of Electricity by the Minister of Works under the provisions of the Public Works Act 1928.

There is no indication, either from the Departments concerned, or the owners, that any practical alternative other than purchasing the land outright was considered or exhausted.

The Crown was already leasing the land and had been from 1942 when it first entered the land. This arrangement could have continued on a partnership basis between the Crown and the Maori owners. A Board, with representatives from both parties, could have been set up to manage the airfield. This would have served the Government's interest and those of the

[421]Supra n 409 at 517.

local aero clubs and authorities who wanted an airport in the area and served the owners interests by keeping their ‘rangatiratanga’ intact and, along with it, their right to self-regulation. The fact that the airport users pay for the privilege to use the airfield means it is bringing in an income and is therefore not a drain on the Government purse as is the case for other public works such as roading. It is appreciated that this solution will not be appropriate for many public works ‘takings’, but it was, and still is, appropriate in this case.

Summary

While it is conceded there may be circumstances when the compulsory taking of land for a public purpose (kawanatanga) constitutes a more significant public interest for both Maori and Pakeha than the guarantee to Maori of tino rangatiratanga it is usually possible to negotiate a mutually acceptable solution.

The fiduciary obligation of the Crown, the active protection of Maori rangatiratanga, and the duty of reasonableness on both sides, suggests a negotiated approach to the *use* of Maori land for public purposes, one that acknowledges Maori rangatiratanga and does not extinguish Maori freehold title. This would go some way towards reconciling the apparent conflict between the Treaty principles of kawanatanga and rangatiratanga in Articles 1 and 2.

BREACH OF THE DUTY TO CONSULT

Throughout the protracted bargaining between the various Departments of the Crown involved in the taking of the land for Waharoa Aerodrome, there are several instances that show a lack of, in the words of Richardson J, "extensive consultation and co-operation" with the Maori owners or, indeed, due regard for their interests and concerns.

Initial 'Taking' in 1942[422]

In the first item of correspondence concerning the aerodrome, Tawara Morewa writes:

> We have approached the overseer in charge of the works and have asked him to discontinue his operations on this land and the surveying of it. He replied by saying that after the work was completed he would send his report to the Government when a decision would be arrived at. In consequence of his reply we are forwarding you our petition stating our objection.
>
> We await your reply and would be much obliged if you would treat this matter as urgent.
>
> Good health to you all from
> The Committee Marae Of Raungaiti Paa
> Under the special authority of Kingi Koroki and Wiremu Tamehana Tarapipipi te Waharoa.
> (*Signed*) Tawara Morewa[423]

[422]Unless otherwise specified, references are to the Maori Affairs file MA 1 19/1/610 Vol 1.

[423]English translation of letter to the Prime Minister (PM) and Minister of Native Affairs (MNA), 17/6/42.

In response Mr Carter, the Land Purchase Officer of the Public Works Department, accompanied by Judge Beechey of the Native Land Court, arranged to meet the owners informally on 7 August 1942 at Raungaiti Marae, Waharoa, to discuss any difficulties connected with the acquisition of the land.

In his report Beechey J noted that the owners were "in the dark" about the Government's proposals. They had not received any indication about the temporary or permanent requirement for the land from the government authorities or what was to be done about the removal of buildings from the site. At the conclusion of the meeting, according to Beechey J, the owners appeared to be satisfied that the authorities should "use their lands as a war measure" and *"appeared to recognise"* [424] that if the Government wanted to establish a permanent aerodrome then their lands would be taken.

Beechey J's choice of words is interesting: he writes *use* their lands and not *take* their lands. This corresponds with Maori concepts of land usage and if "use" the land was the understanding, then the Maori owners would have expected the return of the land when the war was over.

He also noted there was "not so much a feeling of excitement among the owners as I expected" but rather one of "uncertainty as to what was proposed to be done".[425] At the end of the report he criticised the Department's handling of the situation:

> It certainly seemed to me that insufficient attention had been paid to the Natives' love for their ancestral lands. I would suggest for the consideration of the authorities, that on any future occasion when it is desired to carry out a public work on Native land, as soon as the project is decided upon, some responsible officer, together with the local

[424]Report of E M Beechey to the Registrar, (Maori) Land Court (LC), 10/8/42. Emphasis added.
[425]Ibid.

> Native Department Supervisor, should call the Native Owners together and explain exactly what is about to happen, and their co-operation sought. If this is done, I feel sure that there will be no difficulty in coming to any arrangement desired with Native owners. My experience of them has been that when they understand fully what is desired, they are always ready and willing to assist. [426]

It appears that conduct such as this by Crown officials was not isolated. The same theme is echoed concerning the authorities' action at Raglan. In similar vein to Beechey J, Bisson J in the 1980 *Raglan Golf Course*[427] case was also highly captious of the Crown's conduct in its dealings with Maori owners. In his review of the events surrounding the taking of the Raglan land, he mentioned a telegram sent to the Hon. R Semple, Minister of Public Works by the Reverend T Manihera on 19 November 1940. He also cited the follow-up letter to the Minister of Native Affairs, dated 25 November 1940, protesting on behalf of Raglan Maori at the surveying and pegging of their land for an emergency landing ground without consultation:

> ...I am writing to say that our Homestead properties at our Koura Reserve No 2A has been surveyed and pegged by workers under the engagement of the Public Works, in planning out for a Land Ground for planes - without our permission. We are asking you to make immediate inquiries regarding this surveying. Why is it they can do such things on Maori Lands without asking permission. We cannot help looking back to the Commission that was set up, to look into the matter of Confiscation of the Lands - as to this the pakeha admitted that he [sic] was in the wrong. Today as it seems, the same thing has occurred... If it is to be an Emergency Ground for planes for the duration of the

[426]Ibid.
[427]*Raglan Golf Course Inc v Raglan County Council*, unreported, High Court, Hamilton, 16 July 1980 (A285-790). Bisson J.

> war, surely we would get to some agreement as long as we can see who is in charge.[428]

In his judgment, Bisson J said that the Crown showed thoughtless and tactless conduct by entering on to privately owned land, even if it had the right to do so, for surveying and pegging purposes without at least first approaching the owners. He commented that conduct of this kind by those in authority contributed to the feeling of resentment under which some Maori still labour today. Secondly he said it showed a spirit of co-operation on the part of the Maori owners to assist in the war effort by reaching some agreement regarding the use of their land as an emergency field. Lastly the letter indicated that their approach to the requirement of their land, in similar vein to the owners of Waharoa, was "for the duration of the war".[429]

Despite Beechey J's comment, H. G. R. Mason, Under-secretary of the Native Department, in his reply to Tawara Morewa's letter curiously states that the matter had been investigated and that

> [T]he Judge's report has been submitted to me and from it I see from the that *all* aspects of this matter have been *fully* explained to you and that your misgivings have been amicably allayed.[430] [emphasis added]

The uncertainty that Beechey J noted was not confined to the owners. Mr Cotter, an officer of the Maori Land Court, also wanted to know if the land went back to the owners at the end of the war or if it had been taken under the Public Works Act.[431] Already confusion over the agreed terms of the August meeting is apparent, that is whether the land was to be rented or

[428]Ibid, 7.
[429]Ibid, 7 & 8.
[430]Letter from H G R Mason, MNA to Tawara Morewa, 27/8/42. A handwritten footnote, dated 31/8/42, on that file letter states: "Rang Mr Jones, action complete. File."
[431]Memos, MNA to Native Department (ND), 9/11/42 and ND to Public Works Department (PWD), 16/11/42.

whether interest on compensation owed was to be paid, for the reply from the Public Works Department states:

> …the proposal with regard to the Native land included in the above Aerodrome is to *rent* the land for the duration of the war and take it after the war under the Public Works Act *unless it is then found not to be required permanently*.[432]

The Native Department remarked that the 1942 meeting was an *informal* one at which proposals were discussed[433] and, while there was never any settlement and final arrangement made with the owners concerning either payment of rent during the occupation of the land or the terms of the occupation,[434] it implies there was an assurance given to return the land.[435] Mr Bell, Registrar of the Land Court, later mentions that "in addition to other points covered, a basis of rental was determined or *tacitly agreed* upon…"[436] What other arrangements were tacitly agreed on?

