S. 29.

BEFORE THE WAITANGI TRIBUNAL **Wai 705**

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

IN THE MATTER of **Barbara Francis,** on behalf of the whanau of Peneamene Tanui of Whitianga

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COUNSEL'S OPENING FOR WAI 705- 4th OCTOBER 2001

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MAY IT PLEASE THE TRIBUNAL

1. THE CLAIMANTS

The claimants for Wai 705 are the descendants of their ancestor Peneamene Tainui. Tanui, as was typical for Hauraki Maori, could identify with a number of hapu and iwi and did so in the face of the conversion of Maori land tenure in the 1860s, by the Native Land Court. The hapu he identified with for the blocks which are the subject of this claim was Te Rapupo. This hapu can be said to no longer exist in that it is a name that has come into dis-use. It is submitted that the discontinuance of this name Te Rapupo probably occurred with the landlessness that resulted. With the landless that resulted Maori from Whitianga increasingly identified with the iwi Ngati Hei, despite that at the time of the investigation of titles by the land court in the 1860s-70s, Maori who were named on the titles to these blocks called themselves Te Rapupo.

The name Te Rapupo came about from a connection with the iwi Ngati Whanaunga and Ngati Piri, and indeed Maori at Whitianga included in these blocks identified also as being Ngati Piri, Ngati Whanaunga along with Ngati Paoa and Ngati Koheru.

The connection can be best told by the following:

> Ngati Tamatera began to attack a Ngati Piri hapu called 'Te Whanauwhero' at Whitianga about three generations prior to the Native Land Court hearings. A Whanauwhero ancestor, Te Whakapakinga II was killed during one such attack. His relatives searched for him at night, supposedly the origin of the Te Rapupo name.
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> The son of Te Whakapakinga II, Te Hinaki, married a Ngati Paoa/Tamatera woman and established the Paoa/Tamatera connection to the area as well as peace. The whakapapa below shows this:
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> Ngawhare Te Hinaki of Te Whanauwhero = Ihipera Te Wawa of Paoa/Tamatera (son of Te Whakapakinga II)

Maori in the region tended to identify with being from several hapu, Te Rapupo members also said they were Ngati Paoa, Ngati Whanaunga and Ngati Hura (on various land purchase deeds). Testimony before the Native Land Court told how tribes from Kawhia - Ngati Koheru, Ngati Piri and Ngati Hei came, conquered, then intermarried to settle in the region. Te Rapupo then could identify with the ancestor Piri, but intermarriage later (Te Hinaki's to Te Wawa) made for the Paoa and Whanaunga identification too.

The Tribunal is asked to bear in mind this fluid history of intertribal marriage and settlement when considering the way in which the tangata whenua witnesses shall identify themselves as Ngati Hei rather than from the hapu Te Rapupo.

Four witnesses shall be called for the claimants as tangata whenua witnesses. They shall first talk about their whakapapa. Then each will give an account of the history of their whanau connections to the land at Whitianga including their use and relationship to the Whitianga Harbour. All the witnesses too give various accounts of whanau members who have made attempts to retrieve lands in the 20th century, but whom are no longer here to give their own testimony.

2. THE CLAIM AREA

The claim area is an area that borders on the Whitianga Harbour, to the west of the harbour and covers some 5 blocks determined by the Native Land Court as Karamuramu, Puahape, Te Weiti, Whakau and Wharetangata. The claim has been confined in terms of land, in this way, since Peneamene Tanui was named on the title to those blocks, and the claimants are his descendants.

The claim also concerns the Whitianga Harbour itself and the rivers and streams running through the blocks.

3. THE TREATY BREACHES - A SUMMARY

This claim against the Crown can be summarised as follows:

3.1 Crown purchasing.

Between the period 1850-1882 the Crown purchased almost all of the claimant's whanau lands, with about 24 000 acres purchased from the hapu Te Rapupo, out of 28 000 acres said to be held by the hapu. (This 28 000 acres comprises all of the Te Rapupo's lands while the 5 blocks which are the subject of this claim are only part of that landholding.)

It is claimed Crown policy, legislation and action by Crown agents in the Whitianga, led to the claimant's whanau being landless soon after the turn of the century. Most of Te Rapupo lands were purchased by the Crown and it is claimed that little regard was had for the effect this was demonstrably having on Whitianga Maori at that time, both socially and economically. In this regard it is claimed the Crown breached the Treaty as a treaty partner and in its fiduciary duty to the claimants where it failed to provide for restrictions on alienations, reserves and even a period where purchasing would cease in light of the warnings being given to the Crown by various officials that landlessness would result and that Whitianga Maori were leading a hand to mouth existence.

It is also claimed as a breach of the Treaty that the Crown was offering below market prices for Maori land at Whitianga, during Crown pre-emption. It is claimed this breached the principle of viewing Maori as a Treaty Partner and acting in good faith as a partner.

It is further claimed the Crown purchasing tactic of advancing payments to individuals named on the title, over sometimes many years, is a breach of the Treaty. It shall be seen that this Crown policy and action was closely aligned with the operation of the Native Land Court and its legislation.

3.2 Native Land Court operations

It is claimed that the Native Land Court operated in this district much in the same way complained of by other claimants throughout Hauraki. It is claimed that the Crown's action of passing legislation constituting the Native Land Court was a breach of the Treaty in that the court's main function was to alienate Maori lands and to break down the communal nature of Maori land tenure. The repercussions of this was to break down Maori life socially which in turn had an affect on the people economically. It is claimed that the legislation providing for the court's powers saw to it that individuals were placed on the title, allowing for ease of alienation to the Crown through pressure on individuals by Crown agents. A communal front barring alienation by a hapu could not be undertaken given the legislation placing few or single individuals on the title. With the break down of holding lands communally, Maori were not sustaining themselves through known and traditional means (hunting, gathering and agriculture). Lands were sold for mere sustenance.

