Ngai Tahu's Tangled Web

Part 3 (conclusion)

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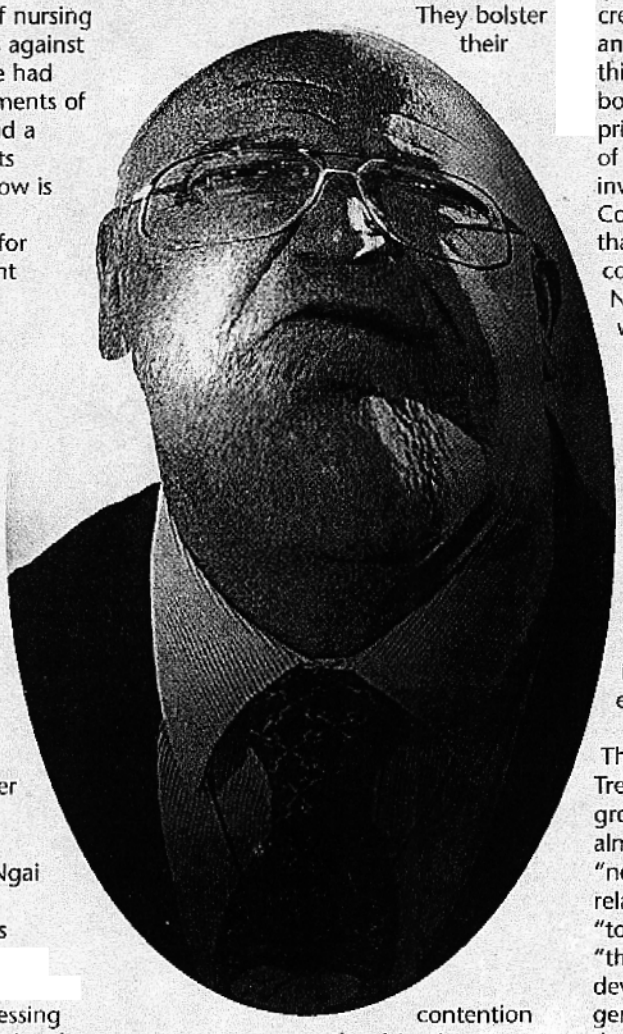
Prior to the Treaty of Waitangi Act being amended in 1985, the 200 or so claims submitted by Ngai Tahu to the Waitangi Tribunal would have been dismissed as the absurd wish-list of a tribe with a long history of nursing imaginary grievances against the government. By 1985 there had been three 'full and final' settlements of its one legitimate land claim, and a series of inquiries had stripped its other claims of all credibility. How is it then that taxpayers will soon have to foot a $170 million bill for a fourth 'full and final' settlement of the South Island tribe's gripes?

The short answer is that the settlement is a swindle. It is based on the findings of a Tribunal that judged Ngai Tahu's claims not by standards of truth and equity, but against 'principles' which have been formulated by a crude re-writing of New Zealand history. Hardly less culpable is the government. It acquiesced to the workings of this kangaroo court, and then entrusted taxpayers' interests to the negotiating skills of a Minister who supports special laws favouring Maoris, and whose ignorance of the history of the Ngai Tahu claim shows that he has swallowed the Tribunal's findings unquestioningly.

The Tribunal is charged with assessing whether claims brought before it involve breaches of the Treaty of Waitangi. None of Ngai Tahu's claims did, but that proved no barrier to the Tribunal sustaining many of them, because it felt itself "not confined to the strict legalities" of the matter, but free to judge whether the claims involved breaches of Treaty 'principles,' rather than that document's literal terms.

And what are these Treaty principles? In effect, they are whatever the Tribunal says they are. Till recently they did not exist outside of the imaginations of a few revisionist academics bent on promoting apartheid or some milder form of bi-culturalism in New Zealand. They bolster their



contention that Maoris are dupes of the white man's assimilationist policies by arguing that the chiefs who signed the Treaty comprehended its significance differently from the British colonists. The Treaty's 'principles' derive mainly from the understanding of its meaning a chief in 1840 might have gained from hearing it read aloud in Maori, as divined by these modern-day mind-readers.

"Partnership"

It did not take long for their musings to be accorded the status of historical truth. For instance, the Tribunal was able to treat as an established fact the 'principle' that the signing of the Treaty created a partnership between Maoris and the Crown. In reality it did no such thing. As Walter Christie shows in his book *Treaty Issues*, the partnership principle traces to an erroneous decision of the Court of Appeal in a 1987 case involving the New Zealand Maori Council. It is founded on nothing more than the opinion of five judges who combined a lamentable ignorance of New Zealand's history with a willingness to ignore the constitutional principle that they are appointed to apply the law, not make it. There is not an iota of evidence that the British authorities intended to establish such a partnership, nor that the chiefs saw this as the Treaty's object. Overwhelmingly, the evidence is that both parties believed its effect to be what the English version plainly states - that it gave the Crown sovereignty and Maoris no rights additional to those enjoyed by other British subjects.

