REVIEW

THE TARANAKI REPORT: KAUPAPAP TUATAHI MURU ME TE RAUPATU. THE MURU AND RAUPATU OF THE TARANAKI LAND AND PEOPLE

BY THE WAITANGI TRIBUNAL

Wai 143 & Ors. 30 April 1996. Chief Judge ET Durie, E Manuel, Prof GS Orr, Right Reverend MA Bennett, Prof MPK Sorrenson. 370pp

> The gravamen of our report has been to say that the Taranaki claims are likely to be the largest in the country. The graphic muru of most of Taranaki and the raupatu without ending describe the holocaust of Taranaki history and the denigration of the founding peoples in a continuum from 1840 to the present.[1]

This sentence of the Waitangi Tribunal's first Taranaki report, which caused much controversy because of its perceived overstatement, follows a summary in the final chapter which veritably shakes with anger. The tribunal concludes that "the whole history of Government dealings with Maori in Taranaki has been the antithesis to that envisaged by the Treaty of Waitangi".[2] Following the end of the war in Taranaki the Government "embarked on a macabre buying spree" of remaining lands accompanied by "fraud and corruption".[3] The invasion and sacking of Parihaka, "must rank with the most heinous action of any government, in any country, in the last century."[4] It has had "devastating effects" on race relations.[5] And the system of perpetual leases to Pakeha farmers over the reserves which remained was the "cruellest" of many "false promises", ensuring that Taranaki Maori "should never be allowed to forget the war, the imprisonments, and their suffering and dispossession."[6]

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1 Waitangi Tribunal, *The Taranaki Report* (1996), at 312.

2 Ibid, 300.

3 Ibid, 309-310.

4 Ibid, 309.

5 Idem.

6 Ibid, 310.

The report is subtitled "Muru me te Raupatu. The Muru and Raupatu of the Taranaki land and People." The claimants had urged the use of this terminology. "*Muru*" means the plunder of property as punishment for alleged offences and "*raupatu*" the conquest or subjugation of people by an external force. The report details both sorts of loss.

Pre war purchasing

The first chapters of the report deal with the government claim to have purchased for settlement 75,370 acres in 9 blocks around New Plymouth between 1844-1859. The purchases were initiated by the NZ Company and subsequently taken over, adjusted, then confirmed by the government. The tribunal faults the Crown conduct in several ways. The initial NZ Company purchase which was the basis for subsequent arrangements in fact post-dated Hobson's proclamations preventing private land dealings with Maori and was therefore simply invalid. The Land Claims Commission established by the Crown to investigate the transactions denied Maori the right to determine matters within their autonomy and prevented much needed dialogue directly between the Crown and Maori. Customary law was misconstrued and many valid owners were simply ignored because it was convenient to argue that they had abandoned the lands when they had temporarily moved to Cook Strait and other places. The government's subsequent efforts to finalise matters by 'purchasing' within the area of the Company's "purchase" were invalid, as these efforts took place in an atmosphere of tension and fighting between Maori sellers and non-sellers, and as more settlers were being introduced. In addition, inadequate reserves were made from the purchases and there was a general failure to properly consult with the proper Maori leadership. Faced with numerous settler encroachments associated with these purchases, the tribunal finds that the Maori response was restrained.

Waitara purchase and the lead up to the war

In Chapter 3 the tribunal examines the pre-war situation and found that in accepting an offer to sell at Waitara in 1857 the Governor had acted in disregard of customary tenure, despite advice to the contrary, and in breach of principles of law that in establishing custom in such cases the law of the people themselves is paramount. The rangatiratanga exercised by Wiremu Kingi was also misunderstood, to the convenience of the government. Kingi was unjustly attacked. Examining the government documents at the time, the tribunal agrees with the interpretation of events offered by historians like James Belich, Hazel Rizeborough, Ann Parsonson and others, that the real issue was not a land dispute but the imposition of government authority.