It is also claimed that the claimant's whanau lost land through the operations of the court through the huge debt which was normally incurred by lands being placed before the court. Charging lands before their titles were investigated occurred, with private purchasers behind many title investigations. The private purchasers invariably were George White and the timber millers. It is claimed that the Crown breached the Treaty where it omitted to act to put a stop to this practice and there is evidence too that Crown agents like MacKay even encouraged this.

It is further claimed that the Crown did not actively protect the claimants from sharp practices engaged in by settlers and complained of by the claimant's whanau before the land court. Forgery of signatures on titles were complained of by Tanui along with a failing to provide a reserve, promised at the time of purchase, by a timber company. The land court either refused to investigate or made findings of no jurisdiction. It is claimed that the Crown ought to have intervened to avail such Maori complaints in light of the context of Maori inexperience in land dealing, the lack of resources available to Maori to endure litigation over land and the promises made nationally by the Crown that the conversion of Maori land tenure would provide increasing economic and social opportunities for Maori.

3.3 Crown omissions to assist Maori development

It is claimed that the Crown failed to meet it fiduciary duty to the claimant's whanau where the Crown was actively purchasing from blocks which had been leased to timber

companies. Such purchasing by the Crown not only contributed to the landlessness which resulted but the Crown was actively discouraging a means by which Whitianga Maori could engage in the new economic regime, sustaining themselves and future generations by retention of the freehold.

It is also claimed that the Crown breached the Treaty given that Crown agents were encouraging lands to be charged with debt for mere sustenance of the claimant whanau. The fact that Whitianga Maori were selling lands and this was recognised by the Crown as their means of sustenance, and the Crown did not intervene to assist, is claimed to be a failure on the part of the Crown as a Treaty Partner and in its fiduciary duty to the claimants. Aligned with this fact is the failure on the part of the Crown to instigate policy and legislation to assist the claimant's whanau with traditional pursuits such as agriculture and pursuits in the new economy such as flax harvesting and timber milling, despite these resources being in existence on Maori land.

3.4 Environmental degradation

Damage to the environment, including the lands, rivers, creeks, beaches and Whitianga Harbour by the timber industry was complained of by the claimant's whanau in the 1870s and 1880s. It was complained too that traditional fisheries were being depleted and polluted by the timber booms. It is claimed that the Crown failed to properly ensure to Whitianga Maori their rangatiratanga over such taonga which was also a means of sustenance, where it omitted to regulate the timber industry's exploitation of Whitianga forest.

3.5 Urupa

The desecration of urupa which are subject to the claim: Huke Huke, Toumuia and an urupa on Te Weiti, has occurred through development. It is claimed that the Crown breached its fiduciary duty when it passed legislation concerning Maori land that omitted to recognise oral agreements regarding waahi tapu, made between settlers and Whitianga Maori. Instead, settlers and developers like timber millers, continued to rely on written deeds despite protest by Whitianga Maori, while the Crown omitted to avail the claimant whanau in this regard.

3.6 Whitianga Harbour

The claimants will show through their tangata whenua evidence their relationship to the harbour, as an entire entity. The relationship that the claimant whanau has with the harbour extends from it providing food and travel as well as an esoteric relationship that views the Harbour as a taonga.

It is claimed that the presumption of the English common law regarding the tenure of the foreshore of the harbour and the seabed, followed by the subsequent enactment of

legislation by the Crown which resumed the control of all harbours in harbour boards, was a denial of claimants' tino rangatiratanga over the harbour. It is claimed that such legislation and legal presumptions were a major abrogation of rights and ownership considering the context of Whitianga Maori being a seafaring people whose relationship and interaction with the sea was not merely usury but was also spiritual in nature.

4. THE CLAIM

4.1 The Early Sales

The claim concerning the lands is confined to five blocks only and today the Whitianga township is comprised within those blocks. The blocks are Te Weiti, Whakau, Karamuramu, Wharetangata and Puahape. Those blocks can be best seen at figure 4 of the Ellis report *Whitianga.*

The claim against the Crown regarding these blocks is that the Crown purchasing was rapacious, in light of the landlessness that resulted, and it is asserted that the Crown recognised this was occurring, as early as the 1870s.

Crown purchasing was responsible for the majority of Te Rapupo lands alienated at Whitianga and this was prior to the implementation of the Native Land Court. Alienation of Te Rapupo lands occurring at the same time as title determination by the Native Land Court from the 1860s through to the 1880s, was again primarily to the Crown but was also to two exclusive groups - merchants like hoteliers and storekeepers and the other, timber millers. So it is then that the operation of the Native Land Court is closely connected with the purchasing actions by both the private and the public "good", in that both used the court to facilitate acquiring Maori land on terms that were very much in their favour, to the detriment of Maori owners. It is alleged that the land court was instrumental in causing the claimants to become landless in that it converted Maori tenure into a mode making for easy alienation to the Crown. This in part was the legislation providing for the ten owner rule.

Mr Ellis' evidence comprised in his report *Whitianga* tells how Maori had been engaging to some extent, in the new economy, prior to the 1860s. This was with timber millers. Deals were being made for land and trees where both were lucrative for Maori. Mr Ellis and Dr Anderson have both made the comment that despite such early deeds of conveyance, even Pakeha purchasers knew their tenure was precarious. In this area too, there is clear evidence that land purchased early by the Crown - Orua in 1858 - was purchased again, within the Te Puia block in 1865 (see fig 3 of the Ellis report). As such then, it would have been important to explain deeds to Maori vendors but there is no evidence that this was undertaken at Whitianga.