The Tribunal felt itself able to ignore the Treaty's literal terms, however, on the grounds that it is "a remarkably brief, almost spare, document" which was "not intended merely to regulate relations at the time of its signing" but "to operate in the indefinite future when "the new nation would grow and develop." As it saw it, "the broad and general nature of its language indicates that it was not intended as a finite contract but rather as a blueprint for the future. As Sir Robin Cooke [then president of the Court of Appeal] has said, 'What matters is the spirit.' "

This is simply nonsense. The Treaty was a treaty of cession, and like all such was concerned with rights and territory: with defining what rights and territory were held or ceded by the contracting

parties. Its language, at least in the English version, was not broad and general but precise and not easily misconstrued. It was a blueprint for the future only to the extent that it laid down what rights and territory the parties would have following its signing. Its "spirit" is as incapable of being accurately ascertained as the Maori perception of what it meant, and equally irrelevant to its effect.

By the first article, the Crown gained sovereignty over New Zealand. The chiefs ceded this "absolutely and without reservation." By the second article the Crown confirmed and guaranteed to all Maoris the "full exclusive and undisturbed possession of their Lands 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." By this article also the chiefs yielded to the Crown the "exclusive right of Pre-emption" over such lands as they might wish to alienate, at prices to be agreed upon by them and the Crown's agents. By the third article the Crown extended to every Maori "all the Rights and Privileges of British subjects."

The settlement is a swindle. It is based on the findings of a Tribunal that judged Ngai Tahu's claims not by standards of truth and equity, but against 'principles' which have been formulated by a crude re-writing of New Zealand history.

The effect of the English version is unambiguous. The whole Treaty settlement industry is based on the Maori version. This spoke of *kawanatanga* instead of sovereignty; *tino rangatiratanga* instead of property rights; and *taonga* instead of property — all terms with meanings as pliable as plasticine apparently. The Pandora's box opened by the Treaty of Waitangi Act was the authority it gave the Tribunal to "reconcile or harmonise" the two texts. A rule of interpreting bilingual treaties holds that neither text is superior and each should be interpreted by reference to the other. But the tribunal ignored it. Since most chiefs signed the Maori version, it chose to give "considerable weight" to this and made little attempt to interpret any of its ambiguities in the light of the English text.

Thus the Tribunal is sure that Maoris would have understood the guarantee of *tino rangatiratanga*, "a complex and subtle concept," to have encompassed something more than the possession of their lands and other property listed in the English text. According to the Tribunal, the term "necessarily carries with it, given the nature of their ownership and possession of their land, all the incidents of tribal communalism and paramountcy. These include the holding of land as a community resource and the subordination of individual rights to maintaining tribal unity and cohesion."

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According to its interpretation, what the Crown was really recognising in article two was the Maoris' "just rights" to maintain "their own customs and institutions." *Tino rangatiratanga*, therefore, guaranteed Maoris "tribal self-management on lines similar to what we understand by local government." This meant that the Crown obtained the cession of sovereignty "subject to important limitations upon its exercise. In short the right to govern which it acquired under the Treaty was a qualified right. It was inherent in the Treaty's terms that Maori customary values would be properly respected."

This is simply self-serving tosh. Maori customs and institutions in 1840 included cannibalism, infanticide, exposing the old and the ill, slavery, internecine tribal warfare, and the practice of *utu* and *muru*. All these practices were outlawed under Article Three. Not only does the Tribunal's interpretation run directly counter to the express terms of the English version of the Treaty, but it also contradicts evidence contained in its own report. In fact, as it acknowledged, Europeans viewed tribalism "as one of the worst evils of Maori life" and "strenuous efforts" were made to replace this type of collectivism with the individual rights guaranteed in Article Three. The Crown's aim was "to assimilate [Maoris] speedily into western culture and values."

And by the 1860s it was evident that Maoris themselves, in their demand for the individualisation of their reserves, were also desirous of throwing off their "tribal communalism." In 1860 Ngai Tahu chiefs announced that the "voice of all the people" was for subdivision, so that "our difficulties and quarrels may cease, that we may live peaceably, and that Christianity and good works may thrive amongst us." The Treaty gave the Maori, for the first time in his history, the chance to escape the influence of the tribe and, in the word's of Kaiapoi's Rev. Stack, to "do what he likes with his own." Within a short time many Maoris had voted with their feet. By the end of the century only about half of all Ngai Tahu were living in tribal communities, and the trend has continued ever since.

Sir Apirana Ngata observed in a 1922 booklet explaining the Treaty that the granting of the rights and privileges of British subjects was "the greatest benefit bestowed upon the Maori people" and the part of the Treaty "that impresses the Maori people most." Yet the Tribunal mentions it only once, when making the point that *tino rangatiratanga* "has always loomed large in Maori consciousness - even above Article Three." This neglect is not accidental. The Tribunal's whole *raison d'être* is bound up in its interpretation of Article Two, and this interpretation remains plausible only so long as the other two articles are ignored.

Besides that of partnership, the Tribunal derived two other principles from its interpretation of the Treaty's meaning — both equally bogus.

Rangatiratanga & pre-emption

First, as Maoris signed the Treaty on the understanding that it ceded sovereignty to the Crown in exchange for the protection of their *rangatiratanga* - "the right of Maori to retain their full tribal authority and control over their lands and all other valued possessions" - the Crown was obliged to actively protect Maori *rangatiratanga*. Second, the Crown's pre-emptive right to buy Maori land imposed on it a duty to engage in all such dealings with "sincerity, justice and good faith." Any tribe alleging a breach of these principles is entitled to call on the Tribunal to investigate its claims and seek a recommendation for compensation when detriment is shown to have occurred.