The Public Works Department, however, considered the 1942 meeting as a "special sitting of the Native Land Court"[437] but according to Beechey J:

> There was nothing really for the Court to do as there was no application of any sort, but for the purpose of *assisting*, I had a meeting with the owners at the meeting house.[438]

This fits the fact that, in a memo dated 18 October 1944 to the Hon E. T. Tirikatene, the Minister of Works advised that his Department's Land

[432]Memo, PWD to ND, 30/11/42. Emphasis added.
[433]Memo, ND to Air Department (AD), 31/7/46. Emphasis added.
[434]Memo, ND to PWD, 1/ 6/44; information from M.R. Findlay.
[435]Memo, ND to AD, 31/7/46.
[436]M V Bell, Deputy Registrar Maori Land Court, Auckland: undated "Report Re Waharoa Aerodrome and Maori Lands Required Therefore:- Following Meeting held with those affected on 28th January 1948".
[437]Memo, PWD to ND, 6/3/45.
[438]Supra n 424. Emphasis added

Purchase Officer "had only *recently* proposed to the Native Land Court that a rental…be agreed upon…".[439]

After the War

Following the decision of 21 September 1944, reiterated by the Minister of Native Affairs on 18 October, that "…Waharoa airfield will not be required for Air Force or for civil purposes after the war…", the Public Works Department Land Purchase Officer at Auckland proposed to the Auckland Native Land Court that rent be paid for the land, based on 5% per annum of valuations made by the Hamilton District Valuer in 1942. Mr Cotter was sent to discuss, and gain, the agreement of the Maori owners to the proposal, after which the Native Department would arrange apportionment and distribution of the rental.[440]

In December 1944, the Maori Land Court advised the Ministry of Native Affairs that, in accordance with the arrangement, the owners had agreed to the proposal.[441] The Auckland office of the Public Works Department informed the Court that it had a written agreement from the owners.[442] It is not clear whether the Department was referring to the agreement reached at the meeting in 1942 or the one agreed to in 1944 but from other information[443] it appears to be the latter but the fact that the owners never used a written agreement in their later discussions with the various government agencies tends to suggest that one did not exist.

[439]Memo, ND to Hon E T Tirikatene, 18/10/44. Emphasis added.
[440]Memo, LC to ND, 1/3/45. Rent, amounting to £614/16/6 for 2 years 7 months at the rate of £236 per annum, was distributed to the owners by the Waikato-Maniapoto Land Board. Memo, PWD to ND, 26/7/46: The individual block payments were: 1B1- £5.10.0, 1B2 - £0.10.0, 1B3 - £135.0.0, 2G1- £61.5.0, 2G2 - £14.0.0, 2H1- £1.5.0, 2H2 - £18.10.0.
[441]Memo, LC to ND, 15/12/44.
[442]Memo from ND to PWD, 26/6/46.
[443]Memo, LC to ND, 15/12/44: the Registrar mentions that one of the owners called at the office and from what was said he gathered that an agreement had been reached; memo, ND to PWD, 26/6/46;

The Maori Land Court later stated that there was no written agreement between the owners and the Public Works Department.[444] The Air Department confirmed that it did not hold a written agreement although it did concede that it had a "tenancy registered on its books" for £236 per annum payable to the Waikato and Maniapoto Maori Land Board on behalf of the owners.[445] Whichever one the Department is referring to and despite internal enquiries to all the departments involved,[446]it appears that *if* a written record existed, it was probably lost as early as 1945 so the exact terms of the agreement reached are not known.

Regardless of the existence or non-existence of a formal written agreement, the owners had been told at the original meeting that rent would be paid only if the aerodrome was not permanently required. They must have agreed to the rental proposal on the assurance contained in the memorandum from the Minister of Public Works to the Ministry of Native Affairs: "It has now been decided that the Waharoa Airfield will not be required for Air Force or for civil purposes after the war…".[447] They would also have placed reliance in the Crown to honour the terms discussed at the 1942 meeting, that is to restore and return the land.

Behind Closed Doors

After the Civil Aviation Branch decided that retaining the land was a preferred option[448] a meeting was held in Wellington on 7 November 1946.[449] Present at that meeting were:

[444]Memo, LC to ND, 18/10/49.
[445]Letter, Air Department, Civil Aviation Branch (AD-CA) to ND, 9/9/46.
[446]Memos, ND to PWD, 26/6/46 and 31/7/46 and LC to ND, 27/9/46 asking for a copy of agreement, but none was forthcoming.
[447]Memo, Minister of Public Works (MPW) to MNA, 11/10/44; reiterated in a letter from the ND to LC, 11/12/44.
[448]Letter, CA to PWD, 7/3/46.
[449]Notes on Future of Waharoa Airport, 7/11/46.

J. Buckridge - Acting Controller of Civil Aviation,
Mr Blane - Department of Native Affairs,
Mr Haskell - Aerodrome Engineer, PWD,
Mr Smart - PWD Liason Engineer to the Air Department,
F. W. Petre

and

E. D. White
T. Davidson
H. E. Schofield
W. L. Brown
- representing the Matamata County and Borough Councils, the Matamata Chamber of Commerce and R. S. A., the Putaruru Town Board, Piako County Council, Te Aroha Borough Council and the Piako Federated Aero Clubs.

The meeting was described as the "Future of Waharoa Airport", but it is interesting to note that not one of the Maori owners was present at this discussion and it begs the question of whether they were even invited to attend. Decisions about the future of their land were discussed without any input from them. They were effectively denied a forum in which to communicate their concerns or voice alternative opinions for consideration to the authorities. This is further exacerbated by the fact that the proposal when prepared, was to be sent *not to the owners,* but to the local interim airport committee for discussion.

A Fait Accompli

After the January 1948 decision by the Civil Aviation Committee to retain Waharoa as a civilian airport, a formal meeting with the owners was called

on 28 January 1948.[450] Present at that meeting were: M.V. Bell, Deputy Registrar Maori Land Court, A. N. Harris, Department of Maori Affairs, W. M. Gumbley, Land Purchase Officer Public Works Department, C. R. Purdy, Public Works Department, W. E. Herewini, Maori Welfare Officer and interpreter and L. E. Welham, Solictor representing the Penetito family and the Kemp (Keepa) Estate. The owners in attendance were: Warena Kaukau, Wetini Taiportitu Wirihana, Haimona Wharawhara,[451] Tawara Morewa,[452] Te Pea Kaukau, Timi Panapa Kaukau, Parekino Wirihana, Pene Penetito,[453] Wahi Penetito, Turia Penetito[454] and Haare Wharemate.[455]

Although the meeting was described as a consultation, there was not, in Richardson J's words, "extensive consultation and co-operation" on the part of the Crown with the owners about the future of the airfield. A Ministry of Works official informed the owners that "the Government is definitely going to take the land" and the only discussion allowed would "be about compensation".[456] From the notes taken at the meeting it is clear that the owners wanted the original agreement honoured, pointing out that the land had important ancestral links and burial sites. They indicate too that they were unaware of the Government proposals now presented. In addition they maintain that, as the original purpose for which the land was 'taken' is no longer valid, it should be returned:

> Warena Kaukau: I object to the taking. Why I do not agree is that in 1942 Mr. Findlay and Mr. Gordon asked me whether I would be agreeable to hand over the land as a runway. I asked them why the land was required. They said that it was for Defence

[450]Notes of the meeting held at Waharoa, 28/1/48.
[451]Aka J H Wharawhara on behalf of his mother Parekino Wirihana, owner in 2H2.
[452]Owner of 1B1 and trustee for minors in the estate of Kura Patehau (Mrs Rangitawhia Keepa or Kemp), owner of 1A, died 4/9/42.
[453]Tustee for Wahi Penetito and Turia Penetito in the estate of Timiuha Penetito, deceased.
[454]Daughter of Timiuha Penetito.
[455]Adopted son of Timiuha Penetito.
[456]W M Gumbley, Notes of Meeting held at Waharoa, 28 January 1948.

purposes. I said I would agree as it was a good scheme for the simple reason that if the Germans came and overran the land, it would be of no use to me. That is why I agreed.

Tawara Morewa: I support Kaukau's views in the matter. I now put up argument in support of my objection. When the act was laid down for taking the land, we all realised that it would be useless if the Germans came. Therefore we all agreed. The arrangement was that at the end of the hostilities the land was to be returned. To-day I hear that the Government intends to take the land. In my opinion the original purpose for which the land was required does not now exist.