If it is understood Te Rapupo hapu was said to own approximately 28 000 acres, then about 17 000 acres had already been purchased by the Crown before the Native Land

Court sat to investigate titles for Whitianga lands in the 1860s. (See figure 3 showing the Mahakirau, Te Puia and the Purangi Islands comprising approximately 17 000 acres.)

These Crown purchases are prior to the time with which we are concerned but the context of such purchasing was that settlers did not move on to the land and Maori were free to continue using the land. The other important feature is the lack of reserves made for Maori from these purchases.

The reason for the lack of development for settlement was the land was unsuited to farming. But the effect of this lack of settlement meant that early purchasing, while large scale, did little to alter the balance of power for Whitianga Maori and did not alert them to the effects of large scale purchasing while they were still free to use the land.

The other feature of the early land purchases was there was a massive influx of wealth to a few individuals. There was no assistance by the Crown to invest it and indeed there were reports of the tribal patrimony being squandered on alcohol and tobacco. This was recognised by Crown officials but there is no evidence of the Crown intervening to curb this frittering away of wealth.

With the early purchases, Preece as agent for the Crown, adopted the tactics complained of by other Hauraki claimants to this Tribunal - chipping away at blocks, sometimes over many years, breaking down any resistance by anti-sellers, by incremental signing up of individuals to sell their share. Dr Anderson has reported to this Tribunal how Preece reported to the Crown that such a tactic was understood by both the Crown and Maori to fundamentally alter Maori society - breaking down "evil" communal life. Hapu and iwi resistance to sale could only occur where the traditional social order was maintained. The sale of land by individuals was complained of by Hauraki Maori to undermine the power of rangatira. This had a trickle down effect on Maori social life where traditional farming, hunting and gathering on a communal level, could not be sustained in the face of individualisation. As such, Whitianga Maori by the end of the century were said to lead a hand to mouth existence with traditional fanning no longer being undertaken. The little land left was being sold off for mere sustenance.

Preece also adopted a further tactic that was to continue into the 1860s - the Crown offered prices to Maori at Whitianga that were under market value, on Preece's recommendation. Preece explained with Mahakirau (a Te Rapupo block) that it should be purchased quickly, as it contained gold, before Maori at Whitianga got wind of this.

4.2 Native Land Court

The sitting of the land court to investigate Whitianga land was not fraught with many of the difficulties that occurred in other regions of New Zealand. The relatively few people residing in the area at the time is one reason for the ease of claims made for land. The land

court investigations were conducted with little acrimony during the 1860s and 1870s. It is only once land became more scarce that counterclaims to land occurred.

From the first blocks to be investigated in Whitianga, Puahape and Karamuramu and Toumuia were amongst them. Their investigation of title in 1866 was similar to others in that the owners named as owners on the titles were decided before going to the land court, with often one individual or a small number were selected. In the case of Karamuramu however, only Tanui was placed on the title.

The Puahape block was investigated by the land court in 1866 and by 1869 it had almost been sold to a private purchaser where 8 of the 9 owners had alienated their share. Middlemass was the purchaser and he married a local Te Rapupo woman. The remaining share not sold to Middlemass (comprising 1 acre 3 roods) was not partitioned out until 1889, on Middlemass' application to the court. He had applied to purchase the final share (now succeeded to as the ninth owner had died).

The Treaty breaches in terms of this block concern fragmentation and compulsory Crown acquisition. The last remaining portion became subject to fragmentation, with succession orders continuing to fragment the shares making them singly uneconomic and even collectively uneconomic considering the small area for the many successors. The Puahape 1 block of 1 acre 3 roods was awarded to Keremeti Maihi and is said to have sat unused by the Maori owner for 60 years. The adjacent block owner believed it part of bis block and farmed it and paid its rates for 20 years. In 1953 the Education Department began looking for a school site and made inquiries with the land court as to the owners.

Eleven successors were identified, but addresses were held for only 5 of the owners. None lived at Whitianga, 3 of the 5 responded agreeing to the sale of the site to the department.

The land was taken by the usual proclamation procedure (where all owners could not be contacted). A notice declaring the intention to take was placed in the Whitianga Post Office for 40 days in 1954. (This is despite none of the owners, where addresses were provided, lived in the area.) The notice was also published in the *New Zealand Gazette,* as was the procedure under the Public Works Act 1928. Finally the proclamation was published in the gazette on 10 February 1955, taking effect 4 days later.

One owner Aherata Waata objected to the acquisition in May 1955, but was told the notice of intention to take had been published and as no objections had been received, the proclamation procedure had endured. She was advised of the land court hearing to compensate the owners. After the notice of hearing was published in the *Thames Panui* and *Waikato Maniapoto Panui,* an Auckland owner requested the hearing be at Auckland as the remaining successors were said to live about Auckland. This was denied. At the hearing the owners were awarded 330 pounds after costs and expenses were taken out. The lone albeit late objector, Waata, was at the compensation hearing.

The Puahape 1 block is now part of the Mercury Bay Area High School.

Issues about this acquisition are:

> the sufficiency of the notification process including both the land court maintaining up to date records of successors' whereabouts as well as that provided for in the statutory taking regime of the Public Works Act 1928
>
> the fragmentation of Maori land as this is partly the reason for such poorly kept records of the land court in the case of succession. The eleven successors in 1955 to Keremeti Maihi had l/7th or 1/21st share holdings, making for unproductive units on their own. The unproductiveness of each individual's share encouraged alienation. As it was, had all eleven communally tried to make something of the land, it was only a one acre block, again encouraging sale
>
> the lack of consideration for Maori landlessness is evident again where Waata had objected saying she wanted this land. No consideration was given by the Crown that the Whitianga Maori were practically landless, in the 1890s nor again when the last scraps of Maori land remained in the district

The Karamuramu block comprised 86 acres and was awarded to Tanui solely in 1866. The entire block was alienated to George White later that month for 60 pounds. This block comprised prime land, and the alienation of the block so close to title investigation leads to an inference that White was sponsoring the investigation by the Native Land Court. This inference can be made in light of what is known about White, who had the local store at Toumuia. White was busy acquiring land at Whitianga and in the case of the Toumuia block (which can be seen at fig 4 of Ellis report) allegations of forgery of Hera Puna's signature on the conveyance were investigated. Chief Judge Fenton urged the Attorney General to seek a warrant to arrest White in regard to Hera Puna's allegation, however this was not done. It was also the experience of Maori across Hauraki and in the Mercury Bay district to become indebted to storekeepers, like White. It will later be submitted in closing, that it can not be ruled out that this block was lost to White for debt.