In respect of the Ngai Tahu claim, the

partnership principle was breached if the Crown did not act "reasonably and with the utmost good faith" when dealing with the tribe. The principle enjoining the protection of its *rangatiratanga* was breached if the Crown did not provide it with an official protector when negotiating to buy its lands. And the principle connected with pre-emption was breached if the Crown did not first ensure that Ngai Tahu wished to sell land or, having made the purchase, neglected to leave the tribe with sufficient land in the form of reserves.

Treaty principles & Ngai Tahu

The spuriousness of these 'principles' becomes apparent to anybody who troubles to enquire into the history of Ngai Tahu's claims. They are supposedly based on the understanding that Maoris had of the meaning of the Treaty, in particular of the partnership principle and the guarantee of their *rangatiratanga.* Yet not once in the ensuing decades, when Ngai Tahu were peppering the government with their land claims, was any appeal couched in terms which remotely hint at them viewing their rights under the Treaty as the Tribunal says they would have. Indeed, this writer came across just one allusion to the Treaty in the myriad petitions, reports and memoranda connected with their claims, and that referred to the explicit guarantee it makes concerning Maori ownership of their fisheries.

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Nevertheless, the Tribunal is able to conclude that the Crown breached the principle requiring it to appoint a protector to safeguard the tribe's *rangatiratanga* in every purchase but one. This was not hard to find. Ngai Tahu had no protector following its first land sale because in the meantime the protectorate department had been abolished. This, the Tribunal decided, meant the tribe was reliant on "the ability and goodwill of land purchase officers" to safeguard its *rangatiratanga,* and they, being incapable of looking after the interests of the government and the tribe, settled for looking after those of the government only.

The Tribunal reinforced its formulation of this principle by referring to the instructions given to Captain Hobson by the colonial secretary, Lord Normanby, prior to the signing of the Treaty. Normanby wished the Crown's land purchases to be undertaken by a protector of aborigines. When Governor Grey arrived in 1845, however, he judged the cost of the department to be too great in proportion to the benefits the Maoris were deriving from it, and axed it. In particular he noted the large sum appropriated to the salaries and allowances of the Chief Protector and his two sons, who "were equally disliked by the Natives and the settlers." Grey's policy was to control the Crown's dealings with the Maoris himself and spend the department's budget on them directly.

There was nothing barring Grey from taking this action. Normanby was merely the politician in charge of colonial affairs at the time Hobson was despatched to New Zealand, and he had been replaced before the Treaty was signed. Later governments were at liberty to adopt or adapt his policies as they saw fit. Even so, Grey and his successor Governor Gore Browne, who between them oversaw eight of the nine remaining purchases of Ngai Tahu land, should have been safe from the charge that they ignored Normanby's instructions. *In every sale the land purchasers appointed were either officers of the Native Department or men well acquainted with and sympathetic to the Maoris.*

The Tribunal tried to paint Walter Mantell, who negotiated three of the purchases, as some kind of Maori-phobe who later underwent a conversion, but other sources portray him differently. The Encyclopaedia of New Zealand says he was a man who "from the outset, was deeply aware of European responsibility for the future of the Maori," while the notebooks he kept during his 1848 negotiations "give the most understanding account of Maori life in Otago at the time."

The principle that the Treaty signified a partnership enjoins the Crown and the Maoris to act towards each other reasonably and with good faith. The Tribunal, however, while finding the Crown guilty of various breaches of this injunction, deigned not to notice any infractions of it by Ngai Tahu. Numerous instances of Ngai Tahu's duplicity during the land-sale process have been instanced in earlier issues, but a recapping of one should be enough to show the Tribunal's double standard in applying this principle.

Ngai Tahu & Banks Peninsula revisited

In the late 1830s and early 1840s a French colonising company tried to purchase Banks Peninsula from the local Ngai Tahu who, when the sale was investigated, admitted to parting with only small sections of it. The peninsula contained about 250,000 acres, but the company had estimated its extent at just 30,000 acres and the Crown, after talks with the French government, agreed to a maximum grant of that area on the basis that four acres would be allowed for every pound spent on the venture. Eventually it was established that the French had spent enough to entitle them to about 47,000 acres, but the grant of 30,000 acres was allowed to stand.

In 1845 the French tried again to secure title to the whole peninsula and two more agreements were negotiated with Ngai Tahu. By now the local Maoris had signed six deeds with the French, five of them in breach of the Treaty's pre-emption clause, and in return had received consideration worth about £1,750. In 1848 when Kemp and Mantell finalised Kemp's purchase, which was intended to include the peninsula, they were assured by local Maoris that it had been sold to the French.

The following year the New Zealand Company began preparing for the arrival of the first batch of Canterbury settlers. It had bought the rights of the now defunct French company and planned to use Lyttelton as a port. Now, however, Ngai Tahu was adamant that Lyttelton had not been sold. At this point Grey could have put an end to their mendacity by having their breaches of the Crown's right of pre-emption cause them to forfeit their right to the land. But instead he chose to treat the matter as a misunderstanding" and instructed that "some small payment" and reserves be made in return for giving up their claim. By 1856 the whole peninsula had been signed over to the Crown in three lots, in return for £650 and six reserves totalling 3,427 acres.

An impartial Tribunal would hold the Maoris fortunate to have done as well as they did. For an area about one-hundredth the size, they received payments well in excess of that made for Kemp's purchase, and reserves that gave them each about one and a half times as much land on average. Yet the Tribunal, ignoring the Crown's reminder that this was a result of its forbearance, charged it with having done "grave harm" to Ngai Tahu "by the serious and numerous breaches of the Treaty and its principles," and found it was under a "clear duty" to repair the damage. "Good faith and the spirit of partnership require no less."