The Wars in Taranaki

Given this assessment, the tribunal not surprisingly finds that the government was an unjust aggressor in the war in North Taranaki beginning in March 1860. The second war, on which the land confiscations were based, was a result of government failure to properly investigate the Waitara purchase, its military reoccupation of areas, and a military trespass which resulted in a Maori ambush in May 1863. These actions were not only contrary to the Treaty, but because no act of rebellion had taken place the confiscation was possibly unlawful in terms of the NZ Settlements Act 1863. The tribunal is at pains to stress that the war continued longer in Taranaki (9 years) than elsewhere in the North Island. Some 534 Maori were killed and 161 wounded, to 205 European troops and Maori allies killed and 321 wounded. It also highlights an issue of ongoing distress to the claimants: the fact that street names in places such as Waitara are a celebration of military and political conquerors. The tribunal comments that "name changes are needed."[7]

Confiscation

The tribunal closely examines the legal background to the confiscations. While it was within the authority of the NZ General Assembly to enact the NZ Settlements Act 1863, since exceptional legislation is permissible where the existence of the state is threatened, the confiscations were unlawful because they were ultra vires that legislation. There was no indication that the Governor was satisfied, as the legislation required, that groups were in rebellion in Taranaki, and the facts suggest that they were not. The most serious error was that while the Act provided for only specific lands to be taken for settlement within a district, the Governor took all the land of the Taranaki district for military settlement, including clearly unsuitable land, such as Mount Taranaki. The confiscation was also not referable to the purpose of the Act i.e. settling sufficient numbers of armed settlers to keep the peace. The actual purpose was simply to take all land capable of settlement. Arguably, later validating acts could not correct such gross illegalities, but only irregularities in form and process. However, to calm any fears that new legal avenues were being opened up, the tribunal commented that this point is now of academic interest only as proceedings are statute barred and properties have since changed hands to bona fide purchasers.

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7 Ibid, 105-106.

As expected, the tribunal concludes that the confiscations were a clear breach of the Treaty of Waitangi:

> While the specific terms of the Treaty may be suspended in an emergency, the general principles enure to the extent that they provide criteria for assessing the circumstances. The Treaty furnishes a superior set of standards for measuring the propriety of the State's laws, policies, and practices. This shifts the debate from the legal paradigm of the state where the rules must protect the Government's authority to one where Government and Maori authorities are equal.[8]

Contemporary records of the debate surrounding the introduction of the confiscation legislation and its application show that the government did not act in good faith. The tribunal also notes that confiscation in other jurisdictions (e.g. Scotland and Ireland) has always been for the purposes of conquest, not of peace.

Compensation

Chapter 6 of the report deals with efforts to compensate 'loyal' Maori whose lands had been confiscated. This is an aspect of the confiscations which has not been well understood in previous historical research. The tribunal finds that the Compensation Court established by the government made inadequate inquiries and wrong decisions on custom (e.g. absentees were disentitled, ancestral interests were distorted by artificial calculations of loyal versus rebel entitlements), had a thin veneer of legality only, and the judicial process was subservient to executive actions to reach agreements with groups, which the court would not look into. The scheme as implemented was probably unlawful, and certainly entirely inconsistent with Treaty principles, there being nothing on the record as evidence of "even minimal protective standards or the performance of fiduciary obligations."[9] By returning individualised titles the scheme was "an engine for the destruction" of Treaty guaranteed traditional values. Worst of all, promissory papers rather than land was actually given so that 14 years after the court decisions almost none of the land awarded had actually been returned (The court made 518 determinations entitling 'loyal' Maori to 79,238 acres. By 1880 only 3500 acres had actually been returned).

From 1864 there was a government power to adjust compensation court awards. In practice these amounted to no more than a series of promises

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8 Ibid, 132

9 Ibid, 162.

of further land for absentees and others who had missed out on the court awards, promises which were in almost all cases never implemented. In past assessments of the impact of confiscation, the amount of land "returned" to individuals has been treated as a credit to government. The tribunal argues that a viable approach to assessing loss and prejudice is to look at land in Maori ownership and determine how far it is an asset for the people, not just individuals. On this approach, "*hapu*," as "*hapu*," retained nothing when the land was confiscated from "*hapu*" and then returned to individuals.

LAND PURCHASES 1872-1881

Another aspect of Taranaki history not previously well understood was a series of transactions between 1872 and 1881 in which the government used deeds of cession and purchase and payments of gratuities to secure 648,048 acres both inside and outside the confiscation boundaries. In north and central Taranaki, the 'purchases' inside the confiscation line, in effect payments for land already technically in Crown ownership, could not, the tribunal says, count as land returned and then properly purchased since the Maori vendor had no title and no ownership if the 'sale' was resisted. For 'purchases' outside the confiscation line, the operation of the Native Land Court in these areas was a "wrongful imposition, promoting individual caprice and judges' preference above traditional decision-making" and failed to provide any protection for Maori.[10] 'Purchases' in the south and on the Waimate plains by way of payments of gratuity or "*takoha*" to individuals and groups on lands already confiscated were "thoroughly bad and meaningless in law".[11] Fraud and undue influence in all these activities was also evident.