Whether it was private purchasers or the Crown, when MacKay was the intermediary or the Crown Agent, his practices were said to be similar: advances made before title determination, sometimes to pay for costs associated with going to Native Land Court, or sometimes to pay for tangihanga, or to discharge debt, particularly with the storekeepers. Indeed David Alexander puts this kind of advancement (daily living expenses) as the most common reason for loss of land (see the brief of evidence of David Alexander for Wai 100, doc F5 paras 14,15 and 18. Mercury Bay is explicitly said to be an area where MacKay practiced this way).

Te Weiti block ran along Buffalo beach and was situated where the township now stands, and had in part harbour frontage. This was investigated by the Native Land Court in 1870 and was surveyed to 6374 acres.

Though the block was first divided into three parts and awarded to separate members of Te Rapupo, a year later in 1871 the blocks were amalgamated at the owners' application (Te Weiti 1, 2, and 3, an area of 6298 acres). It is assumed this amalgamation was for the purpose of a lease that was signed earlier that year for this area. The effect of the amalgamation was to put 10 owners on the title, (the 'ten owner rule' again prevailing) cutting off two owners from the title. A survey lien for 188 pounds 2 shillings and 6 pence was admitted by Maka Puhata to have been arranged by him but he is said by Mr Ellis to have been shocked at the amount of the charge.

A lease was negotiated by MacKay (though he was Crown purchase agent by this time) to the Mercury Bay Saw Mill company, for a 45 year tenure with a lump sum payment then annual rental. Favourable terms were also negotiated such as totara being reserved to the owners for 15 shillings for each tree along with cultivating and collecting kauri gum by the Maori lessors.

In 1873 Maka Puhata died and the cost of his tangi was large. Despite the lease to the sawmill company, MacKay reported to the Crown in 1873 how he had accepted on the Crown's behalf to purchase 5000 acres of the Te Weiti block, at 2 shillings 9 pence per acre. MacKay told the Crown the owners were selling to defray the costs of the tangihanga.

The Crown viewed the block as having attractive features with frontage to the Whitianga and Whangamaroro rivers. Sites on this last river were said to be suitable for homesteads (Alexander, vol 8 part 2 p64). All this was reported without any regard for the lease which Maori were economically benefiting from, nor did the Trust Commissioner turn his mind to this when he certified the lease in 1873, by which time MacKay was already active in acquiring shares in the block from the owners.

So by 1873, 5000 acres had been purchased by the Crown for a total sum of 675 pounds. One shareholder had not sold owing to their being a minor and the trustees were not appointed until 1877.

Other incremental sales occurred; viz in 1879 the trustees sold the minor's share to the Crown with the Native Land Court affirming the sale for 50 pounds extra payment. The Trust Commissioner certified all these sales.

Then in 1873 and 1882 private purchases were made by Thomas Carina of a small area for a considerable sum - 1 acre 3 roods for 85 pounds. The later purchase in 1882 was of a minor's share. His hotel stood on the land.

Also in 1873, the Mercury Bay Sawmill Company acquired a large area of 1296 acres in the block, then the minor's share was acquired in 1883. This piece of Te Weiti had harbour frontage up to Taputapuatea stream and extended to the hills behind (see fig 3 of the Ellis report, private purchases). Finally the company purchased Carina's share too in 1885.

This purchase followed the general pattern of Crown purchasing practice of the time - advances made to individuals over a period of time, with the conveyance being complete some several years later. With incremental purchasing of shares, any owners who might not wish to sell were often squeezed out. An alternative might have been for the Crown to seek hapu or iwi mandate to determine which lands would be sold off. The advantage of this would have been less likelihood of landlessness as well as the authority of the chiefs being upheld. As it was, land agents were intent on accepting individuals' interests and were informing Maori they would not bow to iwi authority. (Anderson *Hauraki and the Crown 1800 -1885* vol 4, chapter II, p 97 citing Hay to Chief Commissioner in 1861).

In 1883 Tanui and Te Aouru applied to the Native Land Court to succeed to then-relative's interests in Te Weiti - Kaitu's in the case of Tanui. Tanui claimed the signature by Kaitu was a forgery and Te Aouru claimed her mother's interest in the 1298 acre portion (sold to Carina and the Mercury Bay Saw Mill Company). The saw mill opposed both applications in what was a fiercely contested case. The solicitor for the saw mill, Dufaur, testified both Kaitu and Harata (Te Aouru's mother) both sold their shares to the saw mill company.

Mr Ellis comments that the 1873 and 1874 purchases were not certified by the Trust Commissioner until 1882 making Dufaur's claim of proof before the court difficult to establish, in the absence of the deed.

In 1883 a new mill was being built at a site on Te Whakau block which eventually expanded on to Te Weiti and was in close proximity to Huke Huke (see fig 2 of the Ellis report). It appears this prompted the application too as Tanui had asserted to Dufaur that those portions of the block had not been sold. (Dufaur used this against Tanui claiming Tanui admitted to Dufaur all the block had been sold bar the waahi tapu.) It appears the construction was threatening the waahi tapu and Maori had interned bodies already.