The Tribunal decided that the French deeds had conveyed "only very small pieces of land" to the company, and that of the 30,000 acres it was awarded, only 1,700 acres were actually bought. The rest "were, in effect, confiscated by the Crown" and despite "repeated efforts by Ngai Tahu" no relief or remedy had been granted (in fact, in 1857 Ngai Tahu told the Crown the peninsula had been fairly bought and the Tribunal was the first to hear otherwise). The Tribunal found Grey's refusal to recognise that Ngai Tahu still owned the land meant Mantell's instructions were "infected" with bad faith. As a result Mantell had been "inflexible over the purchase price," "threatened" that the earlier transactions with the French had imperilled their title, and acted as if his function was merely to make an award, rather than negotiate a purchase. "All such conduct was in complete disregard of Ngai Tahu's *rangatiratanga* over their land and a clear breach of Article Two."

Ironically, the Treaty principle that the Crown was found to have breached most often was that connected with the pre-emption clause. The Tribunal again referred to Normanby's instructions to justify this principle. He foresaw the Crown paying an "exceedingly small" price for Maori land because it had no more than a nominal value in their hands, because a large government expenditure would be needed to enable European settlement, and because the real consideration the Maoris received would be the enhancement in the value of the land they retained following the settlers' arrival. The Tribunal reasoned that, as the Crown's right of pre-emption was an "extremely valuable monopoly right," cheaply gained, the Maoris had granted it in return for Crown protection of their *rangatiratanga*.

This is simply another attempt to re-write history. As explained earlier, the Crown's motive in instituting pre-emption was not to enrich itself but to protect the Maoris from unscrupulous land dealers. In fact, pre-emption was more a liability than a boon to a cash-strapped government in its early years. Its land fund was in deficit in every year but one in the decade following the signing of the Treaty, and in 1862 it abolished pre-emption. A principle that the Tribunal would have us believe is based on a *quid pro quo* in reality benefited the Maoris handsomely and the Crown hardly at all: Pre-Treaty sales involving millions of acres were overturned so the Maoris could resell the land to the Crown, which was now further bound to protect their *rangatiratanga* during the sale process.

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"Sufficient endowment"

Normanby also instructed Hobson not to purchase any land from Maoris "the retention of which by them would be essential, or highly conducive to their own comfort, safety, or subsistence." European settlement was to be confined to such districts as they could alienate "without distress or serious inconvenience to themselves." From such generalities the Tribunal found it "abundantly clear" that the Crown was under a duty to leave Maoris "a sufficient endowment for their own needs - both present and future."

And what constituted a sufficient endowment? There was no single answer to this question, the Tribunal ruled. It depended upon "a wide range of demographic facts including the size of the tribal population; the land they were then occupying or over which the members enjoyed rights; the principal sources of their food supplies and the location of such supplies; the extent to which they depended upon fishing of all kinds, and on seasonal hunting and food gathering."

What the Crown needed to have regard to, it held, was the fact that while "over time Ngai Tahu would become increasingly involved in the new economy, this would occur only gradually and over a relatively lengthy time-span." In the meantime, in addition to sufficient land "to enable them to engage on an equal basis with European settlers in pastoral and other farming activities," a "generous provision" of land had to be secured for them to maintain their old hunting and foraging economy, along with their eel-weirs and other fishing grounds.

These stipulations are so far removed from the idea of "ample" reserves held by officials at the time as to be laughable. A Crown witness told the Tribunal that the 10 acres of land per head reserved for Ngai Tahu during Kemp's purchase in 1848 matched the amount then thought necessary for Europeans to obtain a livelihood. The Tribunal was not impressed by his argument. While his conclusion was "no doubt logical," it did not consider the needs of Ngai Tahu could "be based solely on a narrow and somewhat mechanistic formula." They had to retain "sufficient land to enable them to live comfortably and to prosper." The Treaty required this to "be generously and fully recognised. The rigid application of a formula of say 10 to 15 acres is totally inconsistent with such an approach."

In fact, a formula of 10 to 15 acres per head was not rigidly applied. Based on censuses taken at or near the time, the approximate area set aside for resident Ngai Tahu varied considerably from block to block. In the Otago purchase it was about 47 acres per head. In the Kemp purchase the original 10 acres per head was over the next 40 years increased by about 250 per cent. On Banks Peninsula the average was about 15 acres per head, in Murihiku, about 33 acres. Kaikoura's reserves averaged almost 70 acres per head. The west coast reserves averaged about 63 acres per head and a further 3,500 acres were set aside as an endowment. Stewart Island residents had an average of almost 38 acres each, and they too were left with endowment lands.

The Tribunal maintained that after the sales "an increasing Ngai Tahu population put real pressure on reserves, that were less than sufficient for the smaller communities that existed at the time they were made." Yet even its own figures contradict this assertion.

Expert witnesses estimated the Ngai Tahu population in 1840 at 2-3,000. The Tribunal, doubtless to better enable it to belittle the area reserved to the tribe, thought it "reasonable to assume" that it approximated the larger figure. A census in 1874 put it at only 1,716, however and even by 1896 the reserves were home to only 2,100 Ngai Tahu. Numerous other censuses could be quoted to show that years after the sales the population of many reserves was less than when they were made. It was declining figures like these that led many Europeans, and Maoris too, to believe that the Maori race was dying out.