Haimona Wharawhara: I also object… I am in agreement with Warena Kaukau and Tawara Morewa. The land was taken for defence purposes and at the end of hostilities should be returned to owners. This arrangement for return was agreed to when the case was brought before Judge Beechey. It should be recognised that this land belongs to our forefathers. Our cemeteries also are here…. We did not wish to sell or lease our land but owing to the circumstances we agreed to the land being used as an aerodrome.

Mr Bell: You agreed to the land being taken for as long as it might be required?
Haimona Wharawhara: For the duration of the war.
Mr Bell: It appears then that you all agreed on the understanding that the land would be returned.

Wetini Taiporitu Wirihana: I am in sympathy with Warena Kaukau's disagreement and moreover, suggest that the topsoil which has been removed should be replaced. These new proposals are quite a surprise to me.

The owners' comments also show how they wanted to assist the Government by making their land available as an emergency field during the war, a co-operation the Government does not appear to appreciate judging from the manner in which they treated the owners. The owners always seemed to be the last to know what was going on and most of the time they were told what was to happen. In particular the lack of proper consultation processes did not allow the concerns of all the parties to be recognised and the exploration of any possible alternatives to the outright 'taking' of the land.

This was not the first time that the issue of the cemetery (urupa) had surfaced but the fact that Tawara Morewa in his 1942 letter, and now Haimona Wharawhara, raised the point, tends to suggest that the airfield may have partly encroached on the urupa. It is still in use at the present time and lies on the eastern boundary of the airfield. The Native Department brought this to the attention of the Public Works Department[457] but the Under-Secretary, in his reply, stated that from the plans he "was not aware of the position of any cemetery or old burial grounds".[458] Neither Department appeared to make any inquiry of local Maori to ascertain if the airfield would, or did, violate an urupa.

In order to protect burial grounds from looting and desecration it was common practice for Maori to have unmarked graves and allow the site to grow wild. For the same reason they were often reluctant to reveal these locations.[459] From a Pakeha point of view such a site would not be recognised or registered as a burial ground. This point is illustrated at the urupa to the south of the airport and just north of the town of Waharoa. A largish section of the urupa closest to the road has people buried there but,

[457]Memo, ND to PWD, 8/7/42.
[458]Memo, PWD to ND, 28/7/42; the plan of the area from the ND files and reproduced in appendix 2 does not show an urupa. There are another 2 urupa in the nearby area and neither is shown on the plan.
[459]Marr, Cathy *Public Works Taking of Maori Land 1840-1981*, 154-155.

apart from a couple of marked sites, one of which is that of Tawara Morewa, the rest of the ground is unmarked. J. H. Wharawhara says the urupa is not on the actual property but, not long after his comment, Wetini Taiporitu Wirihana mentions that he wrote to the Prime Minister about a burial ground (he does not specify which one) and the reply he got was "the land was not an urupa and therefore not important". The trespass, or non-trespass, of the urupa is a matter that requires further investigation.

Although the owners raised fairly general objection to the taking of the land, on full explanation of the powers under the Public Works Act 1928 they were 'resigned' to the taking.[460] The inference is that no matter how much they objected to the taking of their land the Government could, and would, use the ultimate power given it under legislation and take the land under the compulsory taking procedures of the Act and in fact that is what the Government did.

BREACH OF FIDUCIARY DUTY

Despite advice from the Air Department to the Public Works Department[461] and from the Minister of Works to the Native Minister[462] that Waharoa airfield was not required for RNZAF or civil purposes, the land was not handed back.

Prior to the outbreak of the war the Council had toyed with the idea of establishing an airport to serve the Morrinsville – Te Aroha district but had

[460]M V Bell, Deputy Registrar Maori Land Court, Auckland: undated "Report Re Waharoa Aerodrome and Maori Lands Required Therefore:- Following Meeting held with those affected on 28th January 1948".
[461]Memo, PWD to ND, 21/9/44; letter, MNA to Hon. J Cotter, LC, 2/10/44.
[462]Memo, Minister of Public Works (MPW) to MNA, 11/10/44; reiterated in a letter from the ND to LC, 11/12/44.

left the matter in abeyance for consideration at a later date.[463] That date had now arrived. Midway through 1945, the Matamata Branch of the New Zealand Labour Party contacted the Minister of Native Affairs, H. G. R. Mason. It was concerned about a cutting in the Matamata Record, a local newspaper, stating that the Piako County Council had approached the Government seeking possession of the aerodrome land. Mr Tansey apprised the Minister that the Branch had not only assured the owners every support in effecting the agreement to reinstate the land, but also that "this [Labour] Government would carry it out to the letter". [464]

In reply the Minister assured the Branch that *"everything will be done by the Government to safeguard the interests of the Maori owners of the land"*.[465] His Department requested both the Native Land Court and the Public Works Department to investigate the matter and report back to the Minister.[466] The Land Court replied saying that it was unaware of any approach from the local aero clubs[467] and the Public Works Department advised that the Civil Aviation Department was in the process of investigating the future of the aerodrome.[468] The Native Department made inquiries of the Public Works Department regarding the future of the airfield on 20 July, 30 August, 27 September, 12 November and 5 December 1945. When the Land Court passed on a further inquiry from the owners to the Native Department on 5 December 1945, the Public Works Department replied: "the future policy with regard to the aerodrome was still under discussion between Air Force and Civil Aviation".[469]

Ultimately, on 7 March 1946 Civil Aviation advised the Public Works Department that they were trying to ascertain whether local bodies and other parties wanted a permanent civil aerodrome in their locality. They

[463]Vennell, C W & More, David *Land of the Three Rivers* 111.
[464]Letter, F Tansey, secretary NZLP, to H. G. R. Mason, MNA, 10/6/45.
[465]Letter, MNA to F. Tansey, 21/6/45; emphasis added.
[466]Letter, ND to LC, 27/6/45; memo, ND to PWD, 27/6/45.
[467]Memo, LC to ND, 5/7/45.
[468]Memo, PWD to ND, 31/7/45.

were also waiting on Cabinet for an indication from National Airways Corporation (NAC), when formed, about proposed air services and staging points.[470] They now argued against returning the land:

> From the viewpoint of this Department, the fact that an eminently suitable airfield has been developed at Waharoa at public expense, it seems most undesirable that the land or portion of it comprising the runways should be returned to its owners… I therefore strongly urge that the present lease tenancy or agreement for the use of the land should be continued for a further period with an understanding that the present unsatisfactory position will be determined before the end of the current year.[471]

When the Public Works Department signalled that there was "little doubt that this aerodrome will be retained"[472] the Native Department sent a letter of disapproval regarding that decision.[473] In the time-honoured tradition of 'passing the buck' the Native Department was directed to the Air Department to whom they voiced strong opposition about backtracking on the 11 October 1944 decision to forgo the aerodrome.[474]

In a letter to the Native Department, the Air Department, Civil Aviation Branch mentioned that an amalgamation of local aero clubs was interested in the retention of the aerodrome for club flying. It stressed that the only part that could stand on its own for aerodrome purposes was the area that was Maori land. It also made the comment that, for purely club flying, the developed airfield was more extensive than required. The reduced landing area required for smaller planes would free up Crown freehold land (Wright's farm) that could be used in exchange for Maori land in the

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[469]Memo, PWD to ND, 20/12/45. Further inquiries were made to the PWD on 1/3, 3/4, and 2/5/46.
[470]Memo, CA to PWD, 7/3/46.
[471]Letter, CA to PWD, 7/3/46.
[472]Memo PWD to ND, 9/5/46.
[473]Memo, ND to PWD, 26/6/46.
[474]Memo PWD to ND, 26/7/46.

airfield, but the proposal would be contingent on the local bodies *dropping their submission for a commercial airfield*.[475]

Beechey J saw this move as a contravention of the terms of the 1942 agreement as he understood them. He wrote a memo in which he stated that the proposed acquisition "looks like a Matamata Flying Club idea". His recollection of the arrangement was that if not required for war purposes, the Government was to put the land back in order and return it to the owners. He went on to say that if the land was wanted for other flying purposes that was a separate matter between those authorities and the owners:

> It would I think be a breach of faith with the owners for the Government to take any step other than to carry out the bargain to reinstate and return the land… [w]e should draw the Native Minister's attention to the matter so that Cabinet may not make any move inconsistent with the agreement made with the owners.[476]

Upholding the agreement was clearly not a priority. It is difficult to reconcile the position taken by Civil Aviation with the information supplied in 1944 by the Minister of Works that the aerodrome was not required for Air Force or for civil purposes after the war. It was on that basis that payment of rent, delayed pending the future of the aerodrome, had been agreed. Although it was expected that central government would return the land as agreed and allow local authorities to negotiate for the purchase of the field, this was not the case. In the face of continued lobbying from local authorities, chambers of commerce and aero clubs, Civil Aviation supported retaining the land.