In chapter 10 of the report the tribunal broadly attacks the work of the Native Land Court in the district, and in particular reviews a decision in 1882 awarding almost all Ngati Tama lands (66,000 acres) to a few individuals from a neighbouring *hapu*, as an apparent means of punishing Ngati Tama for allying with the King movement (the tribunal termed the award 'confiscation'). Overall, the tribunal finds that Native land legislation was contrary to the principles of the Treaty since it deprived Taranaki Maori of authority over their lands. Maori land, in social and cultural terms was made an "illusory and meaningless asset" for the people and community it had traditionally served.[12]

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10 Ibid, 192.

11 Ibid, 198.

12 Ibid, 285.

Parihaka

The tribunal outlines the well known basic history surrounding the invasion of Parihaka and offers some fresh perspectives. Te Whiti's peer, Tohu, was of equal status to Te Whiti. Parihaka was extremely prosperous by 1880, acknowledged as such by government officials, and provided "proof of that which governments past and present have sought to avoid admitting: that aboriginal autonomy works and is beneficial for both Maori and the country".[13] There was no reason, "apart from motivation" why central Taranaki should not have been declared a Maori district under the New Zealand Constitution Act 1852.[14] The NZ Settlements Act 1863 provided that confiscated Maori land did not become Crown land freed of all Maori interests until it was Crown granted for settlement. Since the central Taranaki confiscation was effectively abandoned, and no fresh land could be confiscated after 3 December 1867, and *takoha* which had been paid was of no legal significance, Parihaka lands were in 1881 held by the Crown subject to Maori interests. Consequently, the Crown assumption of land in central Taranaki and the invasion of Parihaka were unlawful and remains so today. Although, again, to remove any fear that new legal avenues might be opened up by this conclusion, the tribunal comments that current land titles would be secure under the land transfer system.

The tribunal concludes that the taking of land and the invasion of Parihaka was contrary to Treaty principles as was the imprisonment without trial of many Parihaka people. The tribunal came to no definite views on the treatment of prisoners. It quotes at length from Martin Luther King's statements about non-violent protest and challenges to unjust laws. It notes also that Parihaka was completely rebuilt after the return from imprisonment of Tohu and Te Whiti.

West Coast Leases

The report critically examines the work of two West Coast Commissions which reported on the failure to reserve lands after confiscation, and the second commission which went on to make reserves, finally giving effect to most of the awards of the Compensation Court. The tribunal finds that there was a bias in the commission towards European settlement, it had limited terms of inquiry, it acquiesced in the Parihaka invasion, which broke its own recommendation that adequate reserves needed first to be

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13 Ibid, 214.

14 Ibid, 215.

made, it lacked independence from government, it 'punished' Parihaka leaders by reducing their reserve awards, and it individualised all but 991 acres of the 200,000 acres put into reserves. Worst of all, the reserves were, by statute, put in the hands of the Public Trustee with power to lease to promote settlement, which in practice resulted in leases to Pakeha farmers (of 193,996 acres in reserves in 1912, 138,510 were leased by Europeans). From 1892 the leases were, by statute, made perpetually renewable. The tribunal looks briefly at the subsequent history and the amalgamation of all reserve interests in a single incorporation in 1976 ('PKW') and ongoing disputes among Taranaki Maori about the role of that body.

With regard to currently proposed changes to alter the perpetual leases, to end their perpetual nature and provide a fair return to Maori, the tribunal takes a hard line. While, it says, the sanctity of private contracts should be respected "There is nothing sacred about those contracts. They are entirely profane."[15] This was not a situation of competing equities or of a contractual relationship between Maori and lessees, but rather of each group having mutually exclusive and distinct claims to make to government. The proposed government scheme would see some leases terminating 62 years after amending legislation is passed. This delay, the tribunal says, was "excessive and unacceptable."[16] There should be termination after no longer than 42 years from the enactment of amending legislation, and 5 yearly rent reviews. Maori were also separately entitled to compensation for loss of possession, control, land and rental (compensation for loss of rents should go only to those who were owners when the loss occurred. Latecomers would be excluded). The loss of opportunity to maintain and develop the society must also be considered.

> Perpetual leasing was the unkindest blow, for it visited upon succeeding generations the pain of knowing the family lands were held by another people; and as parents were forced to send their children away to work, they did so knowing how their lands were worked by others.[17]

Reparation

The tribunal considers the Sim Commission report of 1928, its limitations, and the creation of the Taranaki Maori Trust Board, with its struggle to apportion money among Taranaki tribes and provide a wide range of

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15 Ibid, 274.