Various figures may be quoted when it comes to estimating the total area reserved to the tribe, depending on the year of the return consulted. The Tribunal's report, not surprisingly, quotes one of the smallest when it gives a total of 37,492 acres. Dividing this by its estimated population of 3,000 enables it to assert that the average area reserved was just 12.5 acres per head. However, even a conservative estimate would put the total at 45,000 acres at least, without taking into account the 5,500 acres of endowment lands, the lands set aside for half-castes, and the 3,500 acres which Ngai Tahu retained on Ruapuke Island. Then if an 1844 census which numbered the tribe at less than 2,000 is used, the average holding of each member rises to nearly twice the Tribunal's estimate. When it is unable to bend the figures to bolster Ngai Tahu's case it simply omits them. For instance no mention is made of the value of these reserves, which an 1882 return put at £358,137.

If the French who arrived at Akaroa in 1840 were around today they would no doubt be flabbergasted to hear the Tribunal characterising the reserves left to Ngai Tahu as "grossly insufficient" and their inhabitants as "virtually landless." When the French were set ashore, most of them without a sou to their name, they were allotted five bush-covered acres each, from which they managed to obtain a living. But the Tribunal can classify holdings five times larger as "no more than nominal" because it has already decided that officials in the 1840s and early 1850s should have had the prescience to know that large-scale pastoralism was the land-use of the future.

By its account, it was plain that Ngai Tahu "were interested as early as 1848 in engaging in pastoral activities," but instead they were "ghetto-ised" on "small uneconomic units on which they could do little more than struggle to survive." It could "only assume that the Crown consciously decided that 10 to 12 acres was sufficient for individual Ngai Tahu but that individual Europeans required vastly more land."

In fact it was not until the 1850s that New Zealand began to become well stocked with sheep. In 1848, when most of the south's good grazing land was included in Kemp's purchase, it was far from obvious that a wool-growing squatocracy would later emerge on the Canterbury plains. As the Tribunal itself noted, a year after Kemp's purchase there were just three sheep runs between Kaiapoi and Kaikoura.

The signs of a Ngai Tahu desire to go sheep farming in 1848 were even fewer. They seem to be confined to a request made to Mantell by some Kaiapoi Ngai Tahu for a run of 1,000 acres for two sheep and their lambs, and a letter from a chief a year after the sale complaining that his reserve was not big enough to contain his stock, although Mantell at the time made no note of any sheep, and recorded that the chief had given him "the greatest support and assistance" in laying out the reserve.

It is true that in 1856 when the Crown repurchased the North Canterbury block, Kaiapoi Ngai Tahu expressed a desire for two reserves on good sheep-growing country. But they were interested only in land already being farmed, and were willing to forego this for a higher price. The same pantomime was played out during the Kaikoura purchase in 1859. The locals insisted on reserving lands already farmed by Europeans, but when told that was out of the question and offered their choice of unoccupied country, opted for a large block of coastline that would secure them their fisheries. Later a local related that they preferred to reserve land that supplied their traditional foods. "When the Pakeha came the Maori knew nothing of the cow and the sheep."

The Treaty gave the Maori, for the first time in his history, the chance to escape the influence of the tribe and, in the word's of Kaiapoi's Rev. Stack, to "do what he likes with his own." Within a short time many Maoris had voted with their feet.

Nevertheless, it is a recurring theme of the Tribunal's report that Ngai Tahu were determined "to participate and thrive in the new world" and were only prevented from doing so by their "niggardly allocations" of land. The Crown was even rebuked for not reserving land that could later be used for dairy farming, as if it ought to have foreseen the future of an industry which only emerged half a century later. Had it done so, though, it is unlikely that Ngai Tahu dairy farms would have proliferated. The Rev. Stack reported from Kaiapoi in 1872: "Though very fond of milk and butter, there is not one household that provides itself with these things, everyone shirks the trouble."

Like Royal Commissioner Alexander Mackay in 1887, the Tribunal ignored the numerous accounts of Ngai Tahu's work-shyness. Nor did it remark on data that refuted its charge that their land "was no more than sufficient for a bare subsistence." Maori censuses included returns showing the land under crop. In 1896 just 857.5 of their 45,000-odd acres were set aside for this purpose. In other words they were cultivating about two per cent of their land. Their stock totalled just under 6,000 head, or about one for every seven acres. If, as the Tribunal asserts, the tribe was in a "parlous, some might say pitiable condition," the reason should have been obvious. But it preferred to blame their poverty on a lack of land and the Europeans who had "overwhelmed" and "marginalised" them.

Hunting & foraging undermined?

Other breaches of the Treaty principle which protects Ngai Tahu's *rangatiratanga* were found to have occurred as a result of the Crown neglecting to allow them to continue their traditional hunting and foraging pursuits. This claim stemmed from a clause in Kemp's Deed guaranteeing them their "plantations." Kemp, who was fluent in Maori, had used the phrase 'mahinga kai' in the Maori version of the deed to signify plantations or cultivations, believing it to be the accepted meaning of the term.

Ngai Tahu in 1848 had not led him to believe they had a different understanding of it, nor did they protest that Mantell was breaching the Deed's terms when he refused their requests for "forests for weka-hunting - whole districts for pig runs." Before the Land Court in 1868, however, they

maintained that *mahinga kai* to them signified their traditional sources of food, and that Kemp and Mantell had promised they would retain their eel-weirs and other fishing grounds. Kemp acknowledged discussing eel-weirs, but did not concede that their reservation was "to be an exclusive one." All he had promised was that "a sufficiency of land was to be set apart for them under 'Mahinga Kai,' that is to say grounds fit for cultivation of their crops."