[475]Letter, AD-CA to ND, 9/9/46.
[476]Memo, Beechey J (undated) enclosed in a memo from the LC to ND, 27/9/46.

A Twist In Time

The Air Department, in a memo to the Prime Minister's Department, stated that although it was under the impression that the land was held on a temporary lease under the War Emergency Regulations, *unconfirmed advice* from the Public Works Department appeared to show that the Crown had entered into an agreement to purchase with the owners.[477]

The Minister of Works later twists this slightly saying that the land was leased for the duration of the war so that in the event that it was not needed after the war it could be returned.[478] Rent was to be paid until it was decided whether it was required permanently, whereas Beechey J stated that rent was to be paid if the airfield was temporary. Before the 1944 agreement was reached, both the Air Department and the Public Works Department stated that the airfield was not required for military or civil purposes.

This raises the issue of a self-serving interpretation of the events at the initial meeting in 1942 as there seems to be much confusion about settlement or the finality of terms reached.

The Future of Waharoa Airport

At the 7 November 1946 meeting re the future of Waharoa Airport in Wellington,[479] Civil Aviation and Public Works officials informed the deputation of local bodies (the committee of the proposed Air Board for the Matamata district)[480] that the arrangement regarding the aerodrome was of

[477]Memo, J Buckeridge, Acting Controller of Civil Aviation to the Prime Minister's Department, 2/12/46.
[478]Letter from MW to W R Walker of Waharoa (undated) in correspondence from E R McKillop, Commissioner of Works to DMA, 18/3/49.
[479]Notes on Future of Waharoa Airport, 7/11/46.
[480]Letter, (unheaded) 8/11/46. From the text it appears to be from Mr Smart (PWD) to the ND.

a temporary nature for emergency war purposes. However, as the situation no longer applied, there was "*an obligation on the Government to return the land to the owners",* unless a settlement satisfactory to the owners could be found to supersede the current arrangement. Mr Blane, of the Native Affairs Department, stressed that the present position was unsatisfactory but an "alternative proposition", acceptable and equitable to the owners *could be entertained*.

The deputation stated that it was the wish of the district local bodies and associations to take advantage of the fact that the aerodrome already existed at Waharoa. They stressed the fact that the Government had already incurred considerable expenditure in developing the airport and returning the land to Maori and restoring it to its original condition as farmland would add further costs. Despite being told that NAC considered Waharoa an unlikely staging point on commercial schedule air services and was of little use as a recognised alternative airfield, the deputation pushed the idea that, from a national point of view, the aerodrome would be a valuable emergency airfield.

They also expressed the hope that the Government departments undertake the acquisition of the land, or arrange satisfactory tenure, as it was too great a hurdle and too involved for the local bodies to handle by themselves. The Departments concerned indicated that they would be prepared to assist in negotiations as far as they could. The rest of the discussion revolved around the question of how the "native land question could be overcome". These proposals included reducing the runways and using the surplus land as part compensation to the Maori owners. The meeting participants finally agreed that the Civil Aviation, Public Works and Native Departments prepare a proposal for adjusting the land holdings, that is obtaining a satisfactory tenure of the land or to acquire it, and extend the lease arrangement until the end of 1947 to give aviation interests time to come up with a more definite arrangement.

The Department of Native Affairs is noted in the minutes of the meeting "as representing the interests of the native owners" so Mr Blane's overture, concerning alternative arrangements rather than giving the land back, is a clear breach of fiduciary duty. His proposition, and the resolution passed by the meeting, totally disregarded the previous month's advice from his own Department to the Prime Minister[481] that:

1. the Cabinet decision not requiring the airfield after the war be adhered to;

2. the land be returned in accordance with the original agreement to avoid a breach of faith and

3. the local aero clubs should treat directly with the owners and not go through the Crown as the Crown was bound to return the land.

It also ignored the Prime Minister's concern that the arrangements made with the Maori owners should be carried out and the land returned.[482]

The decision to turn away from their previous pro-owner stance seems to have occurred in early 1947. In a memo Peter Fraser, the Under-Secretary of the Native Department, hints to the Defence Minister that taking into account the cost of construction and restoration it would be better to acquire the land even though indications were that airfield was not required for defence or civil aviation use.[483]

The Maori Affairs Department, newly renamed, now considered that matters of national importance should be balanced against the Crown's commitments to Maori. Though it was concerned that the Crown should in

[481]Letter from the ND to the PM, 15/10/46.
[482]Memo, 1/11/46, from the Prime Minister's private secretary attached to the memo to the PM from the ND, 15/10/46.
[483]ND to Minister of Defence, 20/1/47.

good faith return the land and seek fresh negotiations, it was persuaded that because runways and fences had been built the owners could be approached without first giving the land back:

> While seeking to fulfil the promises made to the Maori owners, we must, on the other hand, give full consideration to the country's future air service... as the matter has now assumed what might be described as national importance...[484]

As previously discussed in the section "The Airport Today",[485] Waharoa Airport, as a centre for aviation sporting activities, can hardly be termed one that is absolutely vital in the 'national interest'. At the time however, there was contemplation of a royal tour by George VI and Elizabeth and the Government wanted to use Waharoa airfield as a stopping point from which they would travel on to Rotorua. In anticipation of this, officials had made a request of the owners for an extension of the leasing arrangements, at least until after the tour.[486]

It is interesting that the owners agreed to this proposal when, up to this point, the Government had not considered their needs or listened to their requests for the return of the land but were now actively asking for the co-operation and forbearance of the owners by seeking a further delay to settling the situation. Rather ironically the tour did not go ahead but the 'taking' of the land did.

Shelved Duty

The fiduciary duty, willingly acknowledged by the Prime Minister and the Department of Maori Affairs to protect and "safeguard the interests of the Maori owners of the land" was suddenly deemed less important than promoting, and assisting in, the retention of the land as an airfield for use

[484]Memo, MA to CA, 9/10/47.
[485]Supra at 86.

by the local bodies and private aero clubs. One is led to speculate on whether pressure was brought to bear on the Prime Minister or the Department to change their stance and abandon their self-professed fiduciary obligation to Maori interests at Waharoa and instead ally themselves to the Air, Civil Aviation and Public Works Departments.

Such conduct is a breach of the fiduciary obligation concerning the misuse of position and the conflict of interest of duty. The Crown, through its agents, used its position to advantage the interests of the local bodies and aero clubs rather than those of the Maori owners. They had meetings with them, discussed plans, particularly ways and means to obtain the airport land, even before these were discussed or made known to the people whose land it was. Though there was an obligation to give the land back, they offered to assist these bodies in negotiations.

Although in the end the local bodies did not have the 'wherewithall' to see the 'taking' through, the Crown Departments took it upon themselves to ensure that these bodies would be able to have the use of an airport anyway. They were also swayed in their service to the owners by taking in to account considerations of personal or third party interest: for example cost factors, that is the cost to the Government of constructing the airport and the cost to return it, were accepted as more important than the protection of Maori interests and Departments involved allowed themselves to be swayed by pressure put on them by other departments and by local organisations.

[486]Memo, PWD to MA, 15/4/48.

CONCLUSION

Although the owners received compensation, partly land and partly monetary, that is not the issue. The issue is that the policies and practices employed by the Crown and its agents were not reasonable. Nor did their actions show a spirit of mutual co-operation although they asked, and got, that from the owners. Ultimately, as a result the owners have lost their 'rangatiratanga' over land that had been theirs for possibly well over two hundred and fifty years.