Dufaur rubbished Tanui's claim to Kaitu's interest, particularly drawing on the court sitting three times at Coromandel and once at Whitianga since Kaitu's death in 1875. During those court sittings the matter was said by Dufaur not to have not been raised by Tanui.

Ema Te Aouru's claim of succession to Harata Patene's share was in the portion sold to the saw mill company (in 1873, 1883 and 1885).

Judge Williams dismissed the case, the court apparently being unable to decide matters of forgery as alleged for Kaitu's signature. Kaitu's interest over Te Weiti 1,2 and 3 was said to be outside the jurisdiction of the Native Land Court as the plan showed the lands as

waste lands of the Crown. A difficulty with the research into these allegations is that the land court records make a thorough record of Dufaur's testimony but not Tanui's.

Te Weiti 4 was the remaining portion of Te Weiti (76 acres) and is included in the Wai 705 claim as the claimants believe this to contain waahi tapu. Title was determined and awarded by the Native Land Court in 1870 to the Kingi family who had their kainga and cultivations on the land. Interestingly this was the only land of all Te Rapupo lands that was made inalienable by court order. Mr Ellis makes the comment that it is apparent this was done as the Kingi family did not have land elsewhere. There is however a reference to an urupa called Tawakerahi, by Hera Puna in 1870 before the land court (Coromandel Minute Book 2 at 439 on 7 October). Hera Puna says her grandmother is buried there. Mr Ellis also gives the connection between the Kingi family and the other Te Rapupo members as close. The boundaries given in the minute book are not clear to say with complete certainty. Despite the restrictions the land was alienated entirely to a storekeeper, called Quinn, six years later. This sale was confirmed too by the land court and the Trust Commissioner Haultain.

This block being the only block that was anything like a reserve, provides evidence of the Crown failure to prevent the landless situation that was to occur. The office of the trust commissioner was supposedly implemented to curb this occurring, but its role in that area did not flourish.

The trust commissioners were constituted pursuant to the Native Lands Frauds Prevention Act 1870. Their function was to investigate transactions where they were contrary to equity, to any trusts or where alcohol or firearms were advanced by European purchasers. Importantly for Whitianga Maori the trust commissioners also had to be satisfied that the parties understood the effect of the transaction and that Maori had sufficient lands left to support themselves.

It is perhaps not surprising there is little evidence of the trust commissioners making genuine inquiry as to the claims by Whitianga Maori that despite alienating their lands they were not close to landlessness - even though the Crown was being alerted to the phenomena by the 1870s. In the first year that the legislation was passed, Sewell issued two instructions to trust commissioners telling them to not be over zealous with their investigations, provided there was good faith in the deal. The second letter was distinctly more reticent considering the issue of Maori becoming landless where Sewell ordered:

> Except in cases where you have reason to believe there is fraud or illegality, you should give the certificate as a matter of course. *(The Crown, The Treaty, ami The Hauraki Tribes 1800 - 1885* vol 4, appendix three by David Alexander p320)

A further feature of the trust commissioners office which was contributing to the lack of inquiry into Maori land holding, was the local Trust Commissioner's resistance to travel. In a bid to keep the cost of the office low, Trust Commissioner Haultain (whose area also

included Auckland) would rely on Native Agent Puckey at Thames, to make the inquiries at Hauraki. Puckey in turn would not travel to Mercury Bay and relied on a JP at Whitianga to make the inquiries locally. The way the power of the trust commissioner was delegated in the claim area makes it easy to understand why the landlessness of Whitianga Maori was not kept in check, despite the legislation.

Title to the Whakau block was determined in 1870 by Judge Munroe, it being awarded to 9 owners, covering an area of 933 acres. Peneamene Tanui and Wi Maihi Te Hinaki requested there be no alienation restrictions on the block, once again stating they held plenty of land elsewhere. Shortly after title determination a lease was executed for the flax on the block, the income of 20 pounds per annum over a 20 year tenure, with the owners' reserving their cultivation sites, being the terms. Meikle, a director of the MBSM Co had an interest in the flax production. A deliberately lit fire destroyed the flax on the block two years later.

In 1874 the Mercury Bay Sawmill Company bought 923 acres from 6 of the 8 owners, for 130 pounds. The final two owners' interests were purchased in 1884. The first sales were certified by the Trust Commissioner, then the Native Land Court for the final two shares.

Before the land court the director Gilmer said the company had purchased the block to gain control of the creeks running through the block that were especially used as the block was opposite the mill. This purchase would obviate the requirement to compensate Maori for damage to the waterways and banks.

Then in August and December 1873 the company purchased all but one interest in the remaining 10 acre portion of the block for 100 pounds. The price was high as it was the only portion of Whakau with harbour frontage and faced the mill. The final share of the block was purchased in 1882 (nine years later) and the mill was moved onto the block. This portion may have contained the Huke Huke urupa.

In 1883 while the purchase of the larger portion of 923 acres was yet to be complete, Wiremu Maka or Te Tarapa applied to the Native Land Court to enforce the company to reserve a 100 acre area out of the 923 acres so far purchased from the 6 owners in 1874. It was claimed too that Maori had not intended to sell waahi tapu. What prompted the application may again be the moving of the mill (as in Te Weiti above with Peneamene's 1883 application) onto the Whakau block commencing in 1882, to a site so near the urupa Huke Huke.

In response to the claim of a 100 acre reserve, the company director Gilmer said only 50 acres had been agreed to, but not the locality. Despite this concession before the court, Gilmer then produced a deed of conveyance of the "entire block without reservation" in both Maori and English. This too was despite the conveyance could not be achieved until the final interest was sold (or alternatively their portion partitioned out by the court) as it was, in 1884. A witness was produced, Richard De Thierry, to say a site had been

surveyed, a 50 acre site, which Te Tarapa had eventually agreed too. However de Thierry did remark that 20 -30 Maori present had believed there to be a 100 acre reserve. The plan for the 50 acre reserve is held at LINZ but was not certified.