Mantell was positive he had not made such a pledge: "All that I promised at any place to the Maoris on this subject was, that their rights of fishing on and beyond their own lands should be neither less nor more than those of Europeans." The court, though, held that Ngai Tahu understood the phrase to have a wider meaning than Kemp's translation of it, and that it included such things as pipi grounds, eel-weirs and fisheries, "excluding merely hunting grounds and similar things which were never made property in the sense of appropriation by labour." To fulfil the condition it ordered a total of 324 acres of fishery easements be made for the tribe at various spots within Kemp's purchase.

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A decade later Ngai Tahu renewed their claim. To the 1879-80 Royal Commission they brought lists specifying all the places where they had traditionally hunted and foraged, and convinced the commissioners that under Kemp's Deed these were not to be interfered with. However, Mackay saw the matter differently during his 1887 commission. In Ngai Tahu's view, he noted, the clause entitled them to fish, catch birds and rats, and procure berries and fern-roots over any portion of the block. "Under this interpretation they would be entitled to roam at will over the whole country - a state of affairs that could not have been contemplated."

After this Ngai Tahu seem to have realised that the claim was too extravagant to be treated seriously and over the next 100 years the issue appears to have been raised only twice more, and then more as a matter of form. The Tribunal, though, saw it as "one of the most emotionally charged elements" of the tribe's case, and gave it lengthy consideration.

It found the claimants' archaeologist "somewhat equivocal" about Ngai Tahu's understanding of the meaning of *mahinga kai* in 1848. He did not doubt the modern meaning was "all places at which food was obtained," but there was evidence that Ngai Tahu had discriminated amongst such places in earlier times. A chief who signed Kemp's deed had referred to "my mahinga kai; also my eel-weirs."

However, the claimants also proffered the evidence of a linguist, who was asked to decide if the expression had the narrow meaning of 'cultivations' or a broader one of 'places where food is produced or procured.' Etymologically, he said, the term was comprised of the verb *mahi*, 'make or produce' and its object *kai*, 'food'. The suffix -nga typically meant 'the place where.' Therefore he thought the term originally had the broader meaning. This was an odd conclusion to come to when by own his definition *mahinga kai* meant 'a place where food is made or produced.' A linguist ought to know that produce is not a synonym for procure. The Oxford Thesaurus says to *produce* is to "make, manufacture, create"; to *procure* is to "obtain, acquire, pick up, find."

The Tribunal was happy to accept this piece of linguistic sleight-of-hand, however, and conclude that it was "highly likely" that the expression meant different things to the two parties in 1848. It agreed with the claimants that the meaning 'cultivations' known by Kemp in the North Island "would not necessarily apply in the south." It found it "inconceivable" that Ngai Tahu would have agreed to forfeit "at one stroke" all access to their traditional food sources, and "even Kemp must have known" that.

The Tribunal here was simply setting up a straw man. There is no evidence that Ngai Tahu were "overnight expected to forgo all access to such resources." The evidence suggests the opposite was the case. The Tribunal itself, to counter the Crown's argument that Ngai Tahu had by the 1840s relinquished many of their traditional food-gathering activities, insisted that "while the scale may have diminished, the activity continued." In fact Ngai Tahu for years continued to use the land they had sold in this way until Europeans settled on it. As late as 1866 Mantell was hoping that his promise that they could fish beyond their own lands would be allowed to hold good for some time yet.

If anything, it is a lack of evidence that best confutes the Tribunal's interpretation of *mahinga kai*. The chiefs who signed Kemp's Deed lived scattered throughout the South Island and, if they truly believed it secured them the right to continue in all their old hunting and foraging customs, it would be reasonable to assume that they would make similar demands when the remaining eight blocks were sold. There is no record of any such request though. Signatories to Kemp's Deed appended their marks to at least six of the later deeds as well, yet nowhere is there an indication that they expected anything more to be reserved than their homes, cultivations and grazing for their livestock.

Even had the Tribunal noticed this it would not have altered its finding, however. It rejected a Crown submission that the lack of reference to *mahinga kai* in other deeds meant that Ngai Tahu had voluntarily surrendered their traditional food sources. Such an argument was "founded on the notion that Ngai Tahu, at the time of signing the deeds, could foresee the future and were prepared to relinquish all but their most important *mahinga kai* in anticipation of other benefits to come from European settlement." And the evidence "showed clearly" that they had no such perception. Ngai Tahu, it seems, were not to be held responsible for a lack of forethought. Only the Crown was expected to be prescient and, as such, held accountable for the tribe's future well-being.

Accordingly, the Tribunal found that Ngai Tahu had no intention of abandoning their old food-gathering customs, and the Crown's failure to guarantee them these in nine of the 10 deeds was a denial of its *rangatiratanga*. This allowed it to rule that food-gathering sites like Lakes Ellesmere and Forsyth, and sites of "national importance" like Kaitorete Spit, ought

never to have been purchased and should be reserved for the tribe, regardless of the fact that it parted with them at the time without objection.

Unwilling sellers?