It seems evident that many Government departments were in conflict concerning the manner in which the Maori 'owners' of the land should be dealt with. The evidence seems to unquestionably establish that the officials of the Land Court and, initially, the Native Affairs Department were diligent in their efforts to represent the best interests of the Maori owners. On the other hand the Civil Aviation Department, along with the Public Works Department, was anxious to acquire the lands in the interests, ostensibly, of public air transport but in reality for the amalgamation of aero clubs in the district.

This situation resulted in competing considerations. Accordingly, the Crown was in a conflict of interest in respect of its fiduciary relationship with Maori. The law is clear that one who undertakes a task on behalf of another must act exclusively for the benefit of the other, putting their own interests completely aside and that equity fashioned the rule so that no person allows a duty to conflict with that interest.

Based on the stated principles and applying them to the facts of the case, the Crown did not act exclusively for the benefit of the owners. The owners were unwilling to part with any of their land and time after time asked that, now the war was over, the land be returned. Their reasons were understandable, based on both the intrinsic and extrinsic values that Maori

have for land. The intrinsic values include the long association of their hapu with the land.

The officials at the Land Court and initially the Native Affairs Department recommended that the Crown honour the original decision to return the land. Their advice was ignored. In the final decision-making process, the views of the Air Department, the Civil Aviation Department, the Public Works Department and, later on, the Maori Affairs Department prevailed over the views and representations of the Land Court. Both Civil Aviation and the Public Works Department agreed to give what co-operation they could to the Airport delegation as far as negotiating with the owners went, while at the same time bound by their fiduciary duty to give full consideration to the interests of the Maori owners. In the end the local aviation committee stood to the side and the Departments undertook the acquisition on their behalf.

It seems clear from the evidence that the Air Department, Civil Aviation and Public Works Department chose to ignore the considered opinions of officials of the Land Court and even those within their own Departments and made little effort to seriously negotiate a settlement. Their answer was to ‘take’ first (in 1942) and negotiate later.

An indication of their seeming indifference to the plight of the owners is shown by their rather leisurely approach to negotiations. Likewise there was not full disclosure to the owners of all the relevant facts. The evidence establishes that they were kept in the dark for very long periods of time. Their land was taken from them and no offers of compensation were forthcoming in a timely fashion, in fact they had to raise the issue themselves.

Bearing in mind that the onus is on the Crown to establish that the owners were in possession of all the relevant information known to it, the only conclusion is that the Crown did not discharge that onus on the facts. Their

attitude is indicative of the attitude of the Crown's servants outside the Land Court. It seemed that they were not concerned about the welfare of the owners.

The principle of the Crown right to take private land for public purposes is, ironically, similar to the traditional concepts of Maori land tenure that recognised the balance between individual and community rights and the precedence of the community to take land in times of necessity. This happened after participation and consensus decision procedures, involving the community, had taken place. Maori as Treaty partners expected to be consulted about public land use - a concept not unlike the scrutiny of Acts before other landowners in the English parliament.

Traditional concepts also recognised that outsiders paid a 'form of compensation'[487] for the right to use land. Because of its spiritual, cultural and economical importance Maori tended to favour use rights rather than alienation of land,[488] so they expected land no longer needed for public works to be returned, as in the pre-emptive right of English landowners.

The owners willingly gifted and offered land to the Crown when they were consulted and saw that the work was obviously required, but they clearly had different expectations about land usage from those of the Crown. Maori understanding implied a continued interest in the land when the need for the public work ceased. Government officials, on the other hand, acted as though they had exercised the right to take the land and ownership now vested permanently in the Crown but rarely acknowledged the cultural differences involved in this process, though they conveniently accepted the generosity of Maori owners.

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[487]Kawharu, I H *Maori Land Tenure* 51. Kawharu explains that food exchanged hands as a form of rent, tribute and payment for services and was not compensation but an indication that title remained with the owners. Often it was refused in case acceptance was construed as payment for title.

[488]Kawharu, ibid,62; *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur R (NS) SC 72: Maori expected gifted land to be returned when it was no longer needed.

The actions or inactions of the Crown must be interpreted in the light of the Treaty itself, including expectations of a reasonable balance between the Crown's rights and obligations of kawanatanga and its obligations to respect tino rangatiratanga as indicated by the Court of Appeal in 1987.

In this light, the failure to hand back land taken from the Maori owners at Waharoa for use as an emergency airfield during the war, but not needed for that intended purpose after the war, is a breach of Treaty principles. The return by the Crown of the Waharoa airport land to Maori ownership would give back a degree of mana to a people who still feel betrayed by the Crown's actions in taking their ancestral land.

Treaty principles were also breached when the Crown's actions overrode Maori preferences through the force, threat and the manipulation of the legal and administrative processes. There was also a breach when the agents of the Crown simply put Maori aside and did not seriously 'consult' with them at all on matters affecting their property. While the Crown has obligations under Article 1 of the Treaty to acquire land in the public interest (though it is argued that the taking of the land at Waharoa was not in the *highest public good)* it has a reciprocal obligation to actively protect Maori rangatiratanga under Article 2.

Mr Bell, the Deputy Registrar of the Maori Land Court, neatly summed up the conflict of interest, essentially land to Maori v cost to Government, when he stated:

> If it were not for the fact that very heavy expenditure has already been incurred in forming the Drome and its retention protects such expenditure, it would perhaps have been better to have chosen a new site.[489]

[489]Ibid: M V Bell, Deputy Registrar Maori Land Court, Auckland: undated "Report Re Waharoa Aerodrome and Maori Lands Required Therefore:- Following Meeting held with those affected on 28th January 1948"

This conflict raged between the Prime Minister, the Cabinet, the Air Department, Civil Aviation, the Public Works Department, Maori Affairs, the Land Court and last, but not least, the tangata whenua of the Waharoa airport land. While Maori Affairs and the Land Court 'went into bat' for the owners even they eventually 'jumped ship' and the muted argument about 'doing the right thing' that was going on behind departmental doors was soon squashed into silence. The 'little people' were left on the outside of the fray.

The Departments concerned were so consumed with their own position that they failed to appreciate the consequence their actions were having, or would have, on the people. From their individual 'one-eyed' positions they did not consider the resolution, already partly in place, that with small modifications would have given them the use of the airport land and preserved the rangatiratanga of the tangata whenua, an arrangement that fully uses the partnership model between the Crown and Maori that the Treaty of Waitangi promoted from the day it was signed.

APPENDIX 1

Tiriti O Waitangi 1840
Maori Text Of The Treaty

Ko Wikitoria te Kuini o Ingarani i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira--hei kai wakarite ki nga Tangata maori o Nu Tirani--kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu--na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei. Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana. Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianei, amoa atu ki te Kuini, e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

The Treaty Of Waitangi 1840
English Text Of The Treaty

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands. Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorize

"me William Hobson a Captain" in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Ko Te Tuatahi

Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu--te Kawanatanga katoa o ratou wenua.

Article The First

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess, over their respective Territories as the sole Sovereigns thereof.

Ko Te Tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu--ki nga tangata katoa o Nu Tirani te tino rangatiratanga o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te

Article The Second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands

wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua--ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Pre emption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Ko Te Tuatoru

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini--Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

Article The Third

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

[signed] William Hobson Consul & Lieutenant Governor

[Signed] W Hobson Lieutenant Governor

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and

kite nei i te ritenga o enei kupu, ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.	We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof in witness of which we have attached our signatures or marks at the places and the dates respectively specified
Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.	Done at Waitangi this Sixth day of February in the year of Our Lord one thousand eight hundred and forty

Treaty Of Waitangi 1840, English translation of the Maori text[490] with footnotes, by Professor (now Sir Hugh) Kawharu[491]

Victoria, the Queen of England, in her concern to protect the chiefs and the subtribes of New Zealand and in her desire to preserve their chieftainship[492] and their lands to them and to maintain peace[493] and good order considers it just to appoint an administrator[494] one who will negotiate

[490] This translation was used in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 662.
[491] Kawharu, I H (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, 319, with his footnotes.
[492]"Chieftainship": this concept has to be understood in the context of Maori social and political organization as at 1840. The accepted approximation today is "trusteeship".
[493]"Peace": Maori "Rongo", seemingly a missionary usage (rongo - to hear i.e. hear the "Word" - the "message" of peace and goodwill, etc).
[494]Literally "Chief" ("Rangatira") here is of course ambiguous. Clearly a European could not be a Maori, but the word could well have implied a trustee-like role rather than that of a mere "functionary". Maori speeches at Waitangi in 1840 refer to Hobson being or becoming a "father" for the Maori people. Certainly this attitude has been held towards

with the people of New Zealand to the end that their chiefs will agree to the Queen's Government being established over all parts of this land and (adjoining) islands[495] and also because there are many of her subjects already living on this land and others yet to come. So the Queen desires to establish a government so that no evil will come to Maori and European living in a state of lawlessness. So the Queen has appointed "me, William Hobson a Captain" in the Royal Navy to be Governor for all parts of New Zealand (both those) shortly to be received by the Queen and (those) to be received hereafter and presents[496] to the chiefs of the Confederation chiefs of the subtribes of New Zealand and other chiefs these laws set out here.