Judge Williams dismissed the application saying the Waitotara reserve (as it was known) had been sold by the deed and the Native Land Court was not the tribunal to which the owners could appeal.

The Wharetangata block comprised an area of 86 acres and an investigation of title by the Native Land Court in January 1870 was conducted. The block was adjacent to Karamuramu and Puahape (two of the first blocks to have their title investigated by the court in 1866) and as such had harbour frontage and is where the township of Whitianga is today (see figure 4 of the Ellis report). Nine people were awarded the block and were the same as those owners for the Whakau block (also adjacent, to the west of Wharetangata).

Development by Pakeha traders had already begun on the block prior to title investigation with William Lee building a flax mill on the block over 1868-69. Flax stretched from the harbour to the hills on the block and weeks after the award of title a lease was signed for 12 acres of the block, an annual rental of 12 pounds was agreed. Compared with the lease for the Whakau block where 933 acres was leased for 20 pound per annum, this price was high.

The arson in 1873 however destroyed the flax and the mill became defunct. The reasons for the arson are given below where the flax industry is discussed.

Alienations occurred from the block over the next thirty years and by 1908 no Maori owners remained. There were some six hearings for this block over the period 1870 to 1897. Hearings took place at Coromandel, Thames and Mercury Bay where the same application had months between. Mercury Bay to Coromandel was a two day trip, while to Thames it was longer. The expense of the travel and accommodation let alone the court costs all had to be borne by Maori.

4. 3 Maori Development

4. 3. 1 Timber industry

The presence of the timber companies in the Mercury Bay district had a disastrous effect on Maori socially and economically as well as for the maintenance of the resource itself.

Most of the Maori land alienated to private buyers went to the timber millers so the industry players came to be in direct competition with the Crown for purchases in the 1870s and 80s. Paradoxically however, this competition did not see any benefit to Maori, and the presence of timber leases was particularly used by the Crown to undermine the position of Maori. Socially, the presence of the cutting rights, then the leases and finally

the sales meant that Maori were no longer using the forests for a source of food to sustain themselves. In the Whitianga area, there were reports Maori were selling land for basic sustenance and were indebted to the shop keepers.

The presence of the timber companies in the area saw the Crown purchasing methods respond in the following ways:

> the Crown would commence purchasing shares from blocks despite that leases had been executed in favour of the timber companies (sometimes very shortly after leases were executed). The Crown actively accepting individual offers to sell ignored the economic and social benefit to Maori that leasing could have provided - an income from the land while still retaining ownership of the land
>
> the Crown agent MacKay often helped negotiate the timber leases but then used their presence to negotiate lower prices when the Crown commenced purchasing from the blocks
>
> when the Crown made advances on blocks, often these were made to shut out the competition from the timber companies who might offer more for the blocks; indeed MacKay gave evidence that if Maori could have sold privately they might have received significantly more

The other way in which it is claimed the Crown failed in its duty to Maori in the district is its lack of regulation of an industry that massively increased into the 1870s, without any regard to Maori for their resource, either immediately or into the future.

It is estimated that some 500 million square feet of timber were exported from the area over 60 years. The first engagements with selling timber by Maori was the individual selling of trees for which Maori greatly benefited, the price being high and the land remaining. The Mercury Bay Saw Mill Company was paying 10 shillings per tree to Maihi Te Hinaki.

This was surpassed by Browne in the 1830s who purchased lands, then the 1860s saw the Mercury Bay Sawmill Company negotiate for the cutting rights over large blocks. Although there were lump sum payments that might have been considerable, per tree per acre the deal was not as good.

Meikle and Gilmer from the Mercury Bay Sawmill Company particularly, next acquired large lease holds then finally purchasing blocks from Whitianga Maori (the purchases discussed above). Prior to the 1865 Act, the deals with the timber companies were illegal, however the Crown turned a blind eye to this.

Despite the timber industry's dominance in the area, Maori were said anecdotally to have been only employed as casual labour. More secure and greater economic benefits did not

come to Maori from the industry despite the economic base it formed for the millers. Despite promises by the Crown how individualisation of title would achieve assimilation into the Pakeha way of life and the benefits would be great, no provision was made by the Crown for Maori to participate in the industry. Any capital that Maori might have derived from the sale of land was not enough - it often being swallowed by debt and daily living expenses given that hapu cropping and hunting was not occurring with the land alienation and timber felling.

The destruction of the rivers from logging is evident from histories about Whitianga, and Maori complaints to government. Massive timber booms were constructed across river mouths, rivers were diverted as were creeks, cliffs and waterfalls were blasted and removed and infrastructures like roads, tramways and dams were constructed. The waste from the milling also polluted the harbour and the beaches; a slag heap was burnt on the beach for 40 years, non-stop. Silting in the Whitianga Harbour and the creeks was said to have occurred from log booms, while steamers were said to have been able to have navigated some way up the rivers prior to the milling.

Peneamene Tanui and others were responsible for a petition to parliament about the Waiwawa timber booms' destruction to lands, but there were also complaints about the loss of food resources obtained from the forests.