The principle governing the Crown's right of pre-emption also required it to ensure that Ngai Tahu were willing sellers. The Crown may have anticipated that it was in the clear here, as Ngai Tahu were willing, if not eager sellers in every purchase it made from them. If so it had not reckoned on the Tribunal's interpretation of the principle. It held, in effect, that the Crown was not entitled to bargain and come to terms with the Ngai Tahu sellers, but was under a duty to accede to any demand they may have made to retain this land or that *taonga*. Anything less was a denial of their *rangatiratanga*.

This is a ludicrous restriction to impose on the Crown, of course, and completely ignores the fact that purchasing land is a process freely entered into, in which agreement is reached by way of negotiation. Naturally, Ngai Tahu as owners could demand whatever they liked, but the Crown was equally at liberty to refuse what they asked. If it was not, then the process is not a sale but a stick-up. The Crown had no power to impose terms on the tribe, and most sales were finalised only after Ngai Tahu wrangled from it a higher price or larger reserves than originally offered. If Ngai Tahu did not like the Crown's offer they were free to end the negotiations, as they did during the west coast purchase. The signing of a deed signified that terms had been agreed upon, often after weeks of bargaining.

An idea of the Tribunal's reasoning can be gained from its view of Mantell's actions as he laid out the Kaiapoi reserve within Kemp's purchase. Kemp's Deed, which Ngai Tahu had signed a short time before, specified that all their land within the boundaries was ceded apart from the "small exceptions" reserved for them. Mantell, though, received a demand for a reserve 10-15 kilometres wide stretching right across the island, encompassing about 500,000 acres. He declined this, showing them instead the 2,640-acre reserve he proposed, and recording that a "great consultation followed ending in their declaring themselves content."

The Tribunal found that what was "in no way an unreasonable request" had been "summarily dismissed" over Ngai Tahu's "strong opposition," in disregard of their *rangatiratanga*. It heard a valuer put an 1848 value of £205,000 on a 220,000-acre block of this land, and place its prairie value today at $370 million. It is probably findings like this that allow Ngai Tahu to claim that its $170 million settlement represents less than one cent in the dollar of the real value of its claims. Mackay in 1887 would have valued the same block at £2,750, and the 1920 Royal Commission at half that again. Ngai Tahu only claimed for the 220,000 acres, maintaining that the original request was for a reserve ending at the foothills, even though Mantell's reports clearly contradict this. A claim for a coast-to-coast reserve would have rather undermined another old claim they tried to revive — that the inland portion of Kemp's block was never sold. Interestingly enough, at other times they backed their claims by quoting chapter and verse from Mantell's records.

If the French who arrived at Akaroa in 1840 were around today they would no doubt be flabbergasted to hear the Tribunal characterising the reserves left to Ngai Tahu as "grossly insufficient" and their inhabitants as "virtually landless."

A most fruitful source of their claims was testimony offered to the 1879-80 commission by Ngai Tahu chiefs concerning the Murihiku purchase. The commission did not take evidence on this sale from Mantell, the purchasing officer, which left it largely up to the Tribunal to decide the worth of the chiefs' allegations. Its rulings turned out to be a bit of a lottery for the claimants. A number of their claims were based on the evidence of one Horomona Patu, some of whose recollections, the Tribunal found "were clearly faulty on a variety of points." At other times, though, it found him perfectly reliable. He recollected that Mantell had neglected to fulfil a promise to lay out a 200-acre reserve at Waimatuku. The Tribunal allowed a claim based on this assertion, which it deemed to have "a convincing ring about it."

Ngai Tahu missed out on the jackpot in Murihiku, however, although it was not for want of trying. It will be recalled that the Tribunal labelled Mackay's attempts in the 1890s to locate landless Ngai Tahu on blocks west of the Waiau River in Southland "a cruel hoax" because it deemed the land uninhabitable. The claimants apparently thought differently, judging by their attempts to establish that this land was never sold. Of course the fact that the claim included southern Fiordland and Lakes Manapouri and Te Anau may have made it seem more desirable to them.

One of their tame historians argued that Mantell's deed map had been drawn to deceive because, to him, it seemed that the Island's south-west coastline could have been mistaken by the vendors for the Waiau River, leading them to believe they were not selling the area claimed. The Tribunal's perusal of the map showed no possibility of any such confusion, however. Also, the deed had been read out in Maori and the boundaries would have been clear to all who heard them.

The claimants then relied on another allegation made by Patu in 1879-80, that Murihiku had been sold not by the local chiefs but by those from Otago. Patu, the claimants alleged, was a paramount chief from western Murihiku and his name was not on the deed. This was proof that local Ngai Tahu had not agreed to sell the land west of the Waiau. However Patu had been having one of his memory lapses. Forty-one of the 59 chiefs named on the deed were identifiable, and nearly two-thirds came from Murihiku, including all the leading chiefs. There was no evidence that Patu was a paramount chief.

The claimants had better luck arguing that Ngai Tahu never intended to part with any greenstone. They claimed that the tribe had always held *pounamu* to be a valuable asset for trade and cultural purposes. It was "our taonga and belongs to us," they said, and they called on the Tribunal to recommend that all *pounamu* in the South Island be made the property of Ngai Tahu "for use in any way they see fit."