The First

The Chiefs of the Confederation and all the Chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government[497] over their land.

The Second

The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise[498] of their chieftainship over their lands, villages and all their treasures.[499] But on the other hand the Chiefs of the Confederation and all the Chiefs will sell[500] land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent.

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the person of the Crown down to the present day - hence the continued expectations and commitments entailed in the Treaty.

[495]"Islands" i.e. coastal, not of the Pacific.

[496]Literally "making" i.e. "offering" or "saying" - but not "inviting to concur".

[497]"Government": "kawanatanga". There could be no possibility of the Maori signatories having any understanding of government in the sense of "sovereignty" i.e. any understanding on the basis of experience or cultural precedent.

[498]"Unqualified exercise" of the chieftainship - would emphasise to a chief the Queen's intention to give them complete control according to their customs. "Tino" has the connotation of "quintessential".

[499]"Treasures": "taonga". As submissions to the Waitangi Tribunal concerning the Maori language have made clear, "taonga" refers to all dimensions of a tribal group's estate, material and non-material - heirlooms and wahi tapu (sacred places), ancestral lore and whakapapa (genealogies), etc.

[500]Maori "hokonga", literally "sale and purchase". Hoko means to buy or sell.

The Third

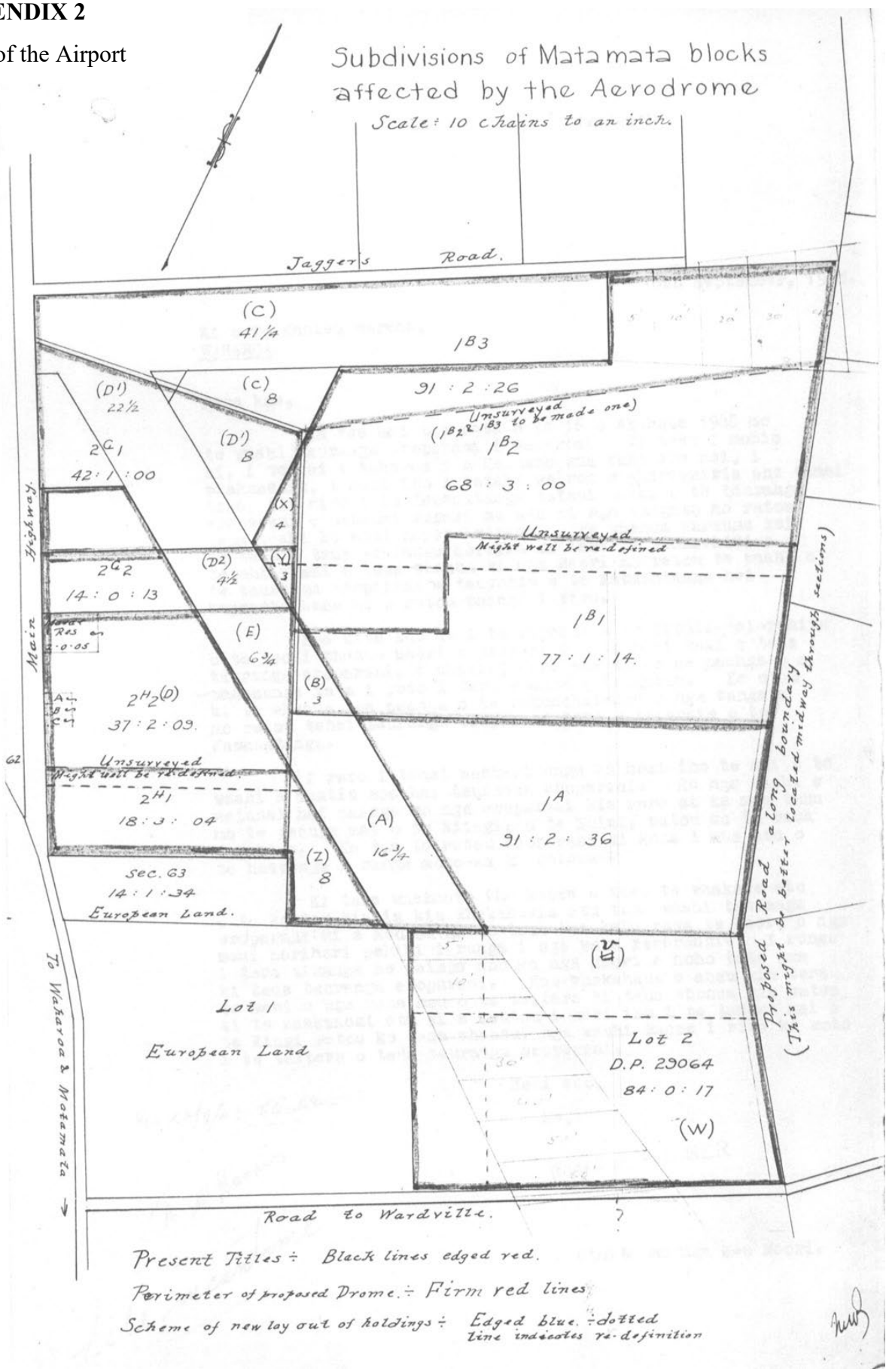
For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties[501] of citizenship as the people of England.[502] [signed] William Hobson Consul & Lieut. Governor So we, the Chiefs of the Confederation of the subtribes of New Zealand meeting here at Waitangi having seen the shape of these words which we accept and agree to record our names and our marks thus.

Was done at Waitangi on the sixth of February in the year of our Lord 1840.

[501]"Rights and duties": Maori "tikanga". While tika means right, correct, (eg "e tika hoke" means "that is right"), "tikanga" most commonly refers to custom(s), for example of the marae (ritual forum); and custom(s) clearly includes the notion of duty and obligation.
[502]There is, however, a more profound problem about "tikanga". There is a real sense here of the Queen "protecting" (i.e. allowing the preservation of) the Maori people's tikanga (i.e. customs) since no Maori could have had any understanding whatever of British tikanga (i.e. rights and duties of British subjects.) This, then, reinforces the guarantees in Article 2.

APPENDIX 2

Map of the Airport



APPENDIX 3: Individual owners of the Matamata North blocks affected by the Airport taking**.**

Block	Total Area prior to taking A: R: P	Owners	Sex	Shares	Notes
1A	91 2 36	Kura Patehau (Mrs Rangitawhia Keepa) Okeroa (Ruby) Roritutu	F F		dec 4/9/42 land leased to Pakeha share-miker sucessor: Ruby Roritutu and 3 Children; Trustee Tawara Morewa
1B1	77 1 14	Tawara Te Morewa Pungatara Maka	M M	2 ¼ **2 1/4**	in occupation and farming
1B2	68 3 00	Timi Panapa Kaukau Te Pea Tohinga Kaukau Te Pea Kaukau Timi Panapa	M M M M	1/3 ¼ ¼ 1/6 **1**	in occupation in occupation Pea and Pai (brother) share-milking 1B2 &3
1B3	91 2 26	Te Pea Kaukau Timi Panapa Kaukau Timi Panapa	M M M	½ ¼ 1/6 **1**	
2G1	42 1 00	Turia Penetito Hare Wharemate	F M	1 1 **2**	
2G2	14 0 13	Timiuha Penetito	M	solely	Deceased; sucessors: Turia Penetito Wahi Penetito Trustee: Pene Penitito
2H1	18 3 4	Wetini Taiporitu Wirihana Tauwhare Taka Wirihana Tohungia Taka Wirihana Tira Taka Wirihana Pati Taka Wirihana Kiki Taka Wirihana Patena Taka Wirihana Timi Taka Wirihana Ema Taka Wirihana [Rauoriwa Taka Wirihana subject to 1/10 interest for life or widow- hood]	M M F F M M M M F F	1/10 1/10 1/10 1/10 1/10 1/10 1/10 1/10 1/10 1/10 **1**	