4.3.2 Flax

The timber industry was not the only economic activity occurring on Maori land at Whitianga. Flax was being exported from the area, until about 1898, with flax fields specifically on the Whakau and Wharetangata blocks. Meikle (Mercury Bay Sawmill Co director too) was owner of the flax mill on the adjacent Wharetangata block, built in 1868. Arson destroyed the flax on Wharetanga and Whakau with local Maori said to be responsible for the fire after asking for a rise in price - which Meikle refused citing low prices in Sydney. A contractor's wife said however the contractors were responsible for the fire. It is assumed that some Maori were either contracting and/or casual labourers at some stages, but there is no evidence of Maori from Whitianga or elsewhere being employed at the flax mill on Wharetangata or the one on Ngati Hei land at Whenuakite. Similarly with the timber industry, there was no encouragement from the Crown (through resources and policy) to Whitianga Maori to develop and benefit from this resource.

4. 3. 3 Agriculture

Agriculture had been a traditional source of sustenance for Whitianga Maori and with more Pakeha coming into the district in the 1870s, Maori there began to trade in agricultural produce.

In 1870, plots of 15 -20 acres were said to be sustained on Te Weiti, Whakau, Kaimarama, Whangamaromaro and Mill Creek. Maori were selling the produce to Pakeha

at trading posts and George White's store to get European goods, including tobacco and alcohol. By 1875 Native Agent Puckey (from Thames) reported a decline in Maori agriculture, Puckey directly drawing a nexus between the lack of agricultural pursuit to the ready sale of lands to the Crown. And a year later he reported the situation to be worse where few Maori were paying any attention to 'industrial pursuits' and were said to be living a hand to mouth existence. Finally in 1880 Puckey warned the government that Maori in the district would be dispossessed of all their lands if care was not taken.

By 1880 most land suitable for cultivations had passed out of Maori ownership. So even if agriculture cropping was desired by Te Rapupo hapu, it was difficult to undertake. A block of land before the land court in 1883 used by Te Rapupo for cropping is indicative of the desperation felt by the 1880s. The block was only 30 acres, being finally awarded to 14 Te Rapupo people, but was fiercely fought over. Compared with earlier court sittings - at a time when the consequences of the court were not so apparent - this was unusual for Te Rapupo.

4.4 Urupa.

The claim specifically refers to the desecration of waahi tapu. The first of these is the Huke Huke urupa which has been referred to above, as it was part of the Te Weiti block and can been seen at figure 2 of the Ellis report.

The exact location and extent of the site is difficult to locate because the township has been developed over it. It is said to have been at the mouth of Whitianga Harbour, opposite the ancient pa Hei Turepe, and today is somewhere located between Monk Street through to Buffalo beach.

The Mercury Bay Sawmill Company is said to have purchased the land where the site is but at the 1883 hearing in the Native Land Court when Ema Te Aouru and Peneamene Tanui disputed the sale of Te Weiti to the saw mill, the deed was not then produced nor can it be found today.

Historically the urupa has been accounted for liberally in Pakeha history. According to Alfred Lee it was near the Dairy Company store which is now the Mercury Bay District Museum. When a reservoir was dug in the 1950s for the Dairy Company bones were discovered. Palisading was apparent until the 1880s, though it disappeared gradually and the site was desecrated by Pakeha visitors looking for taonga. Maori removed bones once the desecration began, and again in the 1950s when the reservoir was dug. Again, at 1 Monk Street when an excavation was done bones were found and on The Esplanade from Mill Road corner towards the wharf. A plan of this is at p 85 of the Ellis report.

The Thames Coromandel District Council has defined an area for Huke Huke (see plan at p85 of the Ellis report) but this is not accepted by the claimant. In 1944 too a letter was written by Miriama Winiata to the Minister of Native Affairs that the urupa was two and a

half acres in area. Winiata drew the Minister's attention to the beach front development then going on where bones had been uncovered. She had taken them to bury at her own home. She too complained of the desecration caused by the digging saying it was "disturbing our dead."

An urupa called Tawakerahi has been described above, in the alienation history for Te Weiti 4.

A waahi tapu Toumuia was on a small hill in the town ship comprising tomo (caves and holes). At the Nga Puhi attack on Ngati Whanaunga in 1918, those Ngati Whanaunga whom perished were placed in the tomo. This urupa is comprised in a esplanade reserve governed by the Thames Coromandel District Council but its status according to tangata whenua is neither acknowledged nor is it being preserved by enclosure.

Of concern regarding all the urupa is that none were reserved nor demarcated on titles nor in deeds. Conclusions can be drawn from this, viz: that Maori did not want them to be known to Pakeha, and/or that Maori did not appreciate alienation of a block could necessarily sever ties to the waahi tapu. Indeed there is evidence of Maori not appreciating the latter with anecdotal Pakeha accounts of Maori still active in guarding their waahi tapu. One transgressor had a sea vessel taken at Whitianga, while another - a horse - was shot.

5. SUMMARY

The end result of Whitianga Maori becoming landless is submitted to have been effected by a determined Crown purchase policy beginning in the 1850s, shortly thereafter coupled with the operation of the Native Land Court through the period 1866 -1908.

The transfer of Maori tenure to the individualised titles determined in the Native Land Court is submitted to have been a means to alienating Maori land, rather than any direct benefit to Maori in either the development of their lands or dealing with their lands in a way which could sustain Maori into the future (such as leasing). As such then, despite promises to Maori how title determination before the court would lead to progress, it instead achieved debt and alienation of Maori lands with the ultimate result of Whitianga Maori being landless. It is submitted there is no evidence the Crown encouraged or provided Whitianga Maori with resources to advance Maori once assimilation had been embarked upon - despite Maori having access to valuable resources beside the land, such as flax, timber and agriculture. Whitianga Maori simply sold their tribal lands to sustain themselves with even traditional development like agriculture falling away.

The moneys derived from the alienation too can not be said in real terms to have been fair. While it is clear that large sums of money might have been given at any one time for an alienation, when worked out on the basis that this was the only real economic sustenance for the hapu and its future generations, the consideration for the lands alienated were

pittance. The evidence of Mr Ellis concludes that 1 shilling 9 pence per person per week was approximately paid for Te Rapupo lands. This could be compared to bush workers who earned about 25 shillings per week, with some saw mill contractors earning 50 shillings per week.