There was little proof offered to substantiate this claim. Although pounamu is now recovered elsewhere, there is no evidence that Ngai Tahu at the time of the sales were aware that it existed anywhere apart from the Arahura River on the west coast. And, arguably, in 1860 when Ngai Tahu resold the west coast its value had been so much reduced by the advent of European tools and weapons that it was no longer regarded as a *taonga* by the tribe. No request had been made to reserve it at the time of Kemp's

purchase, which included the west coast. And when Charles Heaphy in 1847 visited the tiny remnant of the tribe living at Arahura he found them a miserably poor lot. "Beyond seeking to obtain an iron pot or an axe in exchange for a meri [sic] pounamu, their life appeared to be without aim or purpose," he recorded.

There was no mention of *pounamu* in the west coast deed either. James Mackay, the purchase agent, had noted the hapu's insistence on retaining a 200,000-acre block of land centred on the Arahura. But he was then offering only £200, and the vendors were willing to forego the block if he raised his price. Later Mackay recorded that they were willing to settle if they retained a reserve running in a strip up each side of the Arahura "with a view of giving them a right to its bed." Mackay's assurance that they might retain a section of the riverbed was not recorded in the deed, but was later given effect to.

The claimants argued, however, and the Crown accepted, that Mackay's intention was that the bed of the river and its tributaries, together with their banks, were to be reserved to the vendors. The Tribunal went even further. Given *pounamu's* "deep spiritual significance in Maori life and culture," it was satisfied that Ngai Tahu did not consciously agree to part with any greenstone. "Given the high intrinsic value of this taonga to all Ngai Tahu" it considered that specific mention of it in each deed was required to signify Ngai Tahu's intention to part with it. Accordingly, it recommended that ownership of all *pounamu* in the tribe's former territory, whether found on Crown or private land, should be vested in the tribe.

Crown acquiescence

This was not the first time the Crown had meekly subscribed to the claimants' version of events, and if taxpayers are wondering now what it was doing while the Tribunal and the tribe set out to pick their pockets, they need only consult the record of the Tribunal's proceedings to learn how little protection was afforded their interests.

For one thing, the Tribunal gathered its evidence following "Marae protocol." Among other things, this meant that witnesses were questioned in a "culturally appropriate" way. Cross-examination was inappropriate. Apparently kaumatua would have seen this as "a sign of disrespect or hostility." The Tribunal thought it could achieve the same end by asking them to expand on a point or speak further on a subject. The Crown regarded such procedures as "entirely appropriate."

Then again the Crown's historians were told not to put their evidence forward in a manner which was partial to the Crown, nor to act as its advocates. A reading of the Tribunal's report will confirm how well they followed instructions. Much of their evidence was so partial to the claimants' case as to raise the suspicion that they were accepting retainers from both sides. The Crown did seem a little put out that, while it was following the rules, the "enthusiasm" of Ngai Tahu's historians was making them advocates of its claims, but there is no sign that it made an effort to right this imbalance.

Christchurch journalist Brian Priestley was hired by Ngai Tahu as a public relations adviser and attended several of the Tribunal's sessions. He resigned after three months. In that time, he said, "I don't think I was asked a single intelligent awkward question. I should have been. I resigned because I am basically a puzzler after the truth and not a one-eyed supporter of causes." It would, he thought, "be hard to imagine any public body less well organised to get at the truth."

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Chronology of Events

1844-64 Ngai Tahu dispose of their territory in the South Island to the Crown; about 32 million acres of land is sold for £14,750, with the tribe retaining reserves totalling about 45,000 acres for its 2,000-odd members.

1868 Native Land Court awards Ngai Tahu about 5,000 acres of additional reserves as a final settlement of its claims under Kemp's Deed.

1872-1910 Ten parliamentary select committees and other inquiries, and three Royal Commissions investigate Ngai Tahu's claims regarding the Otago, Kemp and Murihiku purchases. By 1910 the tribe's claims concerned Kemp's purchase only.

1920 A Royal Commission decides the 1868 award did not adequately fulfil the terms of Kemp's deed and recommends a payment of £354,000 as a settlement of Ngai Tahu's claim.

1944 Ngaitahu Claim Settlement Act is passed, providing for 30 annual payments of £10,000 each to the tribe in "full and final settlement" of its claim.

1969 Ngai Tahu petition parliament asking that the payments of $20,000 per year continue in perpetuity in "full and final settlement" of their claim.

1973 Maori Purposes Act provides for payments to Ngai Tahu of $20,000 per year in perpetuity.

1985 Treaty of Waitangi Act 1975 amended, allowing Maoris to make claims against the Crown for breaches of Treaty principles from 1840 onwards.

1987-89 Waitangi Tribunal hears about 200 Ngai Tahu claims alleging breaches of Treaty principles by the Crown both during and after its land purchases from the tribe.

1991 Waitangi Tribunal report on the Ngai Tahu land claims recommends that "speedy and generous redress" be made to the tribe for the "great detriment" it has suffered as a result of the Crown's breaches of Treaty principles. Later in the year the Crown and Ngai Tahu begin negotiating a settlement.

September 1997 Crown's final settlement offer submitted to Ngai Tahu. It includes a cash offer of $170 million; the handing over of various parcels of land, several islands, lakebeds and greenstone deposits; the option of buying $250 million of South Island Crown land, and the first right of refusal to buy surplus Crown land in the future; and the statutory recognition of the tribe in conservation and food gathering matters and other areas of cultural, historica and spiritual significance.

November 1997 Te Runanga o Ngai Tahu votes to accept the Crown's offer after a postal ballot of about 12,000 eligible beneficiaries results in 5,945 (93 per cent) of the 6,341 who voted signalling their acceptance of the proposed settlement.