Contd

Block	Area	Owners	Sex	Shares	Notes

2H2	37 2 9	Parekino Wirihana	F	1 1/5	by
		Manauri Wirihana	M	1/55	succession
		Wetini Taiporitu Wirihana	M	1/45	to Pehipehi
		Tauwhare Taka Wirihana	M	1/45	Wirihana
		Tohungia Taka Wirihana	F	1/45	
		Tira Taka Wirihana	M	1/45	
		Pati Taka Wirihana	M	1/45	block in the
		Kiki Taka Wirihana	M	1/45	papakainga
		Patena Taka Wirihana	M	1/45	and a number
		Timi Taka Wirihana	M	1/45	are in
		Ema Taka Wirihana	F	1/45	occupation
		Te Mape Wirihana	M	1/25	
		Mere Pounamu	F	1/25	
		Tereiti Wirihana	F	1/25	
		Taingakawa te Waharoa II	M	1/25	
		Moki Taikereti	F	1/125	
		Mura Taikereti	F	1/125	
		Mika Taikereti	M	1/125	
		Parehiaue Taikereti	F	1/125	
		Riki Taikereti	F	1/125	
		Hone Paretapu[503]	M	1/30	
		Kui Paretapu	F	1/30	
		Niki Paretapu	M	1/30	
		Tautau Paretapu	F	1/30	* Trustee
		Rano Paretapu (1948) *	M	1/30	Parekino
		Taha Paretapu (1949) *	F	1/30	Wirihana
		Haare Kereama	M	1/55	
		Timiuha Penetito	M	1/55	
		Timi Horea	M	1/55	
		Harete te Ngore	F	1/55	owners
		Kihirini Manauri	M	1/55	through
		Tukiterangi Kio	M	1/55	exchange of
		Parewaenga te Teira	F	1/55	Manauri
		Kamau Pere Tapawha	M	1/55	Wirihana's
		a.k.a. Kamao Tapawha			10/55th
		Te Raha Tapawha	F	1/55	share
		Maki Katea	F	1/110	(22/6/37)
		Parehe Katea	F	1/110	
				2	

[503]Misspelt Parehapu in MA 1 19/1/610.

APPENDIX 4: Aerodrome Legal Information[504]

Legal Description	Area m²	Gazette Information	Gazette Year	CT Year/No	Certificate of Title Details	Required Classification	Reserve Status
Sec 72 Blk XIII Wairere SD	46.8474	Pursuant to the Land Act 1948 the land is set apart as a reserve for aerodrome purposes and vested in PCC 1966 under the Reserves and Domains Act 1953 from the Crown	1966 p340	1978: 23C/1294	Land owned by the Council in fee simple as a reserve for aerodrome purposes pursuant to the Reserves Act 1977	LP-aerodrome	Yes
PT Lot 1 DP 29064	0.3629	Pursuant to the Public Works Act 1928 the land is taken for an aerodrome and vested in PCC 1968	1968 p136	1941: 782/229 No Current CT	Land taken for an aerodrome and vested in PCC1968	LP-aerodrome	No
PT SEC 71 BLK XIII Wairere SD	0.971	Pursuant to the Public Works Act 1928 the land is taken for an aerodrome and vested in PCC 1968	1968 p136	1958: 1430/87 No Current CT	Land taken for an aerodrome and vested in PCC1969	LP-aerodrome	No
PTLOT E BLK XIII DP 28345	2.1995	Pursuant to the Public Works Act 1928 the land is taken for an aerodrome and vested in PCC 1965	1965 p2003	1969:10C/459	Land owned by the Council in fee simple for an aerodrome	LP-aerodrome	No
PT LOT F BLK XIII DPS 404	2.7595	Pursuant to the Public Works Act 1928 the land is taken for an aerodrome and vested in PCC 1965	1965 p2003	1969: 10C/459	Land owned by the Council in fee simple for an aerodrome	LP-aerodrome	No
PT LOT G2 BLK XIII	2.4351	Pursuant to the Public Works Act 1928 the land is taken for an aerodrome and vested in PCC 1953	1953 p995	Nil	Crown Land	LP-aerodrome	No
PT LOT 261, 262, 2H2, North 1B BLK	2.4555	Pursuant to the Public Works Act 1928 the land is taken for an aerodrome and vested in PCC 1953	1953 p995	Nil	Crown Land	LP-aerodrome	No

[504]Matamata-Piako District Council, *Draft Matamata Aerodrome Reserve Management Plan* 5.

APPENDIX 5: Whakapapa showing linkages of Ngati Rangi(NR), Ngati Haua(NH), Ngati(rangi) Te Oro(NTO), Ngati Tawhaki(NT), complied from various Waikato Minute Books. Names in bold were on the original 1867 Crown grant for the Matamata Block; Names underlined have historical links; Names in italics are owners of the land at the time of the Airport 'taking'.

Tarakahuki Tuarahuruhuru **Ngati(rangi) Te Oro**

Taha (NR) = TeAukawa (NT)

Whakapoi (NR) Paretapu = Te Oro (NH) Pareomaoma = Haua II (dsp)

TeHei Konamu = Paretapu II (NT) TeAhuroa (NTO) = Rangihoko (NH)

Parewhakaoranga Hare = Kataraina Paretapu = Neri (NR) Rangihuia = TeTiwha = Paremutu
Korotii

Whaiapu Merepaea = TeWarena ↓ Kakiroa = Haare ↓ Tuhakaraina **Hori Neri** = Miriama Hori **Tamaiti TePutu** = Rangiherehere II Pipi TePoi = Rawinia Kereama Hura = **Teni Ponui** (dsp) (NRuaR) Penetito (d 5/1/91) = Ngamako Tuwhenua TeTiwha

Panapa TePea (NR) Wirihana TeTutere = Ruhia TePutu Katia TePutu Mihiata Ngaru (dsp 1878) Hare Penetito TeWhareururua Tuwhenua

Pehipehi Wirihana Rakuraku Paretapu Wirihana Kio Wirihana *Manauri Wirihana* Panapa Wirihana *Parekino Wirihana* Tama Taka Wirihana = *Rauoriwa Patena (Barton)* *Timiuha Penetito*

Wahi Penetito *Turia Penetito (f)* *Hare Wharemate*

Ngati(rangi) Te Oro

TeAhuroa = Rumakanga
(NH)

Pareteoro = Whanui
(NMihi of NH)

(2nd w)

Nohotoka = TeIputawahi — Epiha Matamata — TeWhareotenui (dsp) murdered by NT — Urupuha — Tarore = TeTutere

Karanui — Tuhiwhero — **Kereama Tauwhare** (d 5/3/1899) — Matiria = Rihia — RuhiaTePutu = Wirihana TeTutere ↓ (aka Wharaurangi)

Ponehe — Ngamako = Penetito — Rawinia =Pipi TePoi — Haare Kereama — TeWhauwhau (d 28/9/1892) — Pere(kau) Riria — Pero (dsp)

Rawinia Kereama

Ponehe Keremete — Hare Penetito — *Hare Kereama* — *Kamau Tapawha* — *TeRaha Tapawha* — Maria — Wati

Ngati(rangi) Te Oro

TeAhuroa = Pareteiwi (NH)

TeHawai = Maioro TeKiri — Paretapu III = Tukau (NH)

Korotii ↓ | Topuni | Pukerahaki (m) | TeTiwha = Rangihuia | Te Omanga (NR) = Kerei (m) (NPare) | Patara | Makaeta

Reone Te Tawari = Tiahuia | Kinaki (f) = Tiahuia | **Te Raihi** (dsp 1888) = Riria | Ngawhetiu | **Tamati TePutu** = Rangiherehere II | **Hoani TeHuia** | Tiahuia=Kinaki | Hamiora TeAhuroa (d 19/5/79) | Haimona Patara (d 21/2/02)