16 Ibid, 275.

17 Ibid, 276.

services with inadequate resources. The continuing role of the Board should be a live issue in settlement discussions, the tribunal finds. The tribunal also looks at the momentary revesting of Mount Taranaki in the trust board in 1978 which had led to it popularly being called "magic mountain" — returned one moment, gone the next. This settlement had obviously not satisfied the people. The tribunal notes that there was no legal basis for the mountain's confiscation in the first place.

Settlement options

As a guide to the negotiations which were proceeding as the report was released, the tribunal comments in detail on the factors which should be taken into account in any settlement which might be reached. It comments that the Taranaki claims are likely to be the largest in the country. Long term prejudice may be more important than quantification of past loss. Taking the broad approach suggested by s6(3) Treaty of Waitangi Act 1975, compensation:

> should reflect a combination of factors: land loss, social and economic destabilisation, affronts to the integrity of the culture and the people over time, and the consequential prejudice to social and economic outcomes.[18]

In all 1,199,622 acres were confiscated and no distinction should be made between this and 296,578 acres said to have been purchased, and 426,000 'expropriated' by the government's Native Land Court process. When determining injurious affection, the impact of loss by reference to the proportion of the land taken and the amount retained in regard to the size of the group is more important than the amount taken in absolute terms. The amount remaining to Taranaki Maori is probably less than 3% and hapu, as distinct from individual, loss appears to be total. Social and economic destabilisation should be compensated as should personal injuries i.e. damage to the psyche and spirit of people. Current social and economic performance may be a measure of past deprivation. Little weight should be placed on reparations previously paid.

Significantly, the tribunal comments that any settlement should not be full and final since a full accounting for loss will not be politically possible in any settlement. The tribunal then turns to the detail of the groupings within Taranaki — a matter of contention throughout the hearings, and which continues to hamper negotiation efforts. The tribunal names eight *hapu* deserving separate consideration in any settlement (including

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[18] Ibid, 312

Pakakohi and Tangahoe, although with a lesser standing than the other six *hapu*). The apportionment of any settlement between *hapu* is a matter for themselves. The broad perception from the evidence is that Taranaki people in the centre of the province account for 1/7, and the north and south 3/7 each; but any apportionment should be settled locally without further reference to the tribunal. Separate settlements for north, south and central groupings seemed appropriate and compensation should be directed to *hapu* and not the trust board, unless *hapu* otherwise agree. The same applies to the PKW incorporation, as settlements should not be dissipated by individuals. However PKW and the trust board should be reimbursed for funding the research and presentation of claims.

COMMENTS

The report is unusual in that it is the first issued by the tribunal before the hearing of Crown evidence. This approach was agreed by the Crown and the claimants because a negotiated settlement is intended and it was felt that a report would give an indication to both parties of the quantum and nature of the settlement. Prior to the report, the Crown had simply filed a short series of concessions on major points raised by the claimants in their evidence.

A consistent historical theme of the report is the struggle of Taranaki Maori to retain autonomy. The report reflects on aboriginal autonomy as it is understood internationally, and the government insistence that its authority prevail in all matters, not just in war and confiscation but in setting up "wrong processes" such as trustee administration and the land court to decide issues that Maori ought to have been left to decide themselves.

The tribunal view that there has been an "expropriation in Treaty terms" of 1,922,200 acres (777,914 hectares) is a large departure from previous assessments of loss in Taranaki, which arrive at a figure of 462,000 acres actually taken by that legal process.

The report will set the historic framework for the tribunal's consideration of confiscation in other districts. For example, the NZ Settlements Act was applied, and the Compensation Court operated, in districts such as the Bay of Plenty and Waikato, and the findings in Taranaki will no doubt have some bearing on findings in those districts. Of equal interest, perhaps, to the findings in relation to confiscation, however, are the findings with regard to Native land legislation and the work of the Native Land Court. It is questionable whether the Native Land Court, which in the first decades of its existence operated clearly with the government interest in mind,

can be said to have been a truly impartial judicial body in those decades. The tribunal in the Taranaki report clearly tends to the opposite view.

Leave has been given to the parties to the Taranaki claims to seek a further hearing if proposed negotiations prove unsuccessful or clarification on particular items is required. The tribunal has promised a second report which will look at the history of particular groups and ancillary claims that may need to be distinguished for any comprehensive settlement "unless matters are earlier resolved."[19]

TOM BENNION*

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19 Ibid, xi and 311.

* LLB(Hons), *Well.*, Editor, Maori Law Review.