The debt incurred by Maori putting their lands before the Native Land Court had the consequence of the loss of land. Survey costs and court fees were direct costs that can be claimed to have contributed to the loss of land at Whitianga. Particularly at Whitianga however, debt was being levied against the land in anticipation of lands going before the Native Land Court (with creditors like storekeepers often behind the scenes encouraging the title determination).

The operation of the Native Land Court and its legislation it is submitted contributed greatly to the demise of traditional Maori social and political structures. This in turn made for mass land alienation. Despite a law change in 1873 with the passing of a new Native Land Act, where the 'ten owner rule' no longer applied and all owners could be put on the title, this was not done generally in Hauraki and nor was it done in the claimed blocks (see Anderson vol 4 p184). This vice in the Act and the Native Land Court operations meant Maori power structures (with rangatira and hapu) were undermined with individuals selling their tribal patrimony without consideration for the existing or future hapu members.

The providing for reserves to be set aside from sales was not done for any of the blocks, except in one instance by way of alienation restriction (for Te Weiti 4). It is submitted this was a failure on the part of the Crown in two ways: at an official level where it ought to have ensured that its legislative provisions were being utilised by the land court and the trust commissioners' office and on the ground when Crown agents were making deals for Maori land. This grievance is particularly exacerbated considering that the Crown was alerted to the landless situation developing. The Native Land Court too did equally not keep this in check. The case of the Whakau alienation to a timber company where the company even admitted to the land court that a reserve was represented to the owners at the time of sale, is very telling it is submitted, of the court's readiness to provide for Maori.

Land purchase agents of the Crown (the likes of MacKay under McLean) engaged in practices that can be described as acting in bad faith, as a Treaty Partner. Methods such as: turning a blind eye to leasing and cutting rights given to the timber companies, then negotiating those deals as MacKay did, quickly followed by MacKay advancing payments to seek the alienation of the title to the Crown but demanding lower prices because of the encumbrance; encouraging debt to local storekeepers like George White; advancing payments to some owners to secure the Crown gaining the alienation of the title over any competition and to discourage any non-sellers in the title, sometimes taking years to effect a transfer of the title to the Crown; the Crown policy, particularly under the Vogel Ministry, of paying as little as possible to Maori for their land, whereby the profit of

on-selling might offset the massive borrowing for the Fox-Vogel public works (see Anderson vol 4 pp 189, 199, 201).

It is submitted the Crown failed to regulate private purchasers whom used the Native Land Court to achieve economic advancement to the detriment of Whitianga Maori. This was particularly so with the timber industry and George White at Whitianga. Timber company personalities sponsored Native Land Court titles being put before the court in the Mercury Bay area, after a period of illegal leasing (pre -1865 until the passing of the first Native Land Act). Survey and title granting that was sponsored by the company would be followed quickly by sale to the timber company (see Anderson vol 4 pl83- 184). There is evidence too the timber company admitted before the court it was purchasing Maori land to avoid paying compensation to Maori owners for damage to river banks. The land court did not discourage this and neither did the Crown propagate the benefits of leasing to Whitianga Maori.

In the ambit of environmental damage it is submitted the Crown failed to ensure Maori prized resources like rivers, forests and the harbour would not be polluted. The issue arises most evidently with the presence of the timber industry in Whitianga. Maori at Whitianga were complaining their rivers, providing for fish and transport, were being desecrated by the logging industry. The lack of regulation by the Crown of the timber industry in the Mercury Bay area is complained of, bearing in mind the Crown moved to protect, licence and regulate cutting on its own forest land during the depletion of the forest in the Mercury Bay District.

The same can be said for urupa, where it is again claimed that the Treaty breach on the part of the Crown is the lack of protecting urupa through legislation. In closing submissions the law shall be more thoroughly put, but briefly it is claimed that while the urupa could have been reserved - as the legislation permitted - the legislation ought to have taken into account Maori tikanga regarding urupa and provided for it. There is some evidence for instance that Whitianga Maori were reserving their urupa but it appears this was done through oral agreements. The legislation however coupled with the land court would not uphold such agreements. The case of Whakau was an acute one considering the timber company purchaser admitted to the court he had agreed to a reserve and had seen a grave. Despite the admissions, the land court reinforced European land law saying the court could not go behind written deeds, or in the case of Te Weiti where there was no deed even, the land court did not avail Whitianga concerns about the urupa on Te Weiti.

Into the 20th century the grievance against the Crown in respect of urupa has continued with development going on, again at Huke Huke with bones ending up in a residential back yard. The failure too of the local council to provide for the Toumuia urupa within their esplanade reserve and again to provide for a wider area for Huke Huke is complained of, it being estimated Huke Huke is actually about two and half acres in area.

Finally this claim has at its centre not only the lands, but equally the Whitianga Harbour. The tangata whenua evidence will give some support to the claimants being a seafaring people whose lives were dependant on the harbour for food, for transport, particularly to the off shore islands and there is consideration for the harbour too in a spiritual context. The operation of the common law and successive legislation (which shall be canvassed in closing submissions) has detracted from the original position that tangata whenua had in relation to this harbour. It is submitted that the end result is that despite assurances to the contrary in the Treaty, Maori at Whitianga have had their rights in ownership and use of the harbour derogated by Crown legislation and actions. It is further submitted too that modern legislation enacted by the Crown like the Resource Management Act 1991, while seeming to take account of Maori as a treaty partner with matters Maori being included as of national importance - in practice - ownership rights are subverted to one of consultation with tangata whenua. The issue of Maori being seen as a Treaty Partner at a local level in Whitianga arises.

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