Heta | Tiahuia | Ngahuia (f) | TeHerehere (f) | Wirihana TeTutere = RuhiaTePutu | Katea | Mihiata | Kahurangi Ka | Hoani TeHuia

Pehipehi Wirihana | Rakuraku Paretapu Wirihana | Kio Wirihana | *Manauri Wirihana* | Panapa Wirihana | *Parekino Wirihana* | (Tame) Taka Wirihana ↓ | (Murutapu) Wharawhara Haimona ↓ | TeNgohe | Tiari | Patoa | Ruarangi | Rangiturutu | Heta | Hakareta | Hamiora Haimona

Jack Haimona Wharawhara

Ngati(rangi) Te Oro

1st w
Ngarongo = (Tame) Taka Wirihana = 2nd w *Te Rauoriwa Patena (Barton)*

Wetini Wiri hana Taiporitu | *Tohungia Wirihana* | *Tauwhare Wirihana* | *Patena Wirihana* | *Tira Wirihana* | 1st w Nane = *Kiki Wirihana* = 2nd w *TeKui Urupuha Paretapu Wharawhara* | *Timi Wirihana* | *Pati Wirihana* | *Hema Wirihana*

Murutapu Wharawhara Haimona = *Parekino Taka Wirihana*

Paretapu Kaukau aka *(Jack)* = *Tione (Hone) Paretapu Haimona* | *(Wharawhara) Wharawhara* | *Kiki Wirihana* | = *TeKui Urupuha Paretapu (Wharawhara)* | *Niki Paretapu (Wharawhara)* | *Tatau Paretapu (Wharawhara)* | *Ramu Paretapu (Wharawhara)* | *Taha Paretapu (Wharawhara)*

Ngati(rangi) Te Oro

TeAhuroa

TeHawai = Maioro

Parerua = Korotii TeKaaho TeTutere = Tarore Ihimutu (f) Paraonete TeKaukau

TeWarena Riroiti Haare = Kataraina Tuwhakaraina Wirihana TeTutere TeTahatika Hoani TeNika Paraone Miriama
Korotii = Ruhia TePutu TeHeihei = **Hori**
↓ (d 1891) **Neri**

Merepaea TeKaewa Kakiroa (f) Hoani Tuwhakaraina TeRiaki Hauiti Taupoki
TeWarena Riroiti = Haare Tuhakaraina (d 1886) Tahatika Tahatika

Whakapoi Kaukau TeWarena TeKaewa Teni TeMatuwhati Wikitoria
TeWarena = Rakuraku Paretapu Parai (f) Tuhakaraina Tuhakaraina Tuhakaraina
Wirihana (dsp 02/03)

Timi Panapa *Kaukau* (m) *TePea (Tohinga)* *Kaukau* (m) Pai Kaukau (m) Paretapu Kaukau = Jack Haimona
Wharawhara

Ngati Ruarangi

			Pupuha (NR)				Rangikotahi (f) (NH)		
TeWao	Kio			Tiki =	Mataroa (NRuaR)				
			Mita Hauwai (NRuaR) dsp	Marahihi	Te Wao	Ngatokai =	TeNgunguru (f)		Ririka (m)
	Meiha	Tarahuanui			TeRopiha	Mita (Ngatewe) Tiki	Mihi	Whakakihi =	TeKata Hipirini
	Maka	Ngatakawe		Mahara	TeKaewa				
		Hinetuku		Turi					
		TeWhakamaru		TeMuri					
	Porititu =	Pakeho		TeAurere	Peina Tarawhiti				
Miriama Hori	Ria Panapa	Nepe Patehau	Poutaka Pakeho	Peina TeTohutohu	Pare Kahurangi	Ngatarawa Tarahuanui			
	Kura	*Patehau(d 4/9/42)*	Rori Patehau						

Ngati Tawhaki

Waitemahine = Poutaka

(2nd w)

(1st) = Tarahuanui = TeKura (NT) Pupu = Tangata TeWhakamapuna

Ngatakawe Mahara TeUruwhakamaro Te Kapuringa Ngapiri = Waitutu

Hinetuku Takutu Ponga Te Kaharunga Parepiu

TeWhakamaru Tumukau TeKeene Hoko(f) = TeTahakura (NT) Haru (m) Hihitana Paretapu II = Konamu (NR)

Porirutu = Pakeho TeMuri TeMotupuka Raniera Te Wharenui (dsp) TeWhakaawa Pakiwhero = Matire Paratene Kataraina Paretapu = Haare Korotii

↓

Peina Tarawhetu Hamiora Rakapa = Taingakawa Kere Raniera Peka (f) Wiri Nikora TeRikihana Tuhakaraina = Katiroa

Hamiora TeKeene Tarapipipi Taingakawa Nohu Bidois = Teni Tuhakaraina

Ngati Rangi

Tuarahuruhuru

Te Mamaonganui TeAukawa = Taha Taonga Torepa

Kahukura TeWaikea

Tanu Hohua (NR) Pehioi (NR)

Rawiri Poritutu (f) = Pakeho (NT) Ngawawa

TeMorewa Rawiri Nepe Patehau Miriama Hori Poutaka Ria Panapa Peneamine
(d 1/12/07) (d 7/2/07)

Tawara TeMorewa *Kura Patehau* Rori Patehau

APPENDIX 6: **List of owners of Matamata North**

determined by the Land Court after the hearings of 1905 and 1908.

Court Order in favour of:	**Sex**	**Shares** [505]	**Reallo-cation**[506]	**Court Order in favour of:**	**Sex**	**Shares**	**Reallo-cation**
Hare Kereama	m	1	2	Ponehe Keremete	f	2	2
Hoani Te Huia	m	1	2	Panapa Te Pea	m	2	2
Hamiora Te Keene	m	1	2	Poutaka Pakeho	m	1	2
Hauatahia Hipirini	f	1/8	1/4	Pare Kahurangi	f	1/4	1/4
Hauiti Tahatika	m	2	2	Peina Te Tohutohu	m	1/2	1/2
Katea Te Putu	f	1	2	Te Pika Paraone	m	2	2
Kamau (Pere) Tapawha	m	1/4	1/4	Ruhia Te Putu	f	1	2
Kahurangi Kaa	f	1	2	Rawinia Kereama	f	1	2
Kaukau Warena	m	1	2	Ria Panapa	f	1	2
Kere Raniera	m	1	2	Rikihana Winika	m	1	2
Keremete Hipirini	m	1/8	1/4	Te Raha Tapawha	f	1/4	1/4
Kimiwai Te Wera	f	1/8	1/4	Te Riaki Tahatika	m	2	2
Te Kihirini Manauri	m	1/2	1/2	Taupoki Miriama	f	2	2
Te Kaewa Ropiha (alias Te Kaewa Parai)	f	2	2	Teni Tuwhakaraina	m	2	2
Te Kata Hipirini	m	1/8	1/4	Taratu Hoani	f	1	2
Maria Tapawha	f	1/4	1/4	Tewenui Hoani	m	1	2
Miriama Hori	f	1	2	Tiahuia Reone	m	2	2
Makarena Hipirini	f	1/8	1/4	Tarapipipi Taingakawa	m	1	2
Matetokoroa Kio	m	1/8	1/4	Tataraimaka Meihana	m	1/8	1/4
Te Matauwhati Tuwhakaraina	m	2	2	Tukiterangi Kio	m	1/8	1/4
Mihiata Te Putu	f	1	2	Taingakawa Te Waharoa	m	1/8	1/4
Te Morewa Rawiri	m	1	2	Tarahuanui Kio	m	1/8	1/4
Ngamako Tuhiwhero	f	2	2	Wati Tapawha	f	1/4	1/4
Nepe Patehau	m	1	2	William Grey Nicholls	m	1	2
Ngatarawa Tarahuanui	m	1/4	1/4	Wirihana Te Tutere	m	2	2
Nikora Te Kupenga	m	1/4	1/4	Whakapoi Warena	f	1	2
Te Ngore Manauri	m	1/2	1/2	Te Whareururua	m	2	2
					Total	**51 ½**	**73 ¾**

[505]Awarded 19/10/05: 33 Waikato MB 215–16.
[506]Reallocated 18/10/08: 34 Waikato MB 53-54